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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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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*.

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9. Conclusion: Challenges, Opportunities, and a Suggestion for Improvement

9.1. Introduction

The UNSC is dependent on states for the execution of its decisions. States need to implement UNSC resolutions for that body to fulfil effectively its task of maintaining international peace and security. To that end, UN member states are under an obligation to carry out the decisions of the UNSC. Under certain circumstances, the implementation of that obligation may result in a breach or a limitation of individuals' rights under international human rights law, as codified by the ECHR and the ICCPR. A conflict of norms may emerge which has to be addressed when adversely affected individuals bring their cases before domestic and regional courts. The research has investigated how these courts then deal with such norm conflicts.

The present chapter discusses and analyses the research's results. First, section 9.2 will sketch the framework within which the research was conducted. Subsequently, section 9.3 will consider the results of the analysis of relevant case law. Thereafter, section 9.4 will make an evaluation of those results. It will assess whether the challenges for judicial protection could be counterbalanced by certain approaches that result in opportunities for judicial protection. Finally, section 9.5 will indicate what approach courts, when confronted with these issues, should follow, taking into account both the importance of judicial protection of individuals' human rights and of the UNSC to operate effectively. In addition, it will briefly reiterate the solution expounded on in the previous chapter for enhancing the fairness of the targeted sanctions regime.

9.2. The Research

The question central to the research was whether domestic and regional courts grant individuals adversely affected by the implementation of a UNSC resolution a measure of judicial protection: in other words, whether these courts fully assess the lawfulness of such domestic implementation against the individuals' international human rights. If this is answered in the affirmative, by what approach do they secure such a review? To answer these questions, the research took an inductive approach. This means that its analysis and discussion were guided by what was decided in relevant case law.

For case law to be relevant for the research it had to meet the following two requirements: first, the case had to concern a conflict of norms, between an obligation created by the UNSC and an obligation under international human rights law. Second, the relevant provisions of a UNSC resolution had to create an obligation upon states which left them no or a very limited scope of discretion in regard to their implementation. Otherwise, a domestic measure could not be said to be an inevitable consequence of an obligation created by the UNSC. It would instead have stemmed from a voluntary choice of policy by the domestic authorities.

Particularly relevant for the research were UNSC resolutions that impose targeted sanctions. These resolutions create an obligation upon states that leaves them no scope of discretion in any respect. Individuals are designated directly by the UNSC or a Sanctions Committee and states can do no other than execute the prescribed sanction measures against the designated individuals. Other types of resolutions included in the research leave states certain discretion to establish the relevant facts and circumstances. However, as soon as state authorities have determined that an individual, an object, or a situation indeed falls within the meaning of the resolution concerned, they have no further discretion and the measures foreseen have to be applied. Another category of resolutions considered in the research are those that grant certain powers to subsidiary

organs, such as a UN High Representative governing certain territory, or the International Tribunals. The decisions of these organs were argued to create obligations upon states that are of the same legal nature as the UNSC's own decisions. Equally, these decisions may leave states no scope of discretion. An example thereof is a request by an International Tribunal directed at certain states to surrender particular individuals. Such a request is binding upon those states pursuant to the general obligation established by the UNSC to cooperate with the International Tribunals.

On the other side of the potential norm conflict are states' obligations following from international human rights law. The rights most often engaged before courts in the cases at issue are the right to peaceful enjoyment of property; the right to freedom of movement; the right to liberty; the right to private and family life; the right to an effective remedy; and the right of access to court and to a fair trial. The research paid special attention to the rights of access to court and to an effective remedy. These rights are, in addition to being human rights in themselves, also essential mechanisms for effectively securing individuals' enjoyment of their human rights in specific instances. It is this latter aspect of these rights, as instruments for human rights enforcement, that the notion 'judicial protection' seeks to cover.

According to the UN Charter, a conflict between the international obligations concerned is solved by article 103 of the Charter. This provision holds that in the case of conflict, obligations under the UN Charter take precedence over states' obligations under any other international agreement. Hence, in principle, when the UNSC establishes an obligation upon states, this obligation prevails over their obligations under the ECHR and the ICCPR. However, if these human rights instruments are set aside by a diverging commitment under the UN Charter, individuals adversely affected by the implementation of a UNSC resolution are denied any judicial protection of their international human rights. This results in a significant detrimental effect on their position compared to the

situation they would be in if they were affected by domestic authorities' decisions not underpinned by an obligation created by the UNSC. The research has investigated how domestic and regional courts deal with such situations, and whether they find ways to maintain the individuals' guarantees under international human rights law.

9.3. Analysis of Case Law

The research discerned two directions in the analysis of case law. On the one hand, there are courts' decisions that result in a lack, or significant limitation, of the judicial protection of adversely affected individuals' human rights. On the other hand, there are courts employing different methods by which the guarantees contained in international human rights law are upheld, as far as possible. These approaches are classified respectively as challenges and opportunities for judicial protection of human rights.

9.3.1. Application and Influence of Article 103 of the UN Charter

The challenges for judicial protection of individuals' international human rights arise mainly from the influence and application of article 103 of the UN Charter. This provision has resulted in courts refusing to engage in a judicial review. The General Court in the *Kadi I* case, for example, denied its competence to review the European implementation of the targeted sanctions regime because by such a review it would indirectly engage in a review of the underlying UNSC resolution. With such an approach the effect of article 103 of the UN Charter even permeates the domestic legal order. Alternatively, the ECtHR appeared to attempt to dispose of the matter by applying a rather controversial standard for the attribution of conduct in the *Behrami* case, leading to the case's inadmissibility. Arguably, it did this in order to avoid having to decide upon the underlying conflict of norms. Moreover, this court also seemed to have continuously amended the conditions for its application of the equivalent protection doctrine, which would result in a marginal review.

These courts' refusal to engage in a review resulted in a lack of access to court for the individuals concerned. This constitutes a serious limitation of their human rights, especially since there is no alternative remedy available at the UN level. Moreover, in these circumstances a situation is maintained in which there is no certainty about whether these individuals' human rights are observed. Effectively, their rights are set aside by a domestic authority's implementation of a UNSC resolution. Without proper judicial review, their rights are illusory and without practical effect.

At the international level there is no clear ruling by the ECtHR or the HRC on how a conflict of norms should be solved. The cases considered in the research evidenced no explicit acceptance of the precedence of obligations under the UN Charter over international human rights law. It would be difficult, of course, for these bodies – established to supervise states' compliance with human rights law – to accept such precedence. The ECtHR has employed several methods by which it could avoid explicitly pronouncing on that matter. Still, it might be argued that it implicitly recognized in the *Al-Jedda* case that if the UNSC uses clear and explicit language to the effect that it intends one of its measures to prevail over international human rights law, it would have that effect. However, this has remained implicit only, and at present it has to be concluded that the Court has not yet decided unequivocally on the alleged precedence of obligations under the UN Charter over international human rights law.

Yet some domestic courts have pronounced on the matter. They relied on article 103 of the UN Charter to conclude that the affected individuals' international human rights were overruled by an obligation created by the UNSC. Still, the fact that they accepted jurisdiction provided them with a possibility to determine the extent to which the relevant human right was set aside. The House of Lords indicated this possibility in the *Al-Jedda* case. It found the individual's rights under the ECHR to be qualified only to the extent strictly required by the implementation of the obligation created by the UNSC. Moreover, it found it for

the courts to review the necessity of the measures taken by the domestic authorities in regard to such implementation. By such an approach, courts might strictly delimit the consequences of an obligation created by the UNSC. However, the UK Supreme Court, in the subsequent *Ahmed* case, concerning the implementation of targeted sanctions, did not engage in any such determination. It merely held that the individuals' human rights under the ECHR were overruled by the relevant UNSC resolution.

When UNSC resolutions are held to take precedence over international human rights law, courts do not assess the lawfulness of the impugned measures against an adversely affected individual's human rights. Hence that individual's enjoyment of the relevant human right is then not merely restricted in the context of the system of lawful limitations, but is set aside completely by a norm emanating from a different regime. Therewith, these approaches result in a lack of judicial protection of the international human rights of the individuals concerned.

9.3.2. Possibilities Emanating from the Need for Interpretation

Every obligation created by the UNSC needs to be interpreted before it can be implemented. Since there is almost always a measure of ambiguity in the meaning of words, the interpreter enjoys a certain discretion which it may use to arrive at a particular result. The research considered the need for interpretation potentially to constitute both a challenge and an opportunity for judicial protection of individuals' international human rights. Courts may use the latitude emanating from the need for interpretation either to employ a broad understanding of what is required by the UNSC or, conversely, a narrow understanding.

In itself, a broad interpretation does not necessarily directly constitute a challenge for judicial protection. It does, however, cause a conflict of norms to stand out clearly, instead of harmonizing that conflict. For example, the House of Lords in the *Al-Jedda* case, after entertaining a broad understanding of what the

UNSC required, subsequently had to decide on a conflict of norms in full. In directly deciding upon such a conflict, in the context of international law, the application of article 103 of the UN Charter will result in setting aside the individual's international human rights. Moreover, a broad interpretation may result in the impugned provision affecting a relatively broad group of individuals, or some individuals to a larger extent, than what would have been necessary under a narrower construction.

In addition, a broad understanding is likely to be induced by a court's inclination towards the interest of securing international peace and security. The Court of Justice, for instance, emphasized in several cases that an effective operation of the UNSC required a broad understanding of the obligations created by that body. However, by employing such an interpretation, it had already given evidence of its leaning towards that interest. In that situation, the burden is on the adversely affected individual to convince such a court, in the case of conflict, to grant precedence to his human rights.

Conversely, courts could also entertain a narrow interpretation of the meaning of the relevant provisions of a resolution. As a consequence, these courts may find the measures taken by the domestic authorities not to be required by the resolution at issue, or may find the affected individual to fall outside that resolution's scope. It is not always evident whether a court employs a narrow interpretation in order to be able to provide the individuals concerned a measure of judicial protection, or whether it merely wishes to avoid having to rule on a norm conflict. Alternatively, it may simply find it the right interpretation, without taking account of the consequences. What is clear, however, is that after such an interpretation courts do not have to decide upon an international norm conflict. They have to scrutinize the lawfulness of domestic measures only. This creates an opportunity for them to provide judicial protection of the individual's human rights, since the measures are no longer underpinned by an obligation

under the UN Charter, which demands precedence over other international obligations.

In several cases, courts have seemed to be merely correcting the domestic authorities' apparently broad understanding of the obligations under a particular resolution. A Pakistani court, for example, did not follow the government's argument that the UNSC's targeted sanctions regime justified the detention of certain individuals, since detention was not a measure required by this regime. In other instances, courts have appeared to employ a particularly narrow interpretation. A Canadian Federal Court, for instance, read exceptions into a travel ban that were clearly not provided for. Some courts seem to have gone even beyond the confines of mere interpretation. They have made the outcome of their interpretation dependent on the fairness of the result. In this way, they obscured any distinction between interpretation and assessment of lawfulness. Possibly, these courts attempted to obfuscate their review of lawfulness by engaging in such a review under the heading of mere interpretation. Interpreting a UNSC resolution appears to be a more neutral, or at least a more accepted, exercise for domestic and regional courts than assessing such resolution's lawfulness.

A particularly interesting interpretative technique resulting in an opportunity for judicial protection of human rights is the presumption of compliance, which was established by the ECtHR. It maintains a clear connection between the domestic implementation and the measure's origin. The ECtHR presumed that the UNSC did not intend to create obligations upon states that are in contravention of their obligations under the Convention. Hence, when interpreting a UNSC resolution, it has to be construed, according to the Court, as far as possible in agreement with the rights laid down in the ECHR. The Court added that if the UNSC then chooses to adopt a resolution that does intend to create obligations upon states that go against their obligations under international human rights law, it is expected to use clear and explicit language to that effect. It has, however, not

(yet) indicated what the consequences of a rebuttal of the presumption of compliance are.

9.3.3. Opportunities Following from a Dualist Approach and Indirect Review

Another opportunity for judicial protection emanates from domestic courts employing a dualist perspective on the relationship between a domestic implementation and the underlying UNSC resolution. The implementation measure is then considered independently from the resolution. This grants courts room to engage in a judicial review, since they are then merely reviewing a domestic measure. Moreover, the impugned measures do not then benefit from the precedence granted to obligations under the UN Charter.

Still, such a review could result in an indirect assessment of the lawfulness of the underlying UNSC resolution against international human rights. The research considered there to be two requirements for such an occurrence. First, the relevant provision in the resolution concerned must not leave states any scope of discretion with regard to its implementation. Second, there must be a clear link between the domestic norms applied and similar norms in international human rights law. This second requirement can be met gradually. In this regard, the research divided the quality of the connection into three levels. The closer that relationship, the more likely the obligation under international human rights law is observed, and that an equivalent protection is guaranteed to the individuals concerned. Moreover, the lawfulness of a domestic implementation of a UNSC resolution is then assessed within a domestic fundamental rights framework which contains norms that are essentially similar to those in international human rights law. Such a review has exemplary value for courts in other legal systems that are confronted with similar cases.

The first level considered courts that applied international human rights law directly in their domestic legal orders on the basis of a constitutional provision to that effect. In these instances the content and scope of the norms applied is

identical to those within international human rights law, but the normative basis for their application remains domestic. An example of this is the BiH Constitutional Court's finding that the lack of a remedy against the decisions of the High Representative was in violation of the right to an effective remedy as guaranteed by the ECHR. In a similar vein, Dutch courts have held that they could, in principle, review the domestic implementation of UNSC resolutions against the rights guaranteed under the ECHR. This would result in an almost direct review of UNSC resolutions against international human rights law. Hence it would provide clear indications 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.

However, such a review cannot readily be taken as evidence as to how these courts would perceive a normative hierarchy within international law. Moreover, any assertion that they did not accept UNSC resolutions to override international human rights law, or the interests and values underlying that system, must be taken with a considerable disclaimer. The precedence of one over the other norm merely depended on the particular internal constitutional set-up. The constitutional nature of (the authorization to apply) the rights engaged caused these norms to prevail over the statutory law by which the UNSC resolutions were implemented.

The second level concerned courts that could not directly apply international human rights law, but which clearly established a link between the fundamental rights applied and a counterpart in international human rights law. In determining the scope and content of similar guarantees under domestic law, these courts were guided by international human rights law. They assessed the lawfulness of domestic implementations of UNSC measures against the right to property, the right of access to court, and the right to an effective remedy, as they found them to be enshrined in the ECHR. Also, these instances may contain

reliable indications as to how these courts would assess the lawfulness of UNSC action when measured against international human rights law.

The third level comprised cases in which courts engaged in a review against fundamental rights that might have a counterpart in international human rights law. However, this could not be ascertained due to the fact that it was not referred to at all. The UK Supreme Court, for example, incidentally reviewed the domestic implementation of targeted sanctions against the rights to peaceful enjoyment of property and unimpeded access to court. Another court referred to constitutional principles of due process without further specifying their content. The relevance of this last category of cases is that they evidence that the fundamental rights concerned could not be set aside by a UNSC resolution, and that these courts maintained their competence to engage in a judicial review. However, any indications as to how these courts considered that the underlying conflict of norms should be solved from the perspective of international human rights law remain tenuous.

In addition to the three-level categorization, other cases were discussed from which no indications could be drawn at all as to where the courts concerned would regard the limits of lawful UNSC resolutions to be if measured against international human rights law. They engaged in a judicial review against entirely domestic prescriptions without any link to international human rights law. Some of them reviewed domestic implementations of UNSC resolutions against prescriptions following from the domestic division of competences. Others reviewed requests by the International Tribunals for surrender against constitutional requirements for extradition. These cases have very little exemplary value for courts from other legal systems, which may not contain norms that are similar in content and scope. However, at least the individuals concerned obtained some measure of judicial review, which may effectively have provided them with a form of relief.

While engaging in an indirect review of a UNSC resolution, courts could also employ a proportionality analysis, in the context of the assessment of lawfulness of a limitation of an individual's enjoyment of his human rights. This analysis is widely recognized in national and international law, and is central to international human rights law. Cases in which such an analysis is applied might essentially be classified beyond the scope of the three-level distinction set out above. In principle, the outcome of a proportionality analysis does not depend on the particular normative foundation of the individual's right. This right could be based either on domestic or international law. However, its force is largely determined by the discretion a court leaves to the decision-maker. This discretion varies depending on the particular norm engaged.

With regard to the right to property, several courts appeared to leave the decision-makers a large scope of discretion. They did not accept any of the apparently reasonable suggestions made by the affected parties that less restrictive alternatives for effectively achieving the same objectives were available. Also, when courts have assessed whether there was a fair balance between the interests at stake, they did not regard any of the impugned measures to be disproportionate if measured against the important objectives the UNSC seeks to achieve. This outcome appears to fit with the generally modest nature of the guarantee provided under the right to property as protected under international human rights law.

The situation was different, however, when the limitations considered the procedural requirement inherent in the right to respect for property. There, certain courts found the implementation of targeted sanctions to be unlawful, since the individual concerned was not provided with a reasonable opportunity of putting his case before the competent authorities. In a similar vein, limitations on the individual's right of access to court due to the implementation of targeted sanctions were not readily accepted as lawful. The courts concerned with this issue held that a balance must be drawn between the conflicting interests at

stake. They considered that it could be justified to place restrictions on the communication of evidence and grounds to the targeted individual, if this is necessary for imperative reasons of security. However, they determined that the individuals concerned must in any case be supplied with sufficient information to effectively defend themselves against the allegations. This means either that they must have access to the relevant information themselves, or a special procedure must be in place that allows them effectively to answer the case against them. Such a procedure could entail the use of a special advocate, but according to the ECtHR it is ultimately for the courts to guarantee the adversely affected individuals a sufficient measure of procedural justice.

Another relevant element in assessing whether an individual's right of access to court is lawfully limited is whether that individual has available to him an alternative remedy for effectively protecting his due process rights. Most domestic courts assessing the remedy available at the UN level for individuals directly targeted by the UNSC have found it to provide insufficient guarantees to establish a fair procedure. Most of all, they have condemned the intergovernmental nature of the procedure, the lack of transparency, and the denial of access to relevant confidential information for the individuals concerned.

Since there is no alternative remedy available, many courts find that they have to engage in a full and strict review of the imposition of targeted sanctions themselves. This means that they will need to evaluate the merits of an individual's designation. The CJEU indicated that such a review would include an assessment of the interpretation of the relevant facts made by the responsible domestic authority. It held that courts must establish whether the evidence, underlying the imposition of sanctions against a particular individual, is factually accurate, reliable, and consistent. Moreover, they must ascertain whether such evidence contains all the relevant information to be taken into account in order to

assess the situation, and whether it is capable of substantiating the conclusions drawn from it.

The main problem with this standard for review is that domestic and regional courts do not have access to sufficient relevant information substantiating an individual's designation by the UNSC or a Sanctions Committee. Hence they cannot guarantee the individuals concerned a measure of procedural justice. Therefore, the only thing they can do is annul the domestic implementation for being in breach of the individual's rights to a fair trial and to an effective remedy.

9.4. Assessment of the Challenges and Opportunities

From the research's findings, it appears that the implementation of UNSC resolutions may pose serious challenges to the judicial protection of international human rights of individuals affected by these resolutions. The working and influence of article 103 of the UN Charter, and the interests it seeks to protect, result in a significant gap in the protection of international human rights law provided for by domestic and regional courts. They may refuse to engage in a substantial review, or when engaging in such a review grant precedence to the obligations under the UN Charter. However, they could resort to certain interpretative techniques and dualist approaches that result in opportunities for them to engage in a review, and by which the protection of international human rights, or their domestic equivalent, might be upheld. Do these opportunities have sufficient potential to counter the challenges for judicial protection of international human rights posed by UNSC action?

The possibility of entertaining a narrow interpretation of an obligation created by the UNSC gives courts some discretion in avoiding a direct confrontation between that obligation and an individual's human rights. The latitude remains, however, limited to what could be read in a text on the basis of the different methods of interpretation. Still, in certain instances this might be sufficient to

mitigate the harshest consequences of a sanctions regime. In addition, at first sight, the interpretative technique of the presumption of compliance also appears to constitute an effective tool in securing a measure of judicial protection of individuals' human rights. However, from the *Nada* case, it appeared that the threshold for rebutting the presumption might actually be rather low. In effect, the Court derived only by necessary implication that the UNSC intended to impose an obligation upon states that was in contravention of their obligations under international human rights law.

But by relying on a relatively lenient standard the presumption of compliance loses much of its potential power as an approach protecting individuals' enjoyment of their human rights. Therefore, the Court should have applied a significantly higher threshold for the UNSC to rebut the presumption. It should have required the UNSC to explicitly create – in the operative paragraphs of the relevant resolution, not in a mere preamble – an obligation upon UN member states to deviate from specifically prescribed international human rights. For example, when imposing targeted sanctions, the UNSC should add a provision such as 'The UNSC decides that states should carry out the obligations created in paragraph [...], notwithstanding any of their obligations under international human rights law to guarantee the individuals concerned a fair trial or an effective remedy.' Moreover, the Court should require the UNSC to do so every single time it adopts a resolution to that effect, and thus also when it concerns a consecutive resolution merely confirming earlier obligations. If such a high threshold were to be applied, it could be expected that the UNSC would not be able to deviate readily from international human rights law. It would probably be difficult for the members of the UNSC to agree on the clear and explicit language then required, since it would really force the UNSC and its members to fully confront what they are doing and accept the political cost.

Another potentially effective mechanism to counterbalance the challenges posed to judicial protection of international human rights law could be for courts to

follow a dualist approach. When a review is conducted against domestic fundamental rights that have a counterpart in international human rights law, equivalent guarantees might be secured. Hence a lack of judicial protection of international human rights law might be compensated for by the application of domestic fundamental rights norms with a corresponding scope and content. Moreover, in this way, states could actually observe their obligations under international human rights law, because from the perspective of international law the source of the norms applied by the domestic courts does not matter. What counts is whether content of the international norms is upheld.¹ In this regard, the opportunity for some form of judicial review may already result in a state observing its obligations under the rights of access to court and to an effective remedy, as guaranteed under international human rights law.

However, for the dualist approach as well as for entertaining a narrow interpretation follows that these methods cannot release the state concerned from the international obligation created by the UNSC. This appears most evidently with respect to the imposition of targeted sanctions. After an annulment of a domestic implementation, the targeted individual remains on the UN blacklist. Hence UN member states continue to be under an international obligation to implement the sanctions imposed against that individual. Even if the authorities of the designating state seek an individual's delisting following a court's decision thereto, they may not necessarily succeed. Accordingly, courts' approaches creating opportunities for judicial protection may result in a measure of relief only within their own legal order. There is no totally effective measure of relief as long as a court's judgment has no repercussions at the UN level.

Moreover, the problem with most of these approaches is that they increase fragmentation in the universal application of UNSC resolutions. In some states the domestic implementation of a resolution could be annulled due to its

¹ 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, 144.

unlawfulness under domestic law, while in other states it remains in force. This bears the serious threat of undermining the effectiveness of UNSC action, especially as some states may resort to similar arguments for non-implementation of resolutions for purposes other than protection of individuals' human rights.

9.5. The Approach to be Followed

While the protection of international human rights is a very weighty interest in international law, so is the maintenance of international peace and security. What is more, there is a significant overlap between the interests the UN Charter and international human rights treaties seek to secure. In large part they mutually enforce each other. For example, international peace and security is an important prerequisite for a human rights-friendly environment. In addition, the absence of international peace and security, or threats thereto, may under certain circumstances even result in violations of individuals' human rights, such as the right to life. Therefore courts, in creating opportunities for judicial protection, need to strike a balance between the competing norms and the underlying interests. Moreover, if courts were to acknowledge sufficiently the importance of the interests the UNSC aims to achieve, they would contribute to the policy makers' recognition of the judiciary protecting individuals' human rights against UNSC action and avoid the danger of alienation.

Another important element is that, in striking a balance between the interests concerned, courts should be more effective in indicating to the UNSC the limits for lawful action, from the perspective of international human rights law. Thereto, courts from different legal orders should take collaborative judicial action. A global judiciary in concert might be able to counteract the gaps in judicial protection of international human rights law, without detracting from international law's integrity. They could send a uniform message to the UNSC on where they understand the limits of lawful action to be. Moreover, a combined effort among a sufficiently large group of courts may result in a de

facto containment of UNSC decision-making that adversely affects individuals. When confronted with a substantial volume of annulments of national implementations the UNSC will see its efficacy and efficiency undermined. In response, it might start opting for solutions that do find large support among domestic and regional courts. In this regard, it is more feasible for the UNSC to observe generally applicable rules than a widespread pattern of particular domestic regulations.

Through judicial dialogue, courts may find agreement on the message they would wish to send. A uniform message is most likely to be arrived at when courts employ concepts and norms that have a counterpart in legal systems beyond their own legal order. International human rights law could be used to facilitate a fruitful judicial dialogue. In a decentralized fashion, courts could apply similar guarantees to assess indirectly the lawfulness of the same UNSC decisions. In this way, they could contribute to a shared understanding of how to assess the lawfulness of UNSC measures in the light of the protection of guarantees similar to those in international human rights law.

There are several judicial approaches courts could follow that draw a balance between the interest of effective judicial protection and the important role of the UNSC. An approach that could be particularly successful in combining a constructive framework for judicial dialogue with an opportunity for judicial protection is the presumption of compliance. This approach essentially maintains the connection between a measure's domestic implementation and its international origin. Therewith, it highlights that the UNSC is ultimately (politically) responsible for the measure. In addition, by accepting that the presumption could be rebutted if the UNSC has expressed its intention to that effect, courts would acknowledge the UNSC's unique power of creating obligations that prevail over obligations under other international agreements. Concurrently, if the presumption were to be applied as strictly as set out in the previous section, it could establish a high threshold for the UNSC to do so.

Thereby, this approach has the potential for creating an effective opportunity for the protection of individuals' human rights, and at the same time showing courts' readiness to defer to UNSC action in very exceptional circumstances.

Alternatively, or if no explicit intention to deviate from international human rights law is included in a resolution, courts could choose to engage in an assessment of that resolution's lawfulness by employing a proportionality analysis. Such an analysis could prove to be a convenient tool for a decentralized, but congenial, judicial review. Providing a mere framework for the assessment of lawfulness, it leaves courts sufficient latitude to apply this standard to the particular facts of the case at hand. Moreover, its broad application in many fields of international law and also in many domestic legal systems makes it widely acceptable. Of course, there is no uniform application of proportionality analysis throughout all national and international legal fields and systems, but there is sufficient common ground to further judicial dialogue. There is agreement, at least, on the underlying idea that a fair balance needs to be drawn within a human rights framework between the potentially conflicting interests involved. This makes it very suitable for universal application. In this way, it promises to be a valuable tool for maintaining some uniformity in a decentralized system of judicial protection of human rights. Moreover, there is sufficient scope to take into account the interest of maintaining international peace and security.

However, when assessing the proportionality of a measure, courts should not too readily assess the balance drawn between the conflicting interests merely *in abstracto*, and thereby leave the decision-maker a large scope of discretion. This would undermine the force of the analysis as a mechanism for judicial evaluation. Rather, courts should review the balance between the conflicting interests *in concreto*. A fair assessment can hardly be made between the overall importance of ending a war, or combating international terrorism in general, and the limitation of the enjoyment of fundamental rights of just a few abstractly

circumscribed adversely affected parties. An individual's interests would then always be outweighed by the imperative security objectives pursued by the UNSC. Hence courts should assess the balance drawn between, on the one hand, the actual contribution of a measure, applied in an individual instance, to the furtherance of pursuing that measure's aims against, on the other hand, the actual loss for the individual concerned. For example, in the case of targeted sanctions, courts should evaluate *in concreto* whether the gain to international peace and security by freezing a particular person's assets is proportionate to the interference with that person's property rights. An important consideration in that regard is whether that person is rightly put on the blacklist: in other words, whether there is indeed sufficient evidence to substantiate his involvement in the financing of terrorism. Presently, courts cannot engage in such assessment due to a lack of access to sufficient relevant information.

In this regard, a fair balance might be accommodated by providing the individual concerned with an alternative venue at the UN level, before which he can effectively defend himself against the allegations. Courts could then engage in a mere deferential review of whether particular measures are justified. However, no such venue is presently found to exist. Still, by assessing whether there is an alternative remedy available, courts could indicate to the UNSC that in principle they are prepared to accept that such a means could facilitate a fair balance between judicial protection of individuals' human rights and the requirements of international cooperation. Eventually, the promise of a mere deferential review from the courts in individual cases might induce the UNSC to guarantee an alternative remedy for protecting the individual's human rights. Through judicial dialogue, courts could attempt to find agreement on the requirements for such remedy, and continue to indicate to the UNSC what improvements to the procedure are required.

Accordingly, these approaches, if adopted by a judiciary in concert, are most likely to result in an effective opportunity for judicial protection of adversely

affected individuals' human rights, without detracting excessively from the ability of the UNSC to operate effectively. In any case, the UNSC is given a reasonable opportunity to answer the courts' demands, and to secure the following up of its decisions.

Finally, it should be added that for a fruitful judicial dialogue, courts should also be willing to learn from other courts' decisions on essentially the same issues. This would require, too, that courts provide sufficient reasoning for their decisions, and maintain therein a clear connection with international law. In addition, truly global judicial dialogue is possible only if judgments are widely available in a language universally spoken.

However, with regard to the targeted sanctions proceedings, as long as there is no alternative remedy at the UN level for directly targeted individuals, these judicial approaches cannot fully counter the fundamental deficits from the perspective of human rights protection. With regard to those sanctions, the main problem remains that courts and the targeted individuals do not have sufficient access to confidential information, on which a designation is based, to ensure a fair trial. Moreover, domestic courts cannot provide targeted individuals with a totally effective measure of relief, since their review cannot result in delisting at the UN level. Although there is a progressive development in the procedural guarantees before the Sanctions Committees, at present there is no effective remedy at the UN level. A potential solution could be to amend the listing procedures towards a decentralized system for designation. In addition to increasing the possibility of a fair procedure for the individuals concerned, such a change could also enhance acceptance by the judiciary, other state authorities, and the public at large, of the practice of targeted sanctions. This might induce greater compliance with these sanctions and increase their effectiveness.

The UNSC should institute a two-step procedure for the imposition of targeted sanctions. National authorities seeking an individual's designation would need to

ensure that individual a fair trial before domestic courts, prior to putting him on a universally applicable blacklist. To avoid undermining the sanctions' effectiveness, temporary sanctions, with a sunset clause, could be adopted immediately after the designating state's request thereto. This would give that state a certain period of time to complete the domestic proceedings, which should guarantee the targeted individual a fair trial. A major advantage would be that the relevant state authorities might be more willing to share confidential information with courts within their own state than with courts in a foreign state. The fairness of the individual's trial could be guaranteed further by the use of special security-cleared advocates, who would have the opportunity to test the strength of the evidence against that individual, and the reasons for its confidentiality. Accordingly, this solution would place the emphasis on the situation before the definitive imposition of sanctions. This would also avoid a conflict of norms after the sanctions' adoption.