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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

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

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Chapter of Theme 1, subtheme iii):

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

Preliminary Note

1. The present text is to be part of the future report of the CDDH on "The place of the European Convention on Human Rights in the European and international legal order". It constitutes the third sub-chapter of part / theme 1 of that future report, which addresses "The challenge of the interaction between the Convention and other branches of international law, including international customary law".

2. The text has been drafted by the co-Rapporteurs Mr Alexei ISPOLINOV (Russian Federation) and Mr Chanaka WICKREMASINGHE (United Kingdom). It has been revised and provisionally adopted by the DH-SYSC-II at its 4th meeting, 25-28 September 2018. Provisional adoption means that the Group has examined the text of the draft chapter paragraph by paragraph and made amendments, both on the content and on the form of the text. The text may be updated in case the European Court of Human Rights delivers new important judgments prior to the final adoption of the entire future report in 2019, in order to harmonise the entire text of the future report and in order to take into account possible orientations given by the CDDH.

INTERACTION BETWEEN THE RESOLUTIONS OF THE SECURITY COUNCIL AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Introduction – The UN Charter

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 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 (ECHR).[2]

2. The Charter system envisages a sophisticated structure of organs, each with its own defined areas of activity and responsibilities, powers, procedures and working methods. And the relationships between the organs and between the organisation and its member States is governed by a complex body of law and practice stemming from the Charter itself. The Charter is therefore the supreme law of the organisation, and given the universal vocation of the UN as the world's central political organisation charged with the maintenance of international peace and security, the Charter is of central significance in the international political and legal systems. In the context of this Report, there are two particularly striking features of the Charter, which are unprecedented in international law and demonstrate the commitment of the member States to ensuring the effectiveness of the UN system in its core role of maintaining international peace and security. The first is the authority given to the Security Council, an organ of 15 member States which operates through a special system of majority voting, and has the power to take decisions which the whole of the membership have a legal obligation to implement (explored in the next section). The second feature is Article 103 of the Charter according to which in case of any conflict between obligations arising on the member States under the Charter and obligations arising under other international agreements, Charter obligations shall prevail.

3. The guarantee of the supremacy of UN obligations over other international obligations contained in Article 103 is unique in the horizontal system of international law that operates between sovereign States. Its special place is reflected in Article 30 of the

[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 ECHR:

"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;" …

Vienna Convention on the Law of Treaties. In legal terms it is a vital provision that ensures that UN obligations are carried out effectively by the member States. States therefore may not invoke other treaty obligations to justify a failure to observe an obligation arising under the UN Charter. Importantly for present purposes obligations arising under mandatory decisions of the Security Council are to be considered as obligations arising under the UN Charter for the purposes of Article 103.[3] Article 103, however, does not provide for a hierarchy among conflicting UN Charter obligations to the extent they exist.

1. The Security Council

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

> "1. 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*)
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> 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."

5. 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 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. Decisions of the Council under Chapter VII are legally binding (Article 25) and the Council has the power to determine whether action is to be taken by all or some member States of the UN (Article 48).

6. 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 provides for the Council (a) to decide on measures not involving the use of force, such as economic sanctions[4], and (b) to use military force, 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 mandate peace operations, 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

[3] See ICJ, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), Provisional Measures, Order of 14 April 1992, § 42.

[4] See Article 41 of the UN Charter: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

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.[5]

(a) The Security Council and the use of measures not involving the use of force, such as economic sanctions

7. 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. These can include, but are not limited to economic sanctions. There is now an extensive body of Council practice where sanctions have been imposed by the Council, which has been developed largely in the post-Cold War period. Sanctions represent an essential tool, which can be used by the Council in response to various threats to international peace and security, importantly as a credible alternative to forcible action. They have been used to support peace processes / peaceful transitions, to deter non-constitutional changes, to constrain terrorism, to protect human rights and to promote non-proliferation. There are currently 14 different UN sanctions regimes in existence.[6]

8. The measures taken will vary according to the nature of the threat and the Council's objective that can range from comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions. It is comparatively rare for general or comprehensive sanctions to be imposed on all trade with target a country or region, because of the unintended impacts they can have on population of targeted States who have little to do with the threat to the peace in question. The Council's practice has resorted to the use of targeted sanctions against individuals, or against particular goods that will have an impact that the Council intends on the situation. It should be noted that sanctions are intended as temporary measures, whose purpose is to induce the individual to change his or her behaviour and to comply with decisions of the Council, rather than punishment. Where sanctions are imposed against individuals, the Council will accompany such measures with a system of humanitarian exemptions to ameliorate the effect of the sanctions on fundamental aspect of the lives of individuals.

[5] 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) pp 771-792; M. Mattheson *Council Unbound* (2006). Other works have focused primarily on the legal limitations of the 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 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).

[6] The currently ongoing sanctions regimes have been established by the Security Council in the Central African Republic, the Democratic Republic of Congo, the Democratic People's Republic of Korea, Guinea-Bissau, Iraq, Lebanon, Libya, Mali, Somalia/Eritrea, South Sudan, Sudan and Yemen, as well as against ISIL (Da'esh) / Al-Qaida and the Taliban.

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

9. 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). However, such agreements with the UN have not been concluded. 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". This model of authorisation of States to take part in military action was for example adopted in 1990/1991 following Iraq's invasion of Kuwait.

10. There has been a greater willingness among States to deploy troops under a UN command in peacekeeping operations. During the Cold War, when the Security Council was frequently paralysed from authorising the use of force under Article 42, the Security Council was more successful in developing its practice of deploying international troops to maintain a peace, once the warring parties had agreed to suspend fighting. Classically these peacekeeping forces were lightly armed and deployed with the consent of the relevant territorial State(s), and authorised to provide a barrier between opponents and only to use force in self-defence. However over time, and with a greater degree of consensus in the Security Council that is now possible in the post-Cold War era, mandates of some UN peace-keeping missions have developed to include, on occasion, the authorisation of the use of force under Chapter VII, for example to tackle immediate threats to blue helmets or civilian population in the area of the mission's responsibility. Equally, rather than deploying a UN force, the Security Council may authorise a regional organisation or particular member States to carry out post-conflict peace operations, including the possibility of using force.

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

(a) The use of measures not involving the use of force, such as economic sanctions

11. The starting point for any discussion of the interaction of UN sanctions and the ECHR is the *Bosphorus* case.[7] 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 ECHR, rather than an examination of the relationship of UN law and the ECHR. 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 ECHR.

> "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

[7] *Bosphorus Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* (2005). The case concerned a Yugoslav-owned aircraft that had been leased by a Turkish company, and was in Ireland for repairs, when in response to the conflict in the former Yugoslavia, the Security Council adopted resolution 820(1993) requiring inter alia States to impound Yugoslav aircraft in their territories. The UNSCR was transposed into EU law, and thus became applicable in Irish law. When Ireland impounded the aircraft the applicant litigated the issue in the Irish courts and then before the European Court of Justice which upheld the Government's actions pursuant to the sanctions resolution.

> 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.
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> 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."

12. 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 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, amongst others, to have been denied access to healthcare infringing his rights under Article 8 and without a remedy in Swiss law contrary to Article 13.

13. The European Court of Human Rights (the ECtHR / 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 the 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 ECtHR was on national implementation measures rather than considering whether there was a possible conflict between the requirements of the UNSCRs and the ECHR. The ECtHR 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 ECtHR 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 ECtHR 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.
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> 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.[8]

14. The ECtHR then considered the requirement of a 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.
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> 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)." (*emphasis added*)

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.[9]

15. Most recently, the ECtHR has considered the interaction of the ECHR and UN sanctions in *Al-Dulimi v. Switzerland*. The case concerned targeted sanctions against named persons associated with the former regime in Iraq following the overthrow of Saddam Hussein in 2003, 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 the validity of the inclusion of the applicant's name on the list was a question exclusively for the Security Council, and therefore outside the jurisdiction of the Federal Court.

16. In 2016, the Grand Chamber 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. On the merits, the

[8] See the joint concurring opinion of Judges Bratza, Nicolaou and Yudkivska in the case of *Nada v. Switzerland*.
[9] See the concurring opinion of Judge Malinverni in the case of *Nada v. Switzerland*.

ECtHR considered whether there was in fact a conflict between the ECHR and the requirements of the relevant Security Council resolution.[10] The ECtHR'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. …
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> 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."

17. The ECtHR noted the seriousness of the consequences for the listed persons and the importance of the ECHR 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

[10] The Chamber had stressed in its judgment of 2013 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 (ibid., §§ 91 and 117). In their dissenting opinion, Judge Lorenzen, joined by Judges Raimondi and Jočienė, regretted that the Chamber has not directly addressed the issue of how the conflict between obligations under the United Nations Charter and under the ECHR, which the Chamber was confronted with, should be resolved.

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."

(b) The use of military force

18. 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 ECHR is applicable has turned on the Court's interpretation of relevant Security Council resolutions.

19. The first was the Grand Chamber Decision in the joined cases of *Behrami and Saramati*, concerning claims against France and Norway, in relation to their participation in KFOR in Kosovo in 2000-2002.[11] 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 ECHR and the UN acting under Chapter VII of its Charter:

[11] The *Behrami* case concerned the death of a child and serious injuries sustained by his brother as a result of playing with unexploded cluster bomb units (CBUs). The Claimants alleged that the French KFOR contingent had failed to mark and/ or defuse the CBUs, despite knowing that the CBUs were present on the site in question. The Claimants therefore invoked Article 2 against France for the alleged inaction of the French troops. The *Saramati* case concerned the detention of the applicant by KFOR for a period of about 6 months. He complained under Articles 5, 5 with 13, and 6.

"147. 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."

20. In the case of *Al-Jedda*, the ECtHR came to a different conclusion in relation to a UN Chapter VII mandate concerning the stabilisation 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.

21. 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. The ECtHR held as follows:

> "102. 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 sub-paragraph of Article 1 of the Charter of the United Nations, the third sub-paragraph provides that the United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and for 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 United Nations 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*)

22. In line with this approach, the ECtHR 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.
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> 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*).

3. Challenges and possible solutions

23. The above survey of the ECtHR's decisions demonstrates that the interaction of the ECHR and binding decisions of the UN Security Council raises complex questions in relation to which the ECtHR's caselaw is still recent.

24. In some cases, notably for example in the quotation above from the *Behrami* case, the ECtHR 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 reciting relevant provisions of the UN Charter, this kind of systemic understanding of the Security Council is less apparent in much of the subsequent caselaw. That may in part be explained by the fact that the ECtHR has sought in those subsequent cases to focus its enquiry on the decisions at the national level in implementing the Security Council decisions. 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 a divergence of legal obligations.

25. 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 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.

26. 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 the purposes of Article 103.[12]

27. Rather than applying Article 103 to give precedence to obligations under a UNSCR, the ECtHR appears to avoid finding that conflicts have arisen between a ECHR right and an obligation arising under the UN Charter. Referring to Article 24 paragraph 2 of the Charter, the ECtHR has adopted a presumption that Security Council resolutions should be interpreted so as to avoid finding any incompatibility with human rights under the ECHR. This presumption may affect the ability of States to comply with a clear requirement of the SCR, and might impair the Security Council's discretion to take effective measure to maintain peace and security. Such a view would take little account of the international

[12] See *Lockerbie* case, Provisional Measures Order (1992), ICJ Rep 4, at p. 15:
"…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;"…

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.[13] However, the Grand Chamber in *Al-Dulimi* has sought to take into account the nature and purpose of the measures adopted by the Security Council by limiting the required scrutiny (under Article 6 of the ECHR) to arbitrariness (*Al-Dulimi*, § 146).

28. 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 ECtHR has recognised in the *Behrami* decision (see above), in the absence of agreements under Article 43 of the Charter enabling the Security Council itself to take enforcement action, the practice of authorising the use of force has become the only way that in practice the Council can take forcible measures to meet its responsibility to maintain international peace and security. To take a too 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 Security Council to carry out its responsibility under the Charter.[14] 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. The interaction of the ECHR with international humanitarian law is considered in the following section of this report.

29. In relation to UN sanctions, the ECtHR 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*,[15] 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 extremely limited on these matters, not least given the Council's concern to ensure consistency and effectiveness in the application of the sanctions.

30. A national judicial review of certain procedural or formal requirements, for example in relation to the identity of listed individuals 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 it would be inconsistent with Article 25 and 103 of the UN Charter

[13] The ECHR also allows for derogation from certain Convention rights under Article 15 in exceptional circumstances and to a limited extent.

[14] See for example Frowein and Krisch and also Lord Bingham in the *Al-Jedda* case in the House of Lords.

[15] In a judgment of 3 September 2008 delivered in the joint cases of *Kadi and Al Barakaat International Foundation/Conseil* (C-402/05 P and C-415/05 P) the CJEU found that the fact that a Community regulation was limited to implementing Resolution 1390 (2002) of the Security Council of the United Nations did not deprive the Community judicature of the competence to control the validity of that regulation in the light of the general principles of Community law. On the merits the CJEU considered that the impugned regulation had manifestly disregarded the rights of the defence of the appellants, and notably the right to be heard.

for a national or regional court to order the de-listing of a person who was listed as a requirement of a Security Council decision.

31. It is important to keep in mind that the Security Council is best-placed to ensure that its decisions are not only soundly based and properly substantiated, but also that appropriate mechanisms and review processes are in place for listing and delisting.[16] Although reaching agreement at the international level is complex, recent years have seen significant developments in the Council's practice in both respects. Member States of the Council, and notably those who are parties to the ECHR, are very much more stringent in ensuring an adequate evidential basis exists to justify listings. Procedures for delisting have also seen some improvements 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. Whilst there is room for further improvements, they are likely to be incremental as they depend on reaching agreement within the Security Council. It is also important that any such improvements are consistent with the competence of the UN Security Council under the UN Charter.

[16] The ECtHR noted that the UN sanctions system, and in particular the procedure for the listing of individuals and legal entities and the manner in which delisting requests are handled, had received very serious, reiterated and consistent criticisms so that access to these procedures could not replace appropriate judicial scrutiny (see *Al-Dulimi* Grand Chamber judgement, § 153).