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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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Summary

The thesis deals with the responses of domestic and regional courts when they are confronted with cases concerning individuals whose human rights are interfered with due to the implementation of UNSC decisions. The UNSC may impose, for example, economic sanction measures, or place specifically designated individuals on a blacklist, the so-called targeted sanctions. UN member states are under an international obligation to carry out these decisions. Moreover, according to article 103 of the UN Charter this obligation prevails over divergent obligations they may have under any other international agreement. How do courts deal with this situation in which a conflict may exist between an obligation under the UN Charter and an obligation under international human rights law? Do they grant precedence to the decisions of the UNSC or do they provide the adversely affected individuals a measure of judicial protection of their human rights? If so, how do they do that? What different approaches may they take, and what are the consequences?

The study distinguishes between judicial approaches that may result in a challenge to judicial protection, and approaches that may result in an opportunity thereto. Challenges emerge from courts accepting a limitation on their jurisdiction when required to decide upon a conflict involving the implementation of a UNSC resolution. Challenges also emerge from courts accepting jurisdiction, but ruling that obligations under the UN Charter prevail over obligations under human rights treaties. Essentially, these courts maintain a direct connection between a UNSC decision and its domestic implementation. The norm conflict is then decided within the realm of international law. If no narrow or harmonious interpretation is possible, or no attempt thereto is made, the norm conflict is governed by article 103 of the UN Charter.

Opportunities for judicial protection follow from courts entertaining narrow interpretations of what is required by the UNSC, or interpreting such obligation

in accordance with a state's obligations under international human rights law. A court may then conclude that there is no conflict between the two obligations, that a particular individual was not intended to be affected by the relevant UNSC resolution, or that the measures imposed by the state were not required by the UNSC. Courts entertaining a dualist approach might bring about another opportunity for judicial protection of individuals' human rights. They then effectively separate the domestic implementation from the underlying UNSC resolution, and engage in a review of the implementing measures only. This dualist approach may result in a reasonably effective form of relief for adversely affected individuals. The domestic measures imposed against them may be annulled. However, in the case of targeted sanctions, such annulment is only partially effective. A targeted individual will be released from the application of domestic measures, but will still appear on the universal UNSC blacklist. Moreover, states remain under an international obligation to implement the sanction measures against that individual. What is more, an important drawback of the dualist approach is that an increasing number of courts may start rejecting domestic implementations of UNSC decisions and therewith undermine the effectiveness of that body's operation.

The thesis argues that to mitigate these dangers and to enhance the effectiveness of the dualist approach, courts should engage in judicial discourse. They need to coordinate the message they would wish to send to the UNSC and to domestic authorities as to what they understand to be the requirements of lawful UNSC action that directly affects the rights of individuals. For example, courts could indicate what an effective remedy at the Office of the Ombudsperson should entail for individuals directly targeted by the UNSC. In order to arrive at an unequivocal message, courts should review domestic implementations of UNSC decisions against norms that stem from, or have a clear counterpart in, international human rights law.

This approach, however, does not necessarily address the important and persisting problem of the lack of access to relevant confidential information underlying individuals' designation for the purpose of UNSC targeted sanctions. Neither the targeted individuals, nor the courts that are asked to decide upon their cases, nor even the domestic authorities of most of the states that have to implement the sanctions measures, are (fully) aware of such information. The thesis analyses this issue and suggests as a solution that the designation of individuals should be decentralised. These individuals should be given an opportunity to bring a case before domestic courts before they are placed on a universally applicable blacklist.