COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DH-SYSC-II(2018)05

05/03/2018

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

_____

COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
(DH-SYSC)

_____

DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER (DH-SYSC-II)

_____

Draft chapter of Theme 1, subtheme iii):

Interaction between the resolutions of the Security Council and the European Convention on Human Rights

(as prepared by co-Rapporteurs Mr Alexei ISPOLINOV and Mr Chanaka WICKREMASINGHE in view of the 3rd DH-SYSC-II meeting, 3-5 April 2018)

The Relationship of the ECHR and UN Security Council Resolutions

1. It is indisputable that the United Nations occupies a central position in the international system, and, correspondingly the Charter of the UN is a central document of the international legal system. The primary aim of the United Nations is the maintenance of peace, but, in its holistic approach to this task, the UN not only seeks to restore peace where conflict has arisen, but it also seeks to prevent conflict and address its causes, including through its work on disarmament, sustainable development, human rights and the development of international law. And, of course, it was the same the spirit of reconstruction and recognition of the need to build the foundations of a sustainable peace that led to the establishment of the Council of Europe[1] and the European Convention on Human Rights.[2]

1. The Security Council

2. Under Article 24 of the UN Charter, the Security Council is charged with the primary responsibility for the maintenance of international peace and security:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. (emphasis added)

3. The powers of the Security Council are broad, giving it a large measure of freedom of action to determine the most appropriate response to a breach of or

---

[1] The Statute of the Council of Europe provides:

Article 1

a The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.

b This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.

c Participation in the Council of Europe shall not affect the collaboration of its members in the work of the United Nations and of other international organisations or unions to which they are parties.

d Matters relating to national defence do not fall within the scope of the Council of Europe.

[2] See the preamble to the Convention:

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

threat to the peace. It may use either its powers to seek diplomatic solutions to disputes under Chapter VI of the Charter or its powers of decision to take enforcement action under Chapter VII to address threats to the peace, breaches of the peace and acts of aggression. In respect of the latter decisions of the Council are legally binding (Article 25) and Council has the power determine whether action is to be taken by all or some member States of the UN (Article 48). Under Article 103 in case of any conflict between obligations arising on the member States under the Charter and obligations arising under other international agreements, Charter obligations should prevail.

4. Following the end of the Cold War, the Security Council has been able to make much more extensive use of its Chapter VII powers than previously. The Charter expressly provides for the Council (a) to use military force and (b) to impose economic sanctions, albeit that, as a result of political and other factors, in its practice the Council has had to adapt the means by which these powers are exercised. Further, and in order to fulfil its responsibility for the maintenance of international peace and security, the Council has also shown considerable ingenuity in its use of its Chapter VII powers including in ways which are not expressly foreseen in the Charter. Thus, for example, the Council has used these powers to administer territory, to establish international tribunals, to refer situations to the International Criminal Court, and to establish a Compensation Commission. Whilst aspects of the Council's practice have not been without critics (at least as often for what the Council has been unable to do, as for what it has in fact done), the Council remains the central institution of the international system for the maintenance of peace and a unique source of legitimacy.[3]

[3] The Security Council's development and expansion of the use of its powers in the immediate post-Cold War era has been observed and discussed in an abundant literature by international lawyers – for some recent examples see: R Higgins et al., *Oppenheim's International Law United Nations* (Vol I and II) (2017); I. Johnstone "The Security Council and International Law" in S. von Einsiedal, D Malone, and B Stagno Ugarte (ed.s) *The UN Security Council in the 21st Century* (2016) pp771-792; M. Mattheson *Council Unbound* (2006). Other works have focused primarily on the legal limitations Council's powers and how they can appropriately be given effect: see D Akande "The International Court of Justice and the Security Council: Is there room for Judicial Control of Decisions of Political Organs of the United Nations" (1997) 46 ICLQ 309-43; M Bedjaoui *The New World Order and the Security Council: testing the legality of its acts* (1994); B

(a)The Security Council and the use of military force

5. The intention of the drafters of the UN Charter was that the Security Council itself should be in a position to use force (article 42), through the deployment of forces made available to it by the member States under standing agreements (article 43). The reality has been however that States have not been willing to enter into such agreements with the UN. The Council has therefore had to use the model of authorising States to use force in order to respond to breaches or threats to peace. Such authorisations famously take the form of an authorisation in a resolution adopted under Chapter VII "to take all necessary measures" or "to use all necessary means". Such authorisations may be given to member States acting directly on behalf of the Council in so–called "coalitions of the willing" or it may be to a force either established by the UN itself or another organisation (eg NATO, the African Union etc).

(b) The Security Council and economic sanctions

6. Article 41 of the Charter gives the Council a broad discretion to decide the measures short of the use of force that it considers necessary to give effect to its decisions. Theses can include but are not limited to economic sanctions. There is now a considerable body of Council practice where sanctions have been imposed by the Council, which has been developed largely in the post-Cold War period. Of particular note has been the Council's efforts to minimise the impact of sanctions on individuals who have little to do with the threat to the peace in question through the use of targeted sanctions against individuals identified for their involvement/ ability to influence the situation. It should be noted that purpose of sanctions is to induce the individual to change his or her behaviour and to comply with decisions of the Council, rather than punishment.

Fassbender "Quis judicabit? The Security Council, Its powers and Its Legal Control" 11 EJIL 219-20 ; V Gowlland-Debbas (ed) *United Nations Sanctions and International Law* (2001).; D Sarooshi *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (1999); A Tzanakoupolous *Disobeying the Security Council* (2011); E de Wet *The Chapter VII Powers of the United Nations Security Council* (2004).

2. The caselaw of the European Court of Human rights and Security Council resolutions

(a) the use of military force

7. The use of military force pursuant to a Security Council authorisation has been the context of a number of cases before the European Court of Human Rights, and in a few the question of whether the Convention is applicable has turned on the Court's interpretation of relevant Security Council resolutions.

8. The first was the Grand Chamber decision in the *Behrami* case, concerning claims against France and Norway, in relation to their participation in KFOR in Kosovo in 2000-2002. It will be recalled that KFOR was a NATO operation, which was mandated by UNSCR 1244(1999) to provide the security presence for the UN Interim Administration of Kosovo (UNMIK). In considering the admissibility of the claim the Grand Chamber carefully examined the mandates and structures of the international presences established by UNSCR 1244, before finding that the impugned actions were in fact attributable to the UN rather than the individual respondent States. This led the Grand Chamber to the conclusion that it did not have jurisdiction *ratione personae* over the acts of the respondent States when they were acting on behalf of the UN pursuant to a Chapter VII mandate. In this respect the Grand Chamber made the following observations about the relationship between the Convention and the UN acting under Chapter VII of its Charter:

> The Court first observes that nine of the twelve original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two Respondent States), that the great majority of the current Contracting Parties joined the UN before they signed the Convention and that currently all Contracting Parties are members of the UN. Indeed, one of the aims of this Convention (see its preamble) is the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN. More generally, it is further recalled, as noted at paragraph 122 above, that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The Court has therefore had regard to two complementary provisions of the Charter, Articles 25 and 103, as interpreted by the International Court of Justice (see paragraph 27 above).

148. Of even greater significance is the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. In particular, it is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force (see paragraphs 18-20 above).

149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.

9. In the contrasting case of *Al Jedda*, the Court took a rather narrower approach to the interpretation of a UN Chapter VII mandate in the circumstances of Iraq following the US-led military action taken in 2003. The case concerned an internee detained by UK forces and interned during the period 2004-2007. The Grand Chamber rejected the UK's argument that the applicant was not within its jurisdiction. The UK had argued that, following *Behrami*, since its impugned actions were pursuant to a mandate in a Security Council resolution (UNSCR 1546(2004)) under Chapter VII, its actions were attributable to the UN, and therefore not within the jurisdiction of the UK for the purposes of Article 1 of the ECHR. However based on the nature of UN involvement in Iraq, which it found to be different from the UN involvement in Kosovo, the Grand Chamber rejected this and found the internment attributable to the UK.

11. The Grand Chamber then rejected the Respondent State's argument that, in light of the fact that the detention and internment of the applicant were carried out pursuant to a Chapter VII mandate from the Security Council, Article 103 of the UN Charter operated so as to displace the UK's obligations under Article 5 ECHR in favour of the fulfilment of the Security Council mandate. In contrast to its approach in *Behrami* the Court held as follows:

> 1. In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms". Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the

> requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law. (Emphasis added)

12. In line with this approach, the Court then considered the language of the UNSCR 1546(2004) and the letters attached thereto, finding that at most it was potentially permissive of internment. However it concluded as follows:

> 109. In conclusion, therefore, the Court considers that United Nations Security Council Resolution 1546, in paragraph 10, authorised the United Kingdom to take measures to contribute to the maintenance of security and stability in Iraq. However, neither Resolution 1546 nor any other United Nations Security Council resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq in indefinite detention without charge. In these circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention.
>
> 110. In these circumstances, where the provisions of Article 5 § 1 were not displaced and none of the grounds for detention set out in sub-paragraphs (a) to (f) applied, the Court finds that the applicant's detention constituted a violation of Article 5 § 1 of the Convention. (emphasis added)

(b) Economic sanctions

13. The starting point for any discussion of the interaction of UN sanctions and the ECHR is the *Bosphorus* case. This case in fact turned on the relationship between EU law (through which the relevant UN sanctions measure had been transposed and was the domestic legal basis of the respondent State's impugned conduct) and the Convention, rather than a careful examination of the relationship of UN law and the

Convention. The key finding in the judgment of the Grand Chamber is that where an international organisation imposes sanctions which require enforcement through the actions of a Contracting Party to the ECHR, then provided that the organisation in question provides "equivalent protection" of fundamental rights to the ECHR, the Contracting Party will not incur liability under the Convention.

> 155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see M. & Co., cited above, p. 145, an approach with which the parties and the European Commission agreed). By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued (see paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.
>
> 156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

14. However subsequent cases, which interestingly involved the implementation of more targeted sanctions, have required a more direct consideration of relevant UN Security Council resolutions. In *Nada* the applicant was subject to a travel ban imposed on him pursuant to what the then sanctions regime against the Taliban and Al Qaeda, under UNSCR 1267 (1999) and a number of following resolutions. The particularities of the case were that the applicant lived in an Italian enclave surrounded by Swiss territory, and the effect of the Swiss authorities decisions, pursuant to the relevant UNSCRs, not to permit him to traverse Swiss territory, effectively confined him to that enclave. As such he claimed to have been denied access to healthcare infringing his rights under Article 8 and without a remedy in Swiss law contrary to Article 13.

15. The Court rejected a preliminary objection by the Respondent State that the imposition of sanctions was attributable to the UN and therefore not within the "jurisdiction" of the Respondent State, on the basis that Court sought to confine its consideration to actions of the national authorities in implementing the sanctions. Similarly, when considering the merits the focus of the Court was on national implementation measures, rather than seeking to resolve an apparent conflict between the requirements of the UNSCRs and the ECHR. The Court started by recognising that the travel ban was expressly required under UNSCR 1390(2002), and therefore that the presumption in *Al Jedda* that the Security Council would only intend to act in conformity with human rights obligations of the member States was rebutted. However, in considering whether the interference with the applicant's Article 8 rights was proportionate, the Court focused entirely on the implementation of the sanctions by the Swiss authorities, finding that they had a degree of latitude "which was admittedly limited but nevertheless real" in how this was done. The Court went on:

> 195 … In this connection, the Court considers in particular that the Swiss authorities did not sufficiently take into account the realities of the case, especially the unique geographical situation of Campione d'Italia, the considerable duration of the measures imposed or the applicant's nationality, age and health. It further finds that the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order should have allowed some alleviation of the sanctions regime applicable to the applicant, having regard to those realities, in order to avoid interference with his private and family life, without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions provided for therein.
>
> 196. In the light of the Convention's special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see, for example, Soering, cited above, § 87, and Ireland v. the United Kingdom, 18 January 1978, § 239, Series A no. 25), the Court finds that the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation.

The difficulty picked up by some of the judges in one of the Separate Opinions is how real the "latitude" in national implementation was under the relevant UNSCRs.

16. The Court then considered the requirement of domestic remedy under Article 13 taken in conjunction with its finding in relation to Article 8:

> 212. The Court would further refer to the finding of the CJEC (sic) that "it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations" (see the Kadi judgment of the CJEC, § 299, paragraph 86 above). The Court is of the opinion that the same reasoning must be applied, mutatis mutandis, to the present case, more specifically to the review by the Swiss authorities of the conformity of the Taliban Ordinance with the Convention. It further finds that there was nothing in the Security Council Resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those Resolutions.
>
> 213. Having regard to the foregoing, the Court finds <u>that the applicant did not have any effective means of obtaining the removal of his name from the list annexed to the Taliban Ordinance and therefore no remedy in respect of the Convention violations that he alleged</u> (see, mutatis mutandis, Lord Hope, in the main part of the Ahmed and others judgment, §§ 81-82, paragraph 96 above).

It might be observed at this stage that, given that the inclusion of the applicant's name on the list annexed to the Taliban Ordinance reflected Switzerland's obligations under the relevant UNSCR, taken literally this finding appears to leave the respondent State with a conflict of obligations.

17. Most recently, the Court has considered the interaction of the ECHR and UN sanctions in *Al Dulimi v Switzerland*. The case concerned targeted sanctions against named persons associated the former regime in Iraq, which required the freezing of assets of named persons and their transfer to the Development Fund for Iraq. When the applicants sought judicial review of their listing before the Swiss Courts, the Federal Court found that whilst certain procedural questions relating to the listings

and proposed confiscations could be subject to domestic judicial review, the underlying substantive question of whether the applicants should have been included on the list was a question exclusively for the Security Council, and therefore outside the jurisdiction of the Federal Court

18. A Chamber (Second Section) of the Court, found the case admissible *ratione personae*, despite the Respondent State's arguments that the impugned acts were acts required by a mandatory decision of the Security Council which, as a matter of international law, had primacy over obligations arising from other international agreements. The Second Chamber again stressed that its focus was on the Swiss implementing measures, which it sought to address separately from the Security Council resolutions requiring Switzerland to adopt those measures. Before reaching its decision on the merits, the majority considered whether the delisting process of the UN Security Council offered "equivalent protection" to the protections of the Convention, concluding that they did not. And when it came to the merits the majority found that until there was an effective and independent judicial review process available at the UN level, it was essential that listed persons should be able to bring a judicial review of measures taken pursuant to the sanctions regime. The non-availability of judicial review of the measures in Switzerland resulted in a disproportionate interference with the applicants' of access to a court under Article 6, and there was therefore a violation of the Convention. It might be added that there were strong dissenting and partly dissenting opinions.

19. Subsequently the Grand Chamber had little difficulty in agreeing with the Chamber on the question of admissibility *ratione personae*. On the merits, the Grand Chamber certainly sought to set out the international legal basis of the sanctions measures, and accepted that Article 103 of the Charter was one of the "basic elements of the current system of international law". However the Court then considered whether there was in fact a conflict between the Convention and the requirements of the relevant Security Council resolution. The Court's starting point was to revert to the presumption that the Security Council did not intend to act contrary to human rights which it had first posited in *Al Jedda*:

> 140. Consequently, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of

human rights (ibid.). In the event of any ambiguity in the terms of a UN Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law (ibid.). Accordingly, where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention. In other words, in such cases, in a spirit of systemic harmonisation, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter…

143. The Court would emphasise, however, that the present case is notably different from the above-cited cases of Al-Jedda and Nada (together with Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, ECHR 2011), in that it does not concern either the essence of the substantive rights affected by the impugned measures or the compatibility of those measures with the requirements of the Convention. The Court's remit here is confined to examining whether or not the applicants enjoyed the guarantees of Article 6 § 1 under its civil head, in other words whether appropriate judicial supervision was available to them (see paragraph 99 above; see, mutatis mutandis, Stichting Mothers of Srebrenica and Others, cited above, § 137). There was in fact nothing in paragraph 23 or any other provision of Resolution 1483 (2003), or in Resolution 1518 (2003) – understood according to the ordinary meaning of the language used therein – that explicitly prevented the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level pursuant to the first of those Resolutions (see, mutatis mutandis, Nada, cited above, § 212). Moreover, the Court does not detect any other legal factor that could legitimise such a restrictive interpretation and thus demonstrate the existence of any such impediment.

20. The Court noted the seriousness of the consequences for the listed persons and the importance of the Convention for the maintenance of the rule of law and in particular the prohibition of arbitrariness. On these points the Court concluded:

146. This will necessarily be true, in the implementation of a Security Council resolution, as regards the listing of persons on whom the impugned measures are imposed, at both UN and national levels. As a result, in view of the seriousness of the consequences for the Convention rights of those persons, where a resolution such as that in the present case, namely Resolution 1483, does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided. By limiting that scrutiny to arbitrariness, the Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security.

147. In such cases, in the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts must be able to obtain – if need be by a procedure ensuring an appropriate level of confidentiality, depending on the circumstances – sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary. Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny. Accordingly, any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Article 6 of the Convention. …

151. The applicants should, on the contrary, have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary. That was not the case, however. … Consequently, the very essence of the applicants' right of access to a court has been impaired.

3. Discussion:

21. The above survey of the Court's decisions demonstrates that the interaction of the Convention and binding decisions of the UN Security Council raises complex questions in relation to which the Court has taken a variety of different approaches. It is also notable that in a number of cases individual Judges have attached separate and dissenting Opinions, often rather trenchantly expressed. As a result the body jurisprudence on these issues is somewhat uneven, and suggests that the Court as a whole has yet to settle on a legal theory or explanation of these interactions that is fully satisfying.

22. In some cases, notably for example in the quotation above from the *Behrami* case, the Court provides a careful appreciation of the legal underpinnings and the context of the work of the Security Council in discharging of its primary responsibility for the maintenance of international peace and security. Whereas, beyond a reciting relevant provisions of the UN Charter, this kind of systemic understanding of Security Council is less apparent in much of the subsequent caselaw. That may in part be explained by the fact that the Court has sought in those subsequent cases to focus its enquiry on the decisions at the national level in implementing the Security Council decisions, rather than the Council decisions per se. However from the perspective of the States such a separation of national action from its basis in obligations under UNSCRs lies at the heart of the problem and risks leading to divergence of legal obligations.

23. In the words of one leading author writing on the interpretation of Security Council resolutions:

> "Two central themes are, first, the need, when interpreting SCRs, to have particular regard to the background, both the overall political background and the background of related Council action; and, second, the need to understand the role of the Council under the Charter of the United Nations, as well as its working methods and the way SCRs are drafted."[4]

From the perspective of States, the role of the UN Security Council is fundamental to the maintenance of international peace and security on a global basis, and it is

[4] M Wood, "The Interpretation of Security Council Resolutions" Max Planck Yearbook of UN Law (1998) vol 2, pp. 73-95, at p.74

endowed with extraordinary powers to that end. The authority of the Council and the agreement of States to carry out its decisions are vital pillars of the whole system of collective security under the United Nations. This is particularly so as, despite the ingenuity the Council has shown from time to time in the use of its powers, its range of tools to achieve international action to maintain peace still remains relatively limited, and rely for their effectiveness entirely on the active cooperation of States. A proposition that national authorities should be able to subject their observance of binding measures addressed to them by the Security Council to considerations of national or even regional law, clearly has implications for the effective discharge by the Security Council of its responsibility for the maintenance of international peace and security.

24. As is well-known the UN Charter's solution to any conflict between obligations under the Charter and obligations arising under other international agreements, is that the Charter obligations should prevail by virtue of Article 103. And, as is equally well-known, Article 103 is given a special place in international law, as for example recognised in Article 30 of the Vienna Convention on the Law of Treaties. It is established in the jurisprudence of the International Court of Justice that binding decisions of the Security Council are obligations arising under the Charter for these purposes.[5]

25. In some of its caselaw, rather than applying Article 103 to give precedence to obligations under a UNSCR, the Court seeks to avoid accepting that a conflict has arisen between a Convention right and an obligation arising under the UN Charter. In this respect the Court has adopted a presumption that Security Council resolutions should be interpreted so as to avoid finding any incompatibility with human rights under the Convention. If the proper goal of the interpreter is to reflect the intentions of the Council it is not clear what basis such a presumption has. If, as the Court's caselaw appears to suggest, its effect is that States' compliance with a SCR is thereby conditioned by observance of Convention rights, even where that affects the

[5] See Lockerbie case Provisional Measures Order (1992) ICJ Rep 4, at p15:

> "…39. Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement,including the Montreal Convention;"

ability of States to comply with a clear requirement of the SCR, then it will impair the Security Council's discretion to take effective measure to maintain peace and security. Such a view takes little account of the international context in which the Security Council adopts measures under Chapter VII, which by definition are situations of a threat to international peace and security, a breach of the peace or an act of aggression. It hardly needs saying that situations of his type that occur at the national level, are likely to entitle a State to derogate from many of its ordinary human rights obligations.

26. The same considerations of effectiveness are also relevant when considering the applicability of Article 103 to Council decisions authorising the use of force. As the Court has recognised in the *Behrami* decision (see above), in the absence of agreements under Article 43 of the Charter enabling the Council itself to take enforcement action, the practice of authorising the use of force has become a prominent feature in the Council's practice. To take too a narrow view of the word "obligations" in Article 103, so as to deny primacy to a Chapter VII authorisation of enforcement action by States simply because there is no mandatory obligation on States to participate in such action, risks undermining the ability of the Council to carry out its responsibility under the Charter.[6] Of course, giving primacy to an authorisation does not mean that the use of force is free from legal constraint, which will derive typically from the terms of the authorisation, the framework of international humanitarian law and other rules of international law that can be applied consistent with the effective performance of the authorisation.

27. In relation to UN sanctions, the Court has sought to emphasise that its judgments are addressed to actions of the member States implementing Security Council decisions rather than decisions of the Security Council themselves. In this respect a parallel may be drawn with the approach of the CJEU in cases such as *Kadi,* which sought to focus on the EU measures taken to implement the relevant UN sanctions, and which the Strasbourg Court duly cited. The difficulty that such an approach can entail for States is that in relation to sanctions the obligations to freeze assets or impose travels bans etc are obligations of result imposed by the Security Council. The discretion or latitude left to States by Security Council decisions is likely to be

[6] See for example Frowein and Krisch … also Lord Bingham in the AL Jedda case in the House of Lords

extremely limited on these matters, not least given the Council's concern to ensure consistency and effectiveness in the application of the sanctions.

28. A national judicial review of certain procedural or formal requirements, for example in relation to the identity of listed individual or the ownership of relevant assets may be consistent with giving effect to a decision of the Council. Whereas the scope for any judicial review of the merits of a listing that is required in a decision of the Council is likely to be much more limited. It may depend on the nature of any remedial measures that may be required. If for example a judicial review resulted in a finding that the basis of a listing was lacking in some respect, it may be that an appropriate remedy – if permissible within the national legal system – would be to mandate the national authorities to seek delisting by the Security Council. However in such a case it would be inconsistent with Article 25 and 103 of the UN Charter for a national or regional court to order the de-listing of a person whose was listed as a requirement of a Security Council decision.

29. On a positive note, it is important to note that the Security Council is best-placed to ensure that that its decisions are soundly based and that appropriate process are in place for listing and delisting. Recent years have seen significant developments in the Council's practice in both respects, with the appointment of a focal point to which individuals can send delisting requests, and in the case of sanctions against ISIL (Daesh) and Al Qaeda the appointment of an independent and impartial Ombudsperson.