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

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6. The Dualist Approach and Indirect Review

6.1. Introduction

The present chapter will examine the dualist approach as creating another opportunity for judicial protection, in addition to the possibility of entertaining a narrow interpretation, which was considered in the previous chapter. By employing such opportunities courts might be able to counterbalance the challenges to judicial protection of international human rights as were discussed in Chapter 4. That chapter evidenced that challenges to such protection arise from courts placing limitations on their jurisdiction to review domestic implementations of UNSC resolutions, due to the prevailing nature of states' obligations under the UN Charter. In addition, other courts were suspected of attributing conduct to the UN, on controversial grounds, in order to be able to declare certain cases inadmissible, and thus to avoid having to decide on a conflict of norms potentially underlying these cases. Especially as the individuals affected have no alternative remedy available, these approaches result in serious restrictions on their access to court. Finally, even if some courts did engage in a judicial review against international human rights, they accorded precedence to obligations under the UN Charter, due to the workings of article 103 of the UN Charter. These decisions illustrate the dimensions of the gap in judicial protection of international human rights.

The present chapter will demonstrate that by employing a dualist approach, courts may, to a certain extent, compensate for this gap. By annulling the domestic implementation of UNSC measures they may provide a measure of relief, albeit limited to their own legal order. Incidentally, they may, by such a dualist approach, also engage in an indirect review of the lawfulness of a UNSC resolution against international human rights law. From such instances indications can be drawn on what these courts consider to be the limits of lawful

UNSC action when measured against the guarantees contained in international human rights law. Effectively, they show how these courts would solve an international conflict of norms if the rule of precedence in article 103 of the UN Charter were not involved.

Note that many domestic courts often refer to the human rights guaranteed under domestic law as fundamental rights. Previous chapters did not follow this distinction because it was not relevant for the discussion. For the present discussion it is relevant, and so it will be maintained throughout this, and the following, chapter. The different label does not as such necessarily say anything about these rights' content, but only about their normative source.

First, section 6.2 will explain the use of a dualist approach as a technique courts may use to avoid having to rule on an international conflict of norms, and will mention some of its benefits and ill effects. Then, section 6.3 will explain under what circumstances the research considers a dualist review to amount to an indirect review of the lawfulness of a UNSC resolution against international human rights law. By way of illustration, it will provide a categorization on three levels, depending on the reliability of the link between the domestic norms applied and international human rights law. After that, section 6.4 will focus on judicial review of implementations of UNSC resolutions against entirely separate domestic prescriptions, which have no counterpart in international human rights law. Finally, section 6.5 will explain how a judicial dialogue could mitigate some of the drawbacks inherent in a dualist approach. A particularly interesting manifestation of indirect review could be courts' use of proportionality analyses in regard to implementations of UNSC resolutions. This will be discussed separately in Chapter 7.

6.2. The Dualist Approach as an Avoidance Technique

A dualist approach means that a court separates a domestic implementation from an underlying UNSCR resolution. It engages in a review of the implementation

against domestic norms, while disregarding its international origin. The notion ‘dualist approach’ is not identical to the concept of dualism, which describes a domestic legal order’s conception of international law.¹ Even courts from monist states could resort to a dualist approach. Most monist states do not consider UNSC resolutions to be self-executing.² Therefore, also in these states, domestic regulations remain necessary for the domestic authorities to be able to apply a UNSC measure to a particular individual. In principle, a court could review such a domestic regulation against domestic fundamental rights without engaging the international obligation under the UN Charter. A Dutch court, for example, held that the fact that a domestic regulation was intended to execute a UNSC resolution did not mean that that regulation could not be reviewed against human rights as applicable in the domestic legal order.³

In principle, there cannot be a true conflict between norms that are not considered to be part of the same legal system.⁴ Therefore a dualist approach could be a useful means for courts to avoid having to rule on the conflict of norms in international law.⁵ In addition, it may prove to be an effective method for providing individuals affected by the implementation of a UNSC resolution a measure of judicial protection. Fundamental rights under domestic law are not affected, in principle, by the prevailing effect given to obligations under the UN Charter pursuant to its article 103.⁶ By employing a dualist approach, norms stemming from the domestic legal order are placed outside any potential hierarchical relationship with the norms stemming from the international legal order. Therewith, courts could create an opportunity to engage in a (full) review of the domestic implementation against other domestic prescriptions.

¹ See chapter 2.4.1.

² See chapter 2.4.1.

³ *The Netherlands v A and Others* [2011] LJN: BQ4781 (*Iranian Nationals*) [5.5]. See subsection 6.3.1.

⁴ M Milanovic 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke Journal of Comparative & International Law* 69, 102.

⁵ *Ibid.*

⁶ Article 103 only speaks of international agreements. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) article 103. See discussion in chapter 4.2.

A seminal case decided on the basis of a dualist approach is the Court of Justice's decision in the *Kadi I* case.⁷ Other domestic courts have been influenced by this decision.⁸ Even the ECtHR in the *Nada* case appeared to require domestic courts to take such approach⁹ with regard to the right to an effective remedy.¹⁰ Moreover, the ECtHR itself followed an approach in its earlier decision in the *Bosphorus* case which amounted to an avoidance technique similar to a dualist approach.¹¹

The effect of a dualist approach should not be overestimated. For example, a domestic remedy would provide individuals who are subject to the UNSC's targeted sanctions with very limited relief, since they will remain on the UNSC list. What is more, states remain under an international obligation to target those individuals on that list. Domestic law cannot be an excuse for not observing an international obligation.¹²

In addition, a dualist approach also carries with it certain dangers.¹³ Individual domestic courts deciding to annul domestic regulations implementing UNSC

⁷ 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.

⁸ See *Iranian Nationals* (appeal) (n 3) [5.5], and *The Netherlands v A and Others* [2012] LJN: BX8351; ILDC 1959 (NL 2012) (*Iranian Nationals*) [3.6.2]. See also *HM Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2 & UKSC 5; ILDC 1533 (UK 2010) (*Ahmed*). The UK Supreme Court first denied that it could take the same approach as the Court of Justice, since the EU is, in contrast to the UK, not a member of the UN. *Ibid.* [71]. Eventually, however, when deciding the case it relied on a similar dualist approach. *Ibid.* [75]

⁹ Or mandated domestic courts to take such an approach. See T Theniel 'Nada v Switzerland: The ECtHR Does Not Pull a Kadi (But Mandates It for Domestic Law)' (12 September 2012) Invisible College Blog <http://invisiblecollege weblog.leidenuniv.nl/2012/09/12/nada-v-switzerland-the-ecthr-does-not-pu/>.

¹⁰ *Nada v Switzerland* [2012] ECHR 1691 [212], see also [176].

¹¹ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* [2005] 42 EHRR 1 [145].

¹² Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) article 27.

¹³ See also E de Wet and A Nollkaemper 'Review of Security Council Decisions by National Courts' (2002) 45 German Yearbook of International Law 166, 32, 37.

resolutions may contribute to an erosion of the effectiveness of UNSC action.¹⁴ Moreover, courts from other legal orders may follow this example and rely on similar approaches for purposes other than protecting the fundamental rights of individuals. In a slightly different context, courts within the member states of the African Union (AU), for instance, could argue that the arrest warrant made by the ICC in respect of President Bashir of Sudan, who is accused of having committed genocide, cannot be observed due to an obligation created by the AU which requires its members not to cooperate with his arrest and surrender.¹⁵ Separating the international from the regional legal order, courts throughout the AU could claim that the AU ‘has created an autonomous legal system which is not to be prejudiced by international agreements’.¹⁶

Another example of a dualist approach that is not immediately favourable for the protection of an individual’s fundamental rights can be found in the *Medellin* case.¹⁷ In that case the US Supreme Court refused to apply the ICJ’s decision upholding Mr Medellin’s procedural rights under the Vienna Convention on Consular Relations.¹⁸ It admitted that the United States was under an international obligation, but it denied that that obligation had direct effect before national courts, and that it could be executed by a President’s Memorandum.¹⁹ In this type of decision courts separate international law from the domestic legal order without providing indications on the relationship between the two.²⁰

¹⁴ Special Rapporteur ‘Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism’ (26 September 2012) UN Doc A/67/396 [23]. See also N Blokker ‘Reviewing the Review: Did the European Court of Justice in *Kadi* Indirectly Review Security Council Resolutions? On the Downside of a Courageous Judgment’ in M Bulterman et al. (eds.) *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Kluwer Law International BV The Netherlands 2009) 315-326, 325.

¹⁵ See M du Plessis and C Gevers ‘Balancing Competing Obligations: The Rome Statute and AU decisions’ Institute for Security Studies Paper 225 (28 October 2011) <http://www.issafrica.org/pgcontent.php?UID=31158>.

¹⁶ *Ibid.* 5. Compare to *Kadi I* (appeal) (n 7) [316].

¹⁷ *Medellin v Texas* [2008] 552 US ____ (2008) (No. 06–984).

¹⁸ *Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 12. See also J Weiler ‘Editorial’ (2008) 19 *European Journal of International Law* 895, 896.

¹⁹ *Medellin v Texas* (n 17) 27, 35.

²⁰ G De Búrca ‘The European Court of Justice and the International Legal Order after *Kadi*’ (2009) 51 *Harvard International Law Journal* 1, 2.

Accordingly, on the one hand, a dualist approach may lead to further fragmentation of the application of international law. In regard to the implementation of UNSC resolutions this carries the danger of threatening the effectiveness of UNSC action. On the other hand, injudicious compliance with UNSC resolutions may lead to serious violations of individuals' fundamental rights, as guaranteed in the domestic legal order.

6.3. Indirect Review of a UNSC Resolution's Lawfulness

Courts may engage in a review of the domestic implementation of an obligation created by the UNSC against domestic fundamental rights which may have a counterpart in international human rights law. Under certain circumstances it could be argued that courts are then effectively reviewing UNSC resolutions indirectly against international human rights law. In that situation, despite the challenges to judicial protection of international human rights posed by the implementation of UNSC resolutions, the content these rights seek to guarantee is upheld through the application of equivalent domestic rights.²¹ It could then be argued that a potential gap in international human rights protection is compensated for by judicial protection of domestic fundamental rights. In addition, courts engaging in such indirect review clearly indicate what they consider to be the limits of lawful UNSC action, when assessed from the perspective of international human rights law. Moreover, in these instances courts decide a case on the basis of norms that could be applicable equally in other domestic legal orders. A situation in which an individual could be affected in the enjoyment of his international human rights due to the implementation of a UNSC resolution that leaves states no scope of discretion could occur in multiple other legal orders, as well. Accordingly, a court's decision in such a case may have exemplary value beyond its own domestic legal order.

²¹ Some authors refer to such occurrence as a consubstantial application of international legal norms. See A Tzanakopoulos 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 133, 143.

The research considers it justified to speak of an instance of indirect review when two requirements are met. First, the UNSC resolution concerned must not leave states any scope of discretion for that resolution's implementation. Accordingly, the domestic implementation needs to be identical to what is required under the obligation imposed by the UNSC.²² Second, the domestic fundamental rights against which the lawfulness of the implementation is reviewed must have a clear connection with international human rights law. The research perceives the first requirement, as to the scope of discretion, to be strict. Only review of the implementation of those provisions of a UNSC resolution which leave no scope of discretion could be considered to result in an indirect review. The second requirement could be met gradually. This means that there are several degrees to which the certainty of the connection between the domestic fundamental right engaged and international human rights law could be established.

The present section will divide the discussion of cases in which courts have reviewed an implementation of an obligation created by the UNSC against domestic fundamental rights into three categories, based on the certainty of this connection. The first level comprises cases in which there is the strongest possible connection. Implementations of UNSC resolutions are reviewed against domestic fundamental rights, which are given content directly by international human rights law. In that situation the content and scope are identical; only the normative source is different. The second level concerns cases in which courts, when reviewing implementations of UNSC resolutions against domestic fundamental rights, refer to similar norms guaranteed under international human rights law. This establishes a clear connection between the two, which may result in an equivalence of content and scope. The third level considers the lowest quality of the connection. Review of a domestic implementation of a UNSC resolution is carried out against domestic fundamental rights with no reference to

²² As to the notion scope of discretion see chapter 2.2.2.

international human rights at all. While in principle similar guarantees could be found in international law, there is no certainty as to whether the court intended to provide the same level of protection.

The higher the level of certainty of the connection between the domestic fundamental rights applied and international human rights, the more reliable the indications as to how a court would assess the lawfulness of a UNSC resolution against international human rights law. Moreover, the higher that level, the stronger the argument that the gap in protection of international human rights is compensated for by judicial protection of domestic fundamental rights.

6.3.1. Direct Application of International Human Rights Law

In BiH, the Constitution determines that the ECHR applies directly in that country.²³ Accordingly, the content of the fundamental rights contained in BiH's Constitution is identical to those guaranteed under the ECHR. Hence a dualist approach inherently still leads to a review against norms that are equivalent to those guaranteed under international human rights law. The Bosnian Constitutional Court engaged in such review in the *Bilbija* case.²⁴ The case concerned the complaints of two individuals who were removed from public office by BiH's High Representative.²⁵ This international administrator, established to ensure the implementation of the Dayton Peace Agreement,²⁶ was given extensive administrative powers.²⁷ These powers were endorsed by the

²³ See article II (2) of the Constitution of Bosnia and Herzegovina (Annex 4 to the Dayton Peace Agreement).

²⁴ *Bilbija et al v Bosnia Herzegovina* [2006] AP-953/05. Subsequently, this case was brought before the ECtHR, which was considered in chapter 4.3.2.2. That court did not accept jurisdiction to review a complaint against BiH concerning the decisions of the High Representative. See *Kalinic and Bilbija v Bosnia and Herzegovina (Admissibility)* [2008] 45541/04 and 16587/07, see also *Beric and others v Bosnia and Herzegovina (Admissibility)* [2007] (36357/04 and others).

²⁵ They were removed by the High Representative from their official public and political-party positions; they were also barred from holding any such positions in the future, and from running for election.

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

²⁷ Annex 10 to Dayton Peace Agreement sets out the mandate of the High Representative.

UNSC.²⁸ Problematic from a fundamental rights point of view was that no effective remedy was available against decisions of this High Representative.²⁹ The Constitutional Court also found itself not competent to review the High Representative's individual decisions.³⁰

The Court continued to determine whether such lack of an effective remedy was contrary to any obligation upon BiH. It considered whether the UNSC resolutions, as the special source of the High Representative's authority, deprived or adversely affected individuals of their rights under the Constitution. In this regard, it held that article 103 of the UN Charter deals only with conflicts between obligations under the UN Charter and those arising under different treaties. It found that article not to have any effect in relation to obligations under the domestic Constitution.³¹ Accordingly, the Court separated BiH's obligations under international law from its obligations under domestic law. It concluded that the international obligation to cooperate with the High Representative and to comply with decisions of the UNSC could not determine the constitutional rights of those who are within the jurisdiction of BiH.³²

The Court then found the reference to the ECHR in BiH's Constitution to provide that that Convention is to be applied directly in BiH, and have priority over all other law.³³ However, the Court added that these human rights, as applicable in BiH, draw their authority from the domestic Constitution, and not from international law. As a result, the Court considered these rights not to be affected by the precedence of UNSC resolutions in international law pursuant to article 103 of the UN Charter.³⁴

²⁸ The High Representative's powers are referred to as the 'Bonn Powers' resulting from the Bonn Peace Implementation Conference. These powers were endorsed by UNSC Res 1144 (19 December 1997) UN Doc S/Res/1144.

²⁹ *Bilbija* (n 24) [51]. See also discussion in chapter 2.3.4.3.

³⁰ *Ibid.* [40].

³¹ *Ibid.* [66].

³² *Ibid.* [68]. See also *Abduladhim Maktouf* [2007] AP-1785/06 [45].

³³ *Bilbija* *ibid.*

³⁴ *Ibid.*

Eventually, the Court found that BiH had a positive obligation under its national Constitution to afford an effective remedy against the decisions of the High Representative.³⁵ It established that no such remedy was available within the domestic legal order, and that BiH had not undertaken the activities to ensure such an effective remedy.³⁶ Accordingly, the Court determined that BiH had violated the individuals' right to an effective legal remedy, as laid down in article 13 of the ECHR.³⁷ It did not apply that provision directly, but through the working of the national constitution. Hence the Constitutional Court reviewed BiH's international obligation, endorsed by the UNSC, indirectly against international human rights, and concluded that BiH had acted in violation thereof.

Formally, the Court's review should be qualified as indirect, since it relied on the domestic Constitution as the source of the applicable fundamental rights. Moreover, it separated the state of BiH, as an entity with international legal personality, from the individual domestic authorities making up this state, which do not as such have international legal personality. As a consequence, it considered international obligations not to be directly binding upon these domestic authorities.³⁸ But in practice, the Court's review was rather direct. The content of the rights applied was identical to those guaranteed by the ECHR. Moreover, because of the High Representative's direct administration of BiH, the international obligation created by the UNSC is implemented without discretion.

However, it is important to note that the Constitutional Court's ruling does not necessarily entail any indication of that court's perspective on how the

³⁵ Ibid. [72].

³⁶ Ibid. [74].

³⁷ Ibid. [76]. The High Representative responded vigorously to this decision and issued regulations declaring any review of his decisions by the courts of BiH as contrary to his international mandate. Therewith, according to the ECtHR in a subsequent decision on a similar issue, the High Representative removed any practical effect from the Constitutional Courts' decision. See *Beric* (n 24) [19].

³⁸ *Bilbija* (n 24) [68].

underlying competing interests should be ranked. This was because, in the case at hand, it was the constitutional source of the obligation to guarantee an effective remedy that made it prevail over other obligations upon the domestic authorities.³⁹ Hence the case was decided, essentially, on the basis of an internal hierarchy of norms prescribed by the national constitution.

A suggestion of the possibility of a similar, almost direct, review of a UNSC resolution against international human rights law was given by the Dutch Court of Appeal in a case concerning measures taken by the Dutch government against Iranian nationals.⁴⁰ The government took these measures with the aim of preventing the proliferation of nuclear knowledge, arguably in accordance with an obligation thereto imposed by the UNSC.⁴¹ The measures were directed generally against all Iranian nationals. Therefore, several Iranians brought a complaint of a violation of the prohibition of discrimination, as guaranteed under international human rights law.⁴² In the monist system of the Netherlands, self-executing norms of international human rights law can be applied directly in the domestic legal order.⁴³ Comparable to the situation in BiH, this application is dependent on an authorization in the Constitution. The Court of Appeal

³⁹ Ibid. [70].

⁴⁰ *Iranian Nationals* (appeal) (n 3).

⁴¹ The Dutch government invoked its obligation under UNSC Res 1737 (23 December 2006) UN Doc S/Res/1737 [17].

⁴² They invoked the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), article 26, and the Twelfth Protocol to (European) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005) ETS No. 177 (Twelfth Protocol to the ECHR), article 1. See *Iranian Nationals* (appeal) (n 3) [2.7].

⁴³ That is to say, treaties and decisions of IOs of a generally binding nature, which need no further clarification in order to function as objective law, are directly applicable before Dutch courts. In addition, for individuals to be able to invoke international human rights, the international instrument needs to actually have intended to confer rights upon them. Dutch Constitution 1983, article 93. See A Nollkaemper *Kern van het Internationaal Publiekrecht* 5th edn (Boom Juridische Uitgevers Den Haag 2011) 500. See also L Besselink and R Wessel *De invloed van ontwikkelingen in de internationale rechtsorde op de doorwerking naar Nederlands constitutioneel recht: Een 'neo-monistische' benadering* (Kluwer Alphen aan de Rijn 2009) 48-51.

considered that it could, when required, review a domestic implementation of a UNSC resolution against international human rights law.⁴⁴

In the case at hand, however, the Court of Appeal did not have to engage in such a review because it considered the UNSC resolution concerned not to oblige the state to take the discriminatory measures that it did.⁴⁵ It did not follow from that resolution that the Netherlands had to make a distinction between individuals of Iranian and non-Iranian nationality.⁴⁶ Still, the Court found it necessary to assert that even if the UNSC resolution had obliged the state to make such a distinction, it would not have prohibited the Court from reviewing whether the domestic implementation of that resolution was in accordance with the human rights laid down in the ECHR.⁴⁷ If the relevant resolution were indeed to leave states no scope of discretion as regards its implementation, such a review would result in a quite direct review of a UNSC resolution against international human rights law, comparable to that of the BiH Constitutional Court.

Subsequently, on appeal, the Dutch Supreme Court was slightly more careful. It started by considering that domestic authorities, when implementing UNSC resolutions, had to take into account other international obligations.⁴⁸ However, thereupon, it did not explicitly consider that a domestic implementation of a UNSC resolution leaving no scope of discretion could be reviewed against international human rights law. Rather, it held that a review of such implementation could be conducted against fundamental rights belonging to the general principles of European law.⁴⁹ By this reasoning, the Supreme Court stayed closer than the Court of Appeal to the Court of Justice's wording in the *Kadi I* case,⁵⁰ on which they both relied.

⁴⁴ *Iranian Nationals* (appeal) (n 3) [5,5].

⁴⁵ See chapter 5.4.1.

⁴⁶ *Iranian Nationals* (appeal) (n 3) [5.4].

⁴⁷ *Ibid.* [5.5].

⁴⁸ *Iranian Nationals* (Supreme Court) (n 8) [3.6.2].

⁴⁹ *Ibid.*

⁵⁰ *Kadi I* (appeal) (n 7) [326].

Still, the fact that the Court of Appeal considered the domestic implementation not to prevail over international human rights law does not necessarily mean that it intended to deviate from the precedence granted in international law to obligations created by the UNSC. Review of the domestic implementation takes place within the framework of the domestic legal order only. The priority of one over the other norm is then dictated by the Dutch Constitution. A large part of international human rights law can be directly invoked before the courts in the Netherlands, in contrast to UNSC resolutions. This is due to the fact that these resolutions are generally not considered to be self-executing.⁵¹ Even in most monist states they need to be transposed into domestic regulations in order to clarify their content.⁵² As a result, before Dutch courts, the normative basis for the implementation of a UNSC resolution is domestic law, while it could be assessed directly against norms pertaining to international human rights law. The Dutch Constitution grants precedence to self-executing provisions of international treaty law over domestic law.⁵³ Accordingly, the precedence of international human rights law in a Dutch court's review would be based on an internal domestic hierarchy imposed by the national Constitution.

The outcome would be different, for example, if the international obligation under the UN Charter could be directly applied in the Dutch legal order. Then, the precedence of that obligation over a conflicting obligation under international human rights law follows from the application of article 103 of the UN Charter. The Dutch Supreme Court decided the *Mothers of Srebrenica* case,⁵⁴ for example, from the perspective of international law. That court held that the Netherlands was under an international obligation, formulated in the UN

⁵¹ V Gowlland-Debbas 'Implementing Sanctions Resolutions in Domestic Law' in V Gowlland-Debbas (ed.) *National Implementation of United Nations Sanctions, A Comparative Study* (Martinus Nijhoff Publishers Leiden 2004) 33-78, 40.

⁵² See chapter 2.4.1.

⁵³ See Dutch Constitution 1982, article 94.

⁵⁴ *Mothers of Srebrenica v The Netherlands* [2012] LJN: BW1999; ILDC 1760 (NL 2012).

Charter,⁵⁵ to grant the UN immunity before Dutch courts.⁵⁶ The Court applied this obligation directly to the case at hand.⁵⁷ Pursuant to article 103 of the UN Charter, the Supreme Court found it to prevail over the Netherlands' obligations under other international agreements, including international human rights treaties.⁵⁸ Accordingly, this case was not decided on the basis of an internal hierarchy imposed by the Dutch Constitution, but directly within the framework of international law.⁵⁹

6.3.2. A Clear Reference to International Human Rights Law

In the previous subsection, international human rights were directly applied in the domestic legal order. In the present subsection there is no direct application of international human rights law, but there is still a clear connection therewith. In order to determine or clarify the content of the domestic fundamental rights applied, courts make reference to similar provisions in international human rights law. While the certainty of the connection is slightly less unequivocal than in the cases discussed in the previous subsection, it still justifies the argument that these courts have indirectly reviewed UNSC resolutions against international human rights law.

In the *Kadi I* case, the Court of Justice reviewed the European implementation of UNSC sanctions against fundamental rights guaranteed within the EU legal order. In this sense, it did not review directly the European implementation of the

⁵⁵ UN Charter (n 6) article 105 (1): 'The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.' The Court considered the Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) article II, §2 to contain a further specification of the obligation under the UN Charter. *Mothers of Srebrenica* *ibid.* [4.2].

⁵⁶ *Mothers of Srebrenica* *ibid.* [4.3.6].

⁵⁷ The Supreme Court did not specify on which basis it did so. Remarkably, according to Van Alebeek and Nollkaemper, it is not entirely clear on what legal basis IO immunities are given effect in the Dutch legal order. See R van Alebeek and A Nollkaemper 'Privileges and Immunities of International Organizations in the Case Law of Dutch Courts' (July 26, 2012). Reinisch (ed.), *Transnational Judicial Dialogues on International Organizations*, Forthcoming; Amsterdam Law School Research Paper No. 2012-81; Amsterdam Center for International Law No. 2012-11, 6. Available at SSRN: <http://ssrn.com/abstract=2117821>.

⁵⁸ *Mothers of Srebrenica* (Supreme Court) (n 54) [4.3.6].

⁵⁹ Therefore, it was considered in chapter 4.4.2.3.

UNSC resolution against international human rights law. However, for the determination, or confirmation, of the content of the European fundamental rights the Court referred to similar human rights laid down in the ECHR. It held that the European general principle of effective judicial protection ‘has been enshrined in Articles 6 and 13 of the ECHR’.⁶⁰ In addition, with regard to its assessment of the extent of the fundamental right to respect for property, it took into account, in particular, Article 1 of the First Additional Protocol to the ECHR, which it found to embody that right.⁶¹

Accordingly, in its review, the Court of Justice connected the fundamental rights guaranteed under European law to international human rights law. It sought guidance for the determination of their scope and content. Therefore, since UNSC resolutions directly targeting individuals do not leave states any scope of discretion in regard to their implementation, the Court indirectly reviewed those resolutions against fundamental rights which are substantially similar to their counterpart in international human rights law. Subsection 7.2.2 will focus in more detail on how the Court of Justice carried out the assessment of the implementation’s lawfulness, in light of the principle of proportionality.

Still, the Court of Justice argued that it was not indirectly reviewing the UNSC resolutions concerned. It totally rejected the General Court’s perspective on this matter. The General Court had held that any review of the implementation of targeted sanctions would unavoidably result in an indirect review of the underlying UNSC resolution, due to the lack of scope of discretion left by that resolution for the implementation.⁶² Therefore, that court did not regard itself as competent to engage in a review of the domestic implementation of targeted sanctions, with the exception of a review against norms of *ius cogens*.⁶³

⁶⁰ *Kadi I* (appeal) (n 7) [335].

⁶¹ *Ibid.* [356], see also [368].

⁶² Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities (Kadi I)* [2005] ECR II-3649 [215].

⁶³ *Ibid.* [226].

Essentially, it maintained the connection between the European implementation and the international obligation under the UN Charter, which pursuant to article 103 of the UN Charter prevails over all other international agreements.⁶⁴ The General Court explicitly considered the EU to be bound by the obligations under the UN Charter.⁶⁵

In contrast, the Court of Justice started from the basic assumption that it must be able to review all EU acts against the fundamental rights guaranteed in the EU legal order.⁶⁶ It considered that this constitutional principle could not be affected by any obligation under an international agreement.⁶⁷ With this perspective the Court separated the international from the European legal order. It effectively drew a clear line between them, and confirmed the full competence of the European judicature to review acts of the EU institutions. It concluded that the European judicature must ensure, in principle, the full review of the lawfulness of EU measures that intend to implement UNSC resolutions.⁶⁸

At the basis of the divergence of opinion between the General Court and the Court of Justice lay a fundamental difference in the perspective on the position of the EU legal order in general international law. The Court of Justice seemed to regard the legal order created by the EU Treaty as separate and independent from the international legal order.⁶⁹ In contrast, the General Court considered the EU legal order part of the international legal order. In other words, the General Court regarded the relationship between the international and the EU legal order from a unified perspective, while the Court of Justice employed a dualist perspective.

⁶⁴ Ibid. [224], [288].

⁶⁵ Ibid. [193].

⁶⁶ *Kadi I* (appeal) (n 7) [285].

⁶⁷ Ibid. [285].

⁶⁸ Ibid. [326].

⁶⁹ Case T-85/09 *Kadi v European Commission (Kadi II)* [2010] ECR II-05177 [119].

Moreover, while the General Court had held that the EU was bound by obligations under the UN Charter,⁷⁰ the Court of Justice did not explicitly pronounce on that issue. It merely recognized that the EU needed to attach special importance to the fact that the UNSC was given primary responsibility for the maintenance of peace and security at the global level.⁷¹ It found that when implementing a UNSC resolution, due account must be given to the terms and objectives of that resolution and of the relevant obligations under the UN Charter.⁷² However, the Court concluded that any alleged limitations on its jurisdiction to review European legislation implementing UNSC resolutions were not required by the UN Charter, nor allowed for by the EU Treaty.⁷³

Conversely, the Court of Justice also considered that a review of the European implementation of UNSC resolutions did not mean that the primacy of UNSC resolutions in international law would be challenged.⁷⁴ It found the consequences of a review by the European judicature to remain limited to European legislation itself. In a similar vein, it considered the European judicature not competent to engage in a direct review of the lawfulness of UNSC resolutions, not even when such a review would be limited to norms of *ius cogens*.⁷⁵

The Court of Justice could only maintain this perspective by rejecting the General Court's argumentation that by engaging in judicial review it would indirectly review the underlying UNSC resolution.⁷⁶ The Court of Justice simply denied the lack of scope of discretion left by the relevant resolution for its domestic implementation.⁷⁷ With this it seems to have relied on a rather artificial construction in regard to UNSC resolutions requiring the implementation of

⁷⁰ *Kadi I* (first instance) (n 62) [193].

⁷¹ *Kadi I* (appeal) (n 7) [294].

⁷² *Ibid.* [296].

⁷³ *Ibid.* [299]-[300]. See similarly *ibid.* [305].

⁷⁴ *Ibid.* [288].

⁷⁵ *Ibid.* [287].

⁷⁶ See also *Blokker 2009* (n 14) 321.

⁷⁷ *Kadi I* (appeal) (n 7) [298].

targeted sanctions against specifically designated individuals.⁷⁸ Also, the General Court in the subsequent *Kadi II* case maintained that by such an approach it would still engage in an indirect review of UNSC action.⁷⁹ It was not at all convinced by the Court of Justice's separation of the domestic implementation from the underlying UNSC resolution.⁸⁰ It reiterated that when a UNSC resolution leaves states no scope of discretion in relation to its implementation, a review of the implementation necessarily amounts to a review of that resolution.⁸¹

6.3.3. A Connection with International Human Rights Law Cannot be Ascertained

The fundamental rights considered by domestic courts in the present category might have a counterpart in international human rights law. There appears to be a significant similarity in application of the norms. However, since the courts did not refer to them, the extent to which they considered the norms they applied to be equivalent in content and scope to similar norms in international human rights law cannot be assured. Although using similar language, the level of concordance in scope and content between the rights applied and comparable provisions in international human rights law cannot be assured, since no reference to the latter is made. Still, what is relevant for the research is that these courts did engage in a review. They did not consider the underlying UNSC resolution to have an adverse effect on their judicial function.

An example can be found in the *Ahmed* case, in which the UK Supreme Court proceeded on the basis that in international law, obligations under the UN

⁷⁸ See chapter 2.3.1 on the scope of discretion left by this type of UNSC resolutions. See also Blokker 2009 (n 14) 323-324.

⁷⁹ *Kadi II* (n 69).

⁸⁰ In addition to the present issue, the General Court was also remarkably critical, in general, towards the Court of Justice's decision in the *Kadi I* case. It found the doubts expressed in legal circles as to the compatibility of the Court of Justice's judgment with the obligations under the UN Charter, as well as with the EU treaties, not entirely without foundation. See *ibid.* [112], [115], and [121].

⁸¹ *Ibid.* [116].

Charter prevail over human rights treaties.⁸² It added, however, that this did not affect its position under domestic law.⁸³ Without referring to an international equivalent, the Court examined the sanction regime's compatibility with the principle of legality, which embraces the rights to peaceful enjoyment of property and unimpeded access to court.⁸⁴ It did this in order to determine whether the UK government, by implementing the targeted sanctions, had exceeded the powers delegated to it by Parliament.

As will be considered in subsection 6.4.1, the UK Parliament may choose to legislate contrary to fundamental rights. However, it can do that only by express language or by necessary implication.⁸⁵ Hence fundamental rights may not be overridden by general words. However, Parliament's delegation of powers for the implementation of UNSC resolutions was caught in general wording.⁸⁶ Therefore, it did not give the government the authority for overriding individuals' fundamental rights. Accordingly, if the government, by implementing the targeted sanctions, was found to override such rights, it would have exceeded the powers delegated to it by Parliament. In this context the Supreme Court incidentally reviewed the implementation of targeted sanctions against domestic fundamental rights, which have comparable provisions in international human rights law, to which the Court did not refer.

In carrying out this assessment, the Court touched upon the issue of lawfulness of the UNSC sanction regime against those fundamental rights.⁸⁷ It noted the procedural reforms and improvements made in the listing and delisting process at the UN level. Still, it found that there was scope for improving the effectiveness of that process and the transparency of the Sanctions Committee's decisions.⁸⁸ It

⁸² *Ahmed* (n 8) [74].

⁸³ *Ibid.* [75].

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* This idea is specified in the Simms principle, see *infra* footnote 122.

⁸⁶ *Ibid.* [76].

⁸⁷ See in this regard particularly Lord Philips at *ibid.* [151].

⁸⁸ *Ibid.* [78]. See chapters 3.7 and 7.3 for a discussion of this procedure.

considered that the listing and delisting procedure lack a basic procedural fairness,⁸⁹ and concluded that ‘there was not when the designations were made, and still is not, any effective judicial remedy.’⁹⁰

In addition, the Supreme Court also recognized that review of the national implementation of the UNSC sanctions in itself could not provide an effective remedy for the designated individuals. Even if such a review would lead to the invalidation of the national implementation, the targeted individuals would still remain on the UNSC sanctions list.⁹¹ In this respect, the Court found that what these individuals needed, if they were to be afforded an effective remedy, is a means of subjecting the UNSC listing to judicial review.⁹² According to the Court, the sanctions regime as currently applied does not provide for such possibility.⁹³ It, therefore, found the implementation to interfere with the individuals’ fundamental rights, and concluded that the government could not have implemented the sanctions regime without explicit approval by Parliament.

Relevant for the present discussion is that the Supreme Court engaged in a review of the implementation of UNSC resolutions, which left no scope of discretion, against domestic fundamental rights, which appear to have a counterpart in international human rights law. By this approach it provided a measure of judicial protection. However, because the Court did not connect the norms applied to international human rights law, it cannot be ascertained to what extent they provided equivalent protection. Moreover, as will be discussed in subsection 6.4.1, the Court decided the case, eventually, on the basis of domestic prescriptions regarding the separation of powers. It quashed the implementation

⁸⁹ Ibid. [80].

⁹⁰ Ibid. [78]. See also Lord Phillips at *ibid.* [149] and Lord Mance at *ibid.* [239], both critically assessing the developments and improvements in the sanction procedures at the UN level.

⁹¹ Ibid. [81].

⁹² Ibid.

⁹³ Ibid.

of the targeted sanctions because it went beyond the powers Parliament had delegated to the government.⁹⁴

Another reason why the connection between the fundamental right engaged and its alleged counterpart in international human rights law may remain unclear is due to the circumstance that a court provides scant legal reasoning for its decision. Therefore, little guidance can be derived from such a decision. Still, the court might provide a measure of judicial protection on the basis of a concept which, at least in name, has a counterpart in international human rights law.

This is the situation with the *Urey* case decided by the Liberian Supreme Court. In that case the Supreme Court was asked to review the lawfulness of the implementation of UNSC sanction measures against the former president of Liberia, Charles Taylor, senior officials of his regime, and other close allies or associates.⁹⁵ The case was brought by some of the targeted former government officials. The Court considered only very summarily the reasons for its decision. What is clear, however, is that it found that the executive was prohibited from pursuing the matter by the procedure it had adopted. According to the Court, the executive is ‘at liberty to proceed with whatever action it wishes to pursue, but in keeping with the due process of law as enshrined in our Constitution and Statutory laws’.⁹⁶ The least that can be concluded from this decision is that the Supreme Court decided that UNSC sanction measures needed to be implemented in Liberia in accordance with the Liberian rules of due process, which in terminology have a counterpart in international law, but the extent to which both provisions concur remains unclear.

⁹⁴ Ibid. [81], [83].

⁹⁵ The Liberia Sanctions Committee is established by UNSC Res 1521 (22 December 2003) UN Doc S/Res/1521. The sanctions are instituted by UNSC Res 1532 (12 March 2004) UN Doc S/Res/1532 [1].

⁹⁶ *Urey et al v The National Transitional Government of Liberia (NTGL)* [2005].

Another reason why the connection between the fundamental rights applied and their alleged counterpart in international human rights law may remain uncertain could be the fact that the original decision was provided in a language of which not many people, outside that particular legal order, have command. This is the case for example with the *Kadi* decision of the Turkish 10th Division of the Council of State (Administrative Court), concerning the implementation in Turkey of the targeted sanctions against Mr Kadi.⁹⁷ The Chairman of the UNSC Sanctions Committee reported this decision to the President of the UNSC,⁹⁸ and *International Law in Domestic Courts* (ILDC) includes a description of this decision in a headnote on the subsequent decision in appeal.⁹⁹

What can be construed from these secondary sources is that the 10th Division, as a Court of First Instance, cancelled the Council of Ministers' decision by which the sanctions against Mr Kadi were implemented.¹⁰⁰ It considered that states, when implementing UNSC resolutions, should act in accordance with their domestic law.¹⁰¹ It then noted that the Turkish Constitution prescribes that fundamental rights and freedoms can be restricted by law only.¹⁰² Therefore, the decision to freeze Mr Kadi's funds, taken by the executive alone,¹⁰³ was in contravention with the constitutional protection of his fundamental rights.¹⁰⁴

⁹⁷ Presently OUP is preparing a translation. See *Kadi v Turkey* [2007] ILDC 311 (TK 2007) at www.oxfordlawreports.com (last visited 19 December 2012).

⁹⁸ Amongst others: 'Letter dated 7 March 2007 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council' (8 March 2007) UN Doc S/2007/132 Annex I, 39.

⁹⁹ *Kadi v Turkey* (ILDC) (n 97). In this decision on appeal the Council of State, acting as Court of Appeal, took a totally different approach. It adopted a strict unified perspective on the relationship between the international and the national legal order, which gave it little room for a review.

¹⁰⁰ Chairman of the UNSC Committee 2007 (n 98) Annex I, 39. See also *Kadi v Turkey* *ibid.*

¹⁰¹ *Kadi v Turkey* *ibid.* [F7].

¹⁰² Turkish Constitution 1982, Article 13.

¹⁰³ Compare Chairman of the UNSC Committee 2007 (n 98) Annex I, 39 to *Kadi v Turkey* (ILDC) (n 97) [F7].

¹⁰⁴ See Chairman of the UNSC Committee *ibid.* and *Kadi v Turkey* *ibid.*

International human rights law appears to contain a similar guarantee.¹⁰⁵ It is not reported, however, whether the 10th Division made any reference thereto.¹⁰⁶

6.3.4. Appraisal

The present section has made a three-level distinction as to the certainty of the connection between the fundamental rights applied in a particular case and their alleged counterpart in international human rights law. The clearer such a connection is, the more convincing is the argument that the content of the relevant international human rights norms is upheld through the application of domestic fundamental rights. Essentially, the same norms are applied, but on a different legal basis. From such a review clear indications could be deduced on where these courts would consider the limits of lawful UNSC action to be, when measured against the guarantees contained in international human rights law. Moreover, if there is an unambiguous connection, a case may have exemplary value for courts from other legal orders, which may have to decide upon similar issues on the basis of norms that are equivalent in content and scope.

In the first category, courts could directly apply international human rights law on the basis of a provision to that effect in the domestic constitution. In these instances the norms applied are identical in scope and content to those in international human rights law. In this regard, the BiH Constitutional Court and several Dutch courts have found it possible to review the execution and implementation of obligations created by the UNSC against the rights guaranteed in the ECHR. This has resulted in an almost direct review of the relevant UNSC resolutions against international human rights law. However, any indication on the hierarchy between an individual's rights and an implementation of a UNSC resolution follows from the internal constitutional hierarchy. Hence it is difficult to draw any general conclusions on how these courts would solve the conflict of norms in international law. Dutch courts, for example, considered international

¹⁰⁵ See chapter 3.6.2. See also R White and C Ovey *The European Convention on Human Rights* 5th edn (Oxford University Press Oxford 2010) 313.

¹⁰⁶ See, however, *supra* footnote 97.

human rights law to be overruled when the relevant obligation under the UN Charter was self-executing.

In cases in the second category, a clear connection is made between the domestic fundamental rights applied and international human rights law. The courts take guidance from the latter in order to determine the content and scope of the former. The Court of Justice and the General Court, for example, assessed the lawfulness of the European implementations of UNSC targeted sanctions against the right to property and the rights to access to court and to an effective remedy as enshrined in the ECHR. In this situation there is still a sufficiently clear connection to justify the argument that these courts engaged in an indirect review of a UNSC resolution against international human rights law. What is more, the decision may have exemplary value for other courts on how the implementation of a UNSC resolution could be assessed against norms that could be found in international human rights law.

With regard to the third category of cases, the individuals concerned obtained a judicial review of their fundamental rights as guaranteed under domestic law. However, any link with international human rights law remains uncertain. This could be due to a court not referring to any international counterpart of the rights applied, or only supplying scant legal reasoning. Alternatively, it could be caused by insufficient access to the original decision. The research does not consider these decisions to compensate for the gap in judicial protection of international human rights. In addition, apart from the fact that they evidence a possibility to engage in a judicial review and to protect domestic fundamental rights, they do not have much exemplary value for other courts. It is uncertain whether the norms applied in these cases have a similar existence in other legal orders.

6.4. Review Against Entirely Separate Domestic Prescriptions

When separating the international from the domestic legal order, courts could also review the lawfulness of the implementation of UNSC resolutions against

entirely domestic prescriptions, which do not have any link with international human rights law. From such a review no indications can be drawn on how these courts would solve the underlying conflict of norms in international law. Moreover, for the purpose of the research, these instances of judicial review cannot be interpreted as compensating for the gap in international human rights protection. Still, what is relevant for the research is that the adversely affected individuals obtained a measure of judicial review. The courts did not regard their judicial function to be ruled out by a resolution of the UNSC. Hence these individuals effectively enjoyed access to court. This approach may, eventually, also provide them with a form of relief.

This section will start by considering judicial review of implementations of UNSC resolutions against domestic prescription concerning the internal division of competences, in subsection 6.4.1. Subsequently, subsection 6.4.2 will deal with courts reviewing International Tribunals' requests for surrender against domestic requirements pertaining to extradition law. After that, subsection 6.4.3 will provide a brief appraisal.

6.4.1. Domestic Division of Competences

For UNSC resolutions to gain effect, they usually need to be implemented into states' domestic legal orders. Often this means that the legislative organ of the state enacts legislation to implement these resolutions in the national legal order.¹⁰⁷ Thereupon, the executive organs of the state take decisions and/or enforcement measures to execute the measures indicated in the UNSC resolution. This division of competences is instigated by the internal separation of powers. It does not directly benefit, nor concern, the protection of the affected individual's fundamental rights. However, a particular constitutional set-up of a state is prompted by values that eventually protect the interests of individuals living in that state, in general. These constitutional prescriptions seek to guarantee fundamental values, such as democracy and the rule of law. Moreover, review

¹⁰⁷ Gowlland-Debbas 2004 (n 51) 40. See chapter 2.4.

against these prescriptions may result in reasonably effective relief for individuals adversely affected by an implementing measure. A court may decide to annul such a measure for reason of it being implemented in violation of the domestic division of competences.

In some states, the legislature has enacted prior general framework legislation on the basis of which the executive is able to implement several successive resolutions. In the majority of states, however, there is no specific prior framework legislation. In those states resolutions are implemented on the basis of other pre-existing legislation (not specifically designed for the implementation of UNSC resolutions) or on the basis of *ad hoc* legislation, specially adopted *post-facto* for the implementation of a particular resolution.¹⁰⁸ When the executive takes action on the basis of a UNSC resolution to which the legislature has not (yet) given effect in the domestic legal order, the executive action could be found to be unlawful in a judicial review.

An example hereof can be found in the Australian *Bradley* case, decided some 40 years ago.¹⁰⁹ The case concerned the implementation of general economic sanctions against Rhodesia, imposed by the UNSC.¹¹⁰ The executive, in this case the Postmaster-General, had decided to withdraw postal and telecommunication services from the Rhodesia Information Centre in order to comply with these sanctions. The Australian High Court considered, however, that even if the acts were done with a view to complying with the resolutions of the UNSC,¹¹¹ these resolutions did not give the executive any power which it would not otherwise possess.¹¹²

¹⁰⁸ Ibid. 43-45.

¹⁰⁹ *Bradley v Commonwealth of Australia and the Postmaster-General* [1973] 128 CLR 557; 1972 WL 38016 (HCA).

¹¹⁰ The High Court does not specify the particular resolution; rather, it refers to 'a number of resolutions passed by the [UNSC], over a period of years from 1965 to 1970.' Ibid. 562.

¹¹¹ The Court found it 'unnecessary to consider whether the resolutions of the Security Council, properly construed, would require the Commonwealth as a member nation to take the action that has been taken against the Rhodesia Information Centre.' Ibid. 583.

¹¹² Ibid. 582-583.

According to the Court, the resolutions had to be carried into effect, first, by legislation before the executive could rely on it.¹¹³ Since that was not the case, the Court concluded that the decision by the Postmaster-General was unlawful, and granted an injunction against the continuation of the actions. Although the High Court recognized the international obligation upon UN member states under the UN Charter, it annihilated that obligation's effect by a strictly dualist approach.¹¹⁴ The Court's ruling was instigated, of course, by Australia's general dualist perspective on the relationship between national and international law.

In a majority of states the legislature approves of the execution of a UNSC resolution by enacting *ad hoc* legislation implementing that particular resolution.¹¹⁵ In others, prior framework legislation is adopted.¹¹⁶ The latter option guarantees a more speedy implementation.¹¹⁷ However, even when such framework legislation is adopted, issues pertaining to the constitutional division of competences may still arise. For example, the legislation may have been enacted as long ago as 1946, shortly after the UN was established. Today, as a consequence of the changing role of the UNSC, implementation of UNSC resolutions by the executive on the basis of such legislation could be in conflict with the national division of competences.

An example hereof can be found in the earlier discussed *Ahmed* case.¹¹⁸ This case was ultimately decided on the basis of domestic prescriptions regarding the separation of powers. In the United Kingdom, the executive implements UNSC

¹¹³ Ibid. 582.

¹¹⁴ C Schreuer 'The Relevance of United Nations Decisions in Domestic Legislation' (1978) 27 *International and Comparative Law Quarterly* 1, 11. Schreuer was quite critical of the Court's approach. He was concerned that it 'could seriously affect organised international co-operation.' C Schreuer 'The Relevance of United Nations Decisions in Domestic Legislation' (1978) 27 *International and Comparative Law Quarterly* 1, 12.

¹¹⁵ Gowlland-Debbas 2004 (n 51) 43-45.

¹¹⁶ Ibid.

¹¹⁷ Ibid. 41.

¹¹⁸ *Ahmed* (n 8).

measures on the basis of prior general framework legislation.¹¹⁹ By this legislation, Parliament has delegated to government the power to take measures in order to implement mandatory UNSC decisions. In the *Ahmed* case, the issue was whether Parliament by that delegation allowed the government to implement UNSC measures that interfered with individuals' fundamental rights. The fundamental rights at stake in that case were those of peaceful enjoyment of property and unimpeded access to court.¹²⁰ These rights were, according to the UK Supreme Court, embraced by the principle of legality.¹²¹ This principle determines that if Parliament chooses to legislate contrary to fundamental rights – which it is allowed to do on the basis of the principle of parliamentary sovereignty – it must squarely confront what it is doing and accept the political cost.¹²² Hence fundamental rights may not be overridden by general words. They can only be set aside by express language or by necessary implication.¹²³ Thus Parliament's delegation of powers for the implementation of UNSC resolutions, which was caught in general wording, did not give the government the authority for interfering with individuals' fundamental rights. Accordingly, the government had exceeded its powers by implementing targeted sanctions¹²⁴ which adversely affected individuals' rights to property and access to court. Therefore the Court quashed (part) of the domestic implementation.

Accordingly, judicial review on these grounds seems to result in an effective remedy for the individual concerned, by the annulment of the domestic

¹¹⁹ United Nations Act 1946, c 45 9 and 10 Geo 6 (enacted 15 April 1946).

¹²⁰ These are the fundamental rights under domestic law considered by Lord Hope. Under the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221; CETS 5 (ECHR) the applicant invoked articles 6, 8, and 1 Protocol 1. See *Ahmed* (n 8) [66] and [75].

¹²¹ *Ibid.* [75].

¹²² This idea is specified in the Simms principle, which holds that: 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.' Fully quoted by Lord Phillips at *ibid.* [111], Lord Brown at *ibid.* [193], and Lord Mance at *ibid.* [240].

¹²³ *Ibid.* [75].

¹²⁴ Only Lord Brown disagreed on this point. See *ibid.* [204].

implementation. However, essentially, the Supreme Court decided the case not so much on the basis of protection of fundamental rights, but on the basis of a flaw in the delegation of powers from Parliament to the government.¹²⁵ Praise of the Supreme Court's decision as an example of judicial protection of fundamental rights might be inappropriate.¹²⁶ Its decision may eventually turn out to be a Pyrrhic victory for fundamental rights protection.¹²⁷ Parliament can still (and already has) enacted legislation that allows for the on-going implementation of the UNSC measures.¹²⁸ This, of course, can be explained by the principle of parliamentary sovereignty, which cannot be limited even by the Human Rights Act, which seeks to implement the ECHR.¹²⁹

6.4.2. Requirements for Extradition

As was discussed earlier, the UNSC created the obligation on states to cooperate with the International Tribunals. An important subject for cooperation is the surrender, upon request, of certain individuals to the Tribunals. The Statutes of the International Tribunals purposely avoid the term extradition and instead use the terms surrender and transfer.¹³⁰ This is to indicate that transfer to the

¹²⁵ The courts in lower instances in the *A, K, M, Q and G* case, which was one of the cases joined before the UK Supreme Court in the *Ahmed* case, essentially followed a similar approach. See *A, K, M, Q, & G v HM Treasury* [2008] EWCA Civ 1187 [129].

¹²⁶ See the statement of Mr Marty in B Smith 'Report on Terrorist Asset Freezing (Temporary Provisions) Bill' House of Commons Library (5 February 2010) SN/IA/5325, 12.

¹²⁷ Protection of individuals' enjoyment of fundamental rights also does not seem to have been the Supreme Court's main concern. That seems to have primarily been with the 'dangers that lie in the uncontrolled power of the executive.' *Ahmed* (n 8) [80]. See also separate opinion of Lord Roger, with whom Baroness Hale agreed, in which he argued that the measures in the TO might be expedient, but that it is for Parliament to enact them. *Ibid.* [173]-[174].

¹²⁸ After the Supreme Court partially quashed the implementation of the 1267 regime, the government decided to rely on European Regulations implementing the same regime to fill that gap. See Smith 2010 (n 126) 11. The implementation of European Regulations is facilitated by: The Al-Qaida and Taliban (Asset-Freezing) Regulations 2010 No 1197; and The Al-Qaida (Asset-Freezing) Regulations 2011 No 2742.

¹²⁹ See Human Rights Act 1998 (UK) c. 42 section 6 (3).

¹³⁰ The research will use the term 'transfer' in a neutral meaning, the term 'extradition' for a transfer of an individual between two states, and 'surrender' for a transfer of an individual from a state to an International Tribunal.

Tribunals is not supposed to trigger the same procedural requirements and fundamental rights guarantees as transfer to the national courts of another state.¹³¹

Still, some states have approached the implementation of the duty to transfer to the International Tribunals from the perspective of inter-state extradition. Certain requirements and conditions, which often find their origin in traditional extradition law, have been included in several national implementing regulations. As a consequence, some domestic courts have engaged in a review of a Tribunal's request for surrender against requirements such as double criminality,¹³² the showing of a probable cause,¹³³ and other general limitations flowing from the constitution.¹³⁴

While these requirements are recognized as general legal principles within extradition law,¹³⁵ and also serve the interest of the individual concerned, they cannot be regarded as constituting part of international human rights law proper. Accordingly, the constitutional prescriptions discussed in this subsection do not have a counterpart in international human rights law. However, the individuals concerned obtain a measure of judicial review. Domestic courts considered themselves competent to engage in a review of requests for surrender against these conditions on extradition, despite the fact that the transfer of the individual concerned was ordered by an International Tribunal.

¹³¹ See also chapter 2.3.4.2.

¹³² Italian legislation, for example, prohibits extradition for crimes not recognized in Italian law. H Fox 'The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal' (1997) 46 *International and Comparative Law Quarterly* 434, 441.

¹³³ What this defence entails will be explained below, in the context of the *Ntakirutimana* case.

¹³⁴ Japan declared that it intended to cooperate in accordance with the spirit of internationally established principles on criminal matters and within its constitution. See K Harris and R Kushen 'Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution' (1996) 7 *Criminal Law Forum* 561, 568 footnote 16.

¹³⁵ See, for example, Model Treaty on Extradition, UN Doc A/RES/45/116 (1990).

For example, in the case of the requested surrender of former president Milosevic to the ICTY, the Constitutional Court of the FRY held that his transfer would be unconstitutional because the Constitution of the FRY prohibited the transfer of Yugoslav citizens.¹³⁶ It added that provisions of the Constitution enjoyed the strongest force in the hierarchy of legal norms.¹³⁷ Moreover, according to the Court, the obligations arising out of the relevant UNSC resolution¹³⁸ could be of a political nature only, and were not legally binding.¹³⁹ The Court considered this the case because UN member states had not transferred any judicial powers to the UN, except for the powers exercised by the ICJ.¹⁴⁰ As a consequence, the UN could not, according to the Court, create legally binding obligations towards an *ad hoc* established judicial body, such as the ICTY. Besides, the Court added, the UNSC had no ‘express power to create and set up judicial bodies, as a measure to protect peace’.¹⁴¹ Therefore, the obligations could acquire legal validity in the FRY only when they were implemented in accordance with national laws.¹⁴²

This decision must be seen in light of the fact that the majority of the judges at the FRY’s Constitutional Court, at the time of this decision, had been elected during Mr Milosevic’s term in office. Legal arguments may have been used to hide the political unwillingness to cooperate.¹⁴³ The FRY government, however, was willing to cooperate and decided, on the very same day that the Constitutional Court made an order to suspend the execution of the ICTY’s order for surrender, that Mr Milosevic could be transferred to the ICTY. This

¹³⁶ *Constitutionality and legality of the decree on process of cooperation with the International Criminal Tribunal, Socialist Party of Serbia and ors v Federal Republic of Yugoslavia* [2001] ILDC 29 (CSXX 2001) [18].

¹³⁷ *Ibid.*

¹³⁸ UNSC Res 827 (25 May 1993) UN Doc S/Res/827 [4], creating the obligation to cooperate with the ICTY.

¹³⁹ *Constitutionality of cooperation with the ICTY* (n 136) [25].

¹⁴⁰ *Ibid.* [26].

¹⁴¹ *Ibid.* [30].

¹⁴² *Ibid.* [26].

¹⁴³ *Ibid.* [A5].

occurrence eventually resulted in him bringing complaints before the ICTY and a Dutch District Court concerning kidnapping and unlawful detention.¹⁴⁴

Another requirement often prescribed by domestic law for the transfer of individuals in criminal cases is the existence of an extradition treaty.¹⁴⁵ Meeting this requirement was one of the issues US courts had to decide on in the *Ntakirutimana* case, concerning a request for surrender made by the ICTR.¹⁴⁶ The United States is the only state in the world to have concluded 'surrender agreements' with the International Tribunals.¹⁴⁷ US courts reviewed whether a transfer of Mr Ntakirutimana, requested by the ICTR on the basis of such an agreement instead of on a proper extradition treaty, would be in accordance with the Constitution.¹⁴⁸ The majority of the Court of Appeal, in a *habeas corpus* review,¹⁴⁹ concluded that the US Constitution does not require a treaty for extradition. The statute implementing the agreements was found to be sufficient ground for the extradition of Mr Ntakirutimana to the ICTR.¹⁵⁰ The Court arrived at this conclusion despite the argument that in the past, the United States had never previously extradited individuals in the absence of a treaty.¹⁵¹

¹⁴⁴ The ICTY did not consider the violations of Milosevic's rights to meet the threshold of abuse of process. *Prosecutor v Slobodan Milosevic (Decision on Preliminary Motions)* [2001] (IT-02-52) [51]. See also *Milosevic v The Netherlands* [2001] KG 01/975. See also subsection 4.3.3.1.

¹⁴⁵ C Bassiouni *Introduction to International Criminal Law* (Transnational Publishers Ardley 2003) 348.

¹⁴⁶ *Ntakirutimana v Reno* [1999] 184 F.3d 419 (5th Cir) WL 98-41597.

¹⁴⁷ A Godinho 'The Surrender Agreements Between the US and the ICTY and the ICTR: A Critical View' (2003) 1 *Journal of International Criminal Justice* 502, 503. See also R Kushen 'The Surrender Agreements Between the US and the ICTY and the ICTR: The American View' (2003) 1 *Journal of International Criminal Justice* 517, 517.

¹⁴⁸ See for a critical assessment G Sluiter 'The Surrender of Ntakirutimana Revisited' (2000) 13 *Leiden Journal of International Law* 459, 466.

¹⁴⁹ The challenges made by Mr Ntakirutimana regarding the legality of the establishment of the ICTR and the incapability of that Tribunal to guarantee due process rights were dismissed by the Court of Appeals as being beyond the scope of *habeas* review. *Ntakirutimana* (n 146) 423, 430.

¹⁵⁰ *Ibid.* 427.

¹⁵¹ *Ibid.* 426, 436.

The effect of the surrender agreements was that, apart from the condition of a 'probable cause',¹⁵² all the other traditional requirements for extradition were held to be inapplicable to the process of surrender to the International Tribunals.¹⁵³ However, in contrast to what the drafters of the agreements had expected, the remaining requirements appeared not to be readily met.¹⁵⁴ The magistrate in the US District Court, which first reviewed the request for surrender, engaged in a scrupulous review against the probable cause standard. He scrutinized the witness statements obtained by the office of the prosecutor of the ICTR and forwarded to the United States, and was very critical as to their legitimacy.¹⁵⁵ Consequently, he denied the request for surrender and ordered Mr Ntakirutimana's release.¹⁵⁶

The ICTR re-filed its request for surrender and supplied the United States with additional information regarding the witness statements.¹⁵⁷ Thereupon the case was brought before another District Court. This court and, subsequently, the Court of Appeal, were convinced that the probable cause requirement was satisfied.¹⁵⁸ Nonetheless, Judge Parker of the Court of Appeal, while not officially dissenting, still found the evidence supporting the request 'highly suspect'.¹⁵⁹

¹⁵² See *ibid.* 427. See also R Kushen and K Harris 'Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda' (1996) 90 *American Journal of International Law* 510, 513; and Godinho 2003 (n 147) 512, 514.

¹⁵³ G Sluiter 'To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal' (1998) 11 *Leiden Journal of International Law* 383 388.

¹⁵⁴ The standard of evidence required by the Statutes of the Tribunals for the promulgation of an indictment by the prosecutor was considered to be higher than the probable cause standard. Kushen and Harris 1996 (n 152) 513. Cf., B Swart 'Arrest and Surrender' in A Cassese (ed.) *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press Oxford 2002) 1658-1671.

¹⁵⁵ See M Coombs 'In re Surrender of Ntakirutimana, 184 F.3d 419' (2000) 94 *American Journal of International Law* 171, 176.

¹⁵⁶ See Sluiter 1998 (n 153) 389.

¹⁵⁷ Coombs 2000 (n 155) 177, and Sluiter 2000 (n 148) 462.

¹⁵⁸ Coombs *ibid.*

¹⁵⁹ *Ntakirutimana* (n 146) 431.

Accordingly, Mr Ntakirutimana was not surrendered readily, and obtained judicial protection of his constitutional rights. Although the result was that the United States, eventually, surrendered him to the ICTR,¹⁶⁰ it took about three and a half years to do so.¹⁶¹ This may not have been entirely in accordance with the United States' international obligation under the Statutes to comply *without undue delay* with requests for surrender by the Tribunals.¹⁶² Hence this obligation gave way to an opportunity for the individual concerned to obtain a judicial review of his constitutional rights.

Other widely accepted conditions for extradition are the existence of double criminality (the acts for which the extradition is sought also need to be criminalized in the requested state); the rule of speciality (the requesting state may only prosecute the extradited individual with regard to the acts for which he was extradited); and statutory limitations (a time limit on legal action). An Argentinean court, when reviewing the ICTY's order for surrender of Mr Lukic, assessed whether these requirements as imposed by national law were satisfied.¹⁶³ After the Court found that the facts underlying the crimes mentioned in the indictment were equally criminal under Argentinean law, and that statutory limitations did not apply to these crimes, it concluded that the requirements for transfer had been met.¹⁶⁴ It added, however, that after a transfer to the ICTY, Lukic could not be re-extradited to another state – 'in connection with facts that were prior to and different from those that constitute the offences for which his surrender is sought' – without Argentina's consent.¹⁶⁵

¹⁶⁰ Ntakirutimana had appealed the decision of the Court of Appeals at the US Supreme Court. That court, however, refused to hear the case and denied certiorari: see 528 US 1135, 120 S. Ct. 977.

¹⁶¹ Godinho 2003 (n 147) 515.

¹⁶² ICTY Statute article 29 (2) and ICTR Statute article 28 (2).

¹⁶³ *Re International Arrest Warrant (Lukic), Decision on arrest, surrender and extradition* [2006] Case No 11807/05; ILDC 1083 (AR 2006) [51]. The Court applied these requirements arising from national legislation because the Argentinean parliament had not implemented the ICTY Statute and Rules of Procedure into its domestic legal order. But see E Cardenas and M Garcia-Rubio 'Argentina' in V Gowlland-Debbas (ed.) *National Implementations of United Nations Sanctions* (Martinus Nijhoff Publishers Leiden 2004) 81-101, 85, 93.

¹⁶⁴ *International Arrest Warrant (Lukic)* *ibid.* [H3].

¹⁶⁵ *Ibid.* [76].

Mr Lukic particularly did not want to be transferred to BiH because of his concerns regarding the possibility of a fair trial and his personal safety.¹⁶⁶ For example, he contended that special police forces had raided his house in BiH and executed his brother, in the conviction that it was him.¹⁶⁷ Nonetheless, after his transfer to the ICTY, the prosecutor sought referral of his case to BiH without seeking any prior authorization from Argentina.¹⁶⁸ Accordingly, the condition imposed on the surrender by the Argentinean court, on the basis of domestic law, was eventually without any effect.¹⁶⁹

6.4.3. Appraisal

The present discussion concerned domestic courts reviewing the implementation of an obligation under a UNSC resolution against domestic prescriptions that have no counterpart in international human rights law. Their decisions were largely dependent on the specific constitutional set-up and the manner in which the obligation created by a UNSC resolution was implemented in the domestic legal order. Such a review satisfies the affected individual's right of access to court. He may even obtain relief in the sense that the domestic implementation could be annulled on the basis of a violation with the prescriptions under domestic law. However, as with all dualist approaches, the effectiveness of such relief could be limited due to the fact that the international obligation at issue remains unaffected. Moreover, no indications can be drawn from these cases on where these courts would consider the limits of lawful UNSC resolutions to be if measures were contrary to international human rights law. What is more,

¹⁶⁶ See *Milan Lukic and Sredoje Lukic (Decision on Referral of Case Pursuant to Rule 11 bis)* [2007] IT-98-32/1-PT [63] et seqq.

¹⁶⁷ He also argued that when he was in detention in Argentina he was threatened by a Republika Srpska police director. The Referral Bench of the Tribunal however found Lukic's allegations insufficiently substantiated. *Ibid.* [65]-[66].

¹⁶⁸ *Ibid.* This decision was later revoked by the Tribunal's Referral Bench, *Milan Lukic (Decision on Milan Lukic' Appeal Regarding Referral)* IT-98-32/1-AR11bis.1 (20 July 2007). See also ICTY Press Release of MH/Mow/1176e (20 July 2007); and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (consolidated version 10 December 2009) UN Doc IT/32/Rev.44 (Rules of Procedure ICTY), Rule 11bis (c).

¹⁶⁹ See also chapter 4.3.3.1.

completely discarding the international origin of the domestic implementation may lead to further fragmentation, and may undermine the effectiveness of international cooperation.

6.5. A Need for Judicial Dialogue

As was mentioned, the combination of a UNSC resolution leaving no scope of discretion and the application of norms that have a direct counterpart in international human rights law creates a situation that may occur similarly in different domestic legal orders. Accordingly, a particular court's approach may have exemplary value for courts in other legal orders confronted with the same situation. If courts take inspiration from other courts' decisions on the same issue, the danger of fragmentation, inherent in a dualist approach, may be mitigated. Moreover, the leverage towards the UNSC following from a concerted dualist approach could be employed effectively. The UNSC, seeing its efficacy and efficiency of action undermined by substantial annulments of domestic implementations, might be willing to adjust its measures to the unambiguous requirements upheld by the courts.¹⁷⁰ This can only be done if an unequivocal message is sent to the UNSC on where these courts understand the limitations of a lawful implementation to be. In this regard, it is more attainable for the UNSC to observe generally applicable rules than a wide-spread pattern of particular domestic regulations. Since most states are party to an international human rights treaty, such rules can best be found in international human rights law. In this way, courts might induce the UNSC to comply with international human rights law, and effectively contain that body's powers in cases concerning decisions directly affecting individuals' human rights.

This approach would require judicial dialogue. Courts need to take note of other courts' decisions on similar issues, and need to give sufficient reasoning of their own decisions, taking into account the international counterparts of the

¹⁷⁰ See also Special Rapporteur 2012 (n 14) [23].

fundamental rights they employ.¹⁷¹ While there is evidence that courts do refer to each other,¹⁷² the cases within the scope of this research are too few to determine the nature of such dialogue, and whether it is occurring widely throughout judicial decisions in different fields of law. Hence the research does not seek to argue that judicial dialogue is indeed presently taking place: rather, it contends that if courts maintain the practice of resorting to a dualist approach for the protection of fundamental rights, they will need to engage in a dialogue of some sort, in order to acquire greater effectiveness of their decisions, and to mitigate the dangers of fragmentation.

In addition, the research indicates which approaches would further judicial dialogue, and which would not. In this regard, guidance can be found in the division made in section 6.3. In that section, different instances of indirect review were categorized on the basis of the certainty of the connection between the domestic norms applied and international human rights law. Arguing from that perspective, it could be said that the closer or more certain that connection, the more exemplary value a decision has for courts from other legal systems dealing with the same issue. Accordingly, courts seeking guidance from international human rights law for the interpretation and application of domestic fundamental rights may facilitate judicial dialogue on how these rights should be balanced against the obligations imposed by the UNSC.

Note, however, that judicial dialogue in itself is a descriptive term. It does not immediately indicate whether the process as such is beneficial for the protection of human rights. For example, the relatively large follow-up by other courts from the General Court's ruling in the *Kadi I* case could be argued to have led to a deterioration of the protection of human rights. Hence judicial dialogue is only a tool that could be applied for the benefit of international human rights protection if courts were to use it in that way.

¹⁷¹ E Benvenisti and G Downs 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 *European Journal of International Law* 59, 66.

¹⁷² See, for example *Nada* (ECtHR) (n 10) [82]-[101]; and *Ahmed* (n 8) [66]-[71].

6.6. Conclusion

By disconnecting the international obligation under the UN Charter from the domestic implementation of a UNSC resolution, courts create an opportunity to engage in a (full) judicial review. In that situation, they can simply review a mere domestic regulation against other domestic prescriptions. Such an approach grants the individuals adversely affected by UNSC action access to court and a measure of judicial protection. However, with regard to individuals affected by the UNSC's targeted sanctions, such an approach could provide them with limited relief only, since they will remain on the universal UNSC list. Moreover, states remain under an international obligation to implement the sanctions against these individuals.

In addition, separating the domestic from the international legal order also carries certain dangers with it. It may undermine the effectiveness of UNSC action. This may adversely affect that body's ability to pursue the maintenance of international peace and security. When other courts and institutions follow the dualist approaches taken by some influential domestic courts in the cases concerned, the effectiveness of UNSC action is endangered further. Moreover, some courts may find justification for the rejection of a UNSC resolution on grounds other than protection of internationally recognized human rights.

In many other instances, courts have reviewed the domestic implementation against domestically guaranteed fundamental rights. Often these rights have a counterpart in international human rights law. These international human rights may serve as a guide in interpreting the content and scope of equivalent domestic fundamental rights.¹⁷³ Occasionally they are even applied directly in the domestic legal order through a constitutional authorization thereto.

¹⁷³ See, for example, *Kadi I* (appeal) (n 7) [356], see also *Görgülü* [2004] 2 BvR 1481/04 [32].

If a domestic court reviews the implementation of a UNSC resolution that leaves states no scope of discretion as to its implementation, against fundamental rights, it might be indirectly reviewing the underlying UNSC resolution against international human rights law. This could only be the case when the domestic fundamental rights applied have a counterpart in international human rights law. In that situation the content of the international human rights is upheld through the application of equivalent domestic fundamental rights. In these circumstances it could be argued that a lack of judicial protection of international human rights is compensated for by a review against domestic fundamental rights. In addition, such a review sends a clear message to the UNSC on where these courts would consider the limits of lawful UNSC action to be, if held against the guarantees under international human rights law. Equally, it may have exemplary value for other courts and institutions applying norms with the same content to particular instances.

In this regard, section 6.3 divided the gradual difference as to the certainty of the link between the fundamental rights applied and their alleged counterparts in international human rights law into three categories. The higher the degree of certainty, the more it is justified to speak of fundamental rights compensating for the gap in judicial protection of international human rights; the more relevant a decision is for courts in other legal systems; and the more unequivocal the message to the UNSC. The first category concerns cases in which international human rights are applied directly in the domestic legal order on the basis of a constitutional prescription to that effect. The domestic fundamental rights applied are then identical to those laid down in international human rights law. However, the normative basis is domestic law rather than international law, or at least the authorization for their application depends on the domestic constitution. The second category comprises cases in which domestic fundamental rights are applied with a reference to international human rights law. The scope and content of the relevant domestic rights is ascertained or established on the basis of equivalent norms in international human rights law. In the third category there

is no reference at all to international human rights law when applying domestic fundamental rights. In that situation the fundamental rights applied might have a counterpart in international human rights law, but this cannot be confirmed. This makes it difficult for others to assess directly the extent of the overlap between the two.

By engaging in an indirect review of UNSC resolutions against domestic prescriptions that have a counterpart in international human rights law, these courts indirectly assess the lawfulness of the resolutions concerned within the context of international human rights law, including its system of lawful limitations. The domestic proxy of that framework is not set aside by the norms that formally prevail within the system of international law. They simply avoid the result prescribed by the hierarchy in international law by securing the same interests on the basis of domestic law. This might be read as an indication that these domestic courts do not consider UNSC resolutions simply to override international human rights law, or rather the values or interests underlying that system. However, such an assertion must be taken with a considerable disclaimer. Often, domestic fundamental rights are merely found to prevail on the basis of their constitutional status, as opposed to the statutory legal basis of the implementation of UNSC resolutions.

The combination of a UNSC resolution, leaving no scope of discretion, and the application of norms that have a direct counterpart in international human rights law creates a situation that may occur similarly in different domestic legal orders. Accordingly, a particular court's approach may have exemplary value for courts in other legal orders confronted with the same situation. By referring to each other's decisions, and by providing sufficient legal reasoning, a fruitful international judicial dialogue could emerge. Such dialogue might mitigate the danger of fragmentation, which is a likely consequence of a dualist approach. Moreover, when courts refer to norms that are equally applicable in most states of the world, an unequivocal message would be sent to the UNSC on where they

understand the limitations of lawful implementation to be. It is easier for the UNSC to satisfy those requirements than to abide by a wide pattern of diverging, entirely domestic prescriptions. This provides the UNSC with an opportunity to avoid a large-scale annulment of the domestic implementations of its decisions, and thereby an undermining of its effectiveness, by observing international human rights.