Norm Conflicts in Public International Law

The Relationship Between Obligations Under the ECHR and Under the UN Charter

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1 Introduction

A majority of European states are members of the Council of Europe (CoE) and bound by the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention; the ECHR). Its role in protecting human rights on the European continent cannot be exaggerated – it has been described as “one of the most advanced systems for the protection of human rights anywhere in the world” and “the continent’s leading human rights organisation”. Nevertheless, it is not alone in the world. States are bound by and members of many other treaties and international organisations. One of these is the United Nations (the UN).

The United Nations is one of a kind. It is the world’s leading organisation in cooperation in several fields, but its most important work lies in the special role it has in maintaining international peace and security. It is the only actor which has the power to use force in international relations in general, and it does so through the Security Council (the UNSC). The Security Council relies, to a very high extent, on member states to carry out their decisions. Those decisions are taken through resolutions, which can be binding upon states. All of the Council of Europe states are also members of the United Nations. This means that at least some of those European states act on resolutions by the Security Council, and that all of them are bound by Security Council resolutions from time to time.

There is a clear and widely accepted link between respect for human rights and fundamental freedoms, and a high level of security and peace. This means that human rights and fundamental freedoms are enforced by peace and security, and the other way around. What complicates this relationship, however, is that states sometimes have conflicting obligations – one based on international peace and security, and one based on human rights, which in specific situations can seem irreconcilable. That can, for example, be the case when states are bound by a resolution by the Security Council which does not seem to allow them to fulfill their obligations under the ECHR. That inevitably puts states

4 Art. 2(4) and 42 of the Charter of the United Nations, 1 UNTS XVI, 24 October 1945 (“the Charter; the UN Charter”); Randelzhofer & Dörr, 2012, p. 203.
5 See e.g. Art. 25 and 40-42 UN Charter.
6 Art. 25 UN Charter.
7 See, e.g., the preamble of the Universal Declaration of Human Rights, UN G.A. Res. 217 (III) A; the preamble of the ECHR; CoE, Global Challenges, 2016, p. 5; Smith, 2014, p. 109.
in a difficult situation, where they may have to choose which obligation to honor, with
the outcome that the other is breached.

The reason that these conflicts can ever occur lies in the special features of
international law – more specifically, its fragmentation.\textsuperscript{8} International law, to put it
simply, does not have the same amount of coordination as a domestic legal system. The
fragmentation of international law may not be harmful in itself – the lack of coordination
does not always provide difficult outcomes. But when it does, for example in situations
of norm conflict, the outcome may be harmful if not overcome, since it otherwise leaves
states in a kind of “damned if they do, damned if they don’t” situation – they would have
to dishonor one of the norms. It is obvious that there needs to be established ways to solve
these conflicts which reduces such effects.

When reviewing case law of the European Court of Human Rights (the Court; the
ECtHR), it seems that there are especially two kinds of situations in which conflicts
between norms of the UN system and the Convention system may arise. First, when states
act on UNSC resolutions in peace operations outside their own territories, e.g. by
providing forces for security. Second, when states implement sanctions under UNSC
resolutions in their own territories, e.g. by freezing assets of certain individuals. These
kinds of actions can activate a whole range of Convention rights, but focus often seems
to have been on rights connected to some form of judicial review\textsuperscript{9} (and claimed violations
due to the lack of such review).

Cases regarding these types of conflicts have emerged during the last 10 years, and
the Court decided one such case as late as June 2016. That case was considered to leave
many questions unanswered – meaning that there is probably more case law to come in
the future.\textsuperscript{10} The area is therefore both interesting and relevant to further examine. This
thesis will do just that.

Due to the Convention’s important role in human rights protection on the European
continent, with effects spreading outside that area as well, it must be regarded as
important that its efficiency in human rights protection is not decreased due to conflicts
with other norms (i.e., that its role and application is not seriously reduced so that
individuals cannot fully enjoy their rights and freedoms). Due to the UN’s role in

\textsuperscript{8} See chapter 6 below.
\textsuperscript{9} E.g. Art. 6 and 13 ECHR.
\textsuperscript{10} See e.g. Milanovic at https://www.ejiltalk.org/grand-chamber-judgment-in-al-dulimi-v-switzerland/
(2017-05-03).
international peace and security, its efficiency should not be undermined by such conflicts either. The logical approach to norm conflicts between these two systems would therefore be to find a way which protects them both, if possible. However, protecting both might not always be possible, and then the question arises which of them should be awarded priority. The UN has a specific rule of protection – Article 103 of its Charter\textsuperscript{11}, which suggests that UN norms should be given priority in certain situations. The Convention has no such rule. Does this mean that the UN system can override the Convention system?

For all these reasons, examining norm conflicts between these two systems specifically feels both relevant and interesting.

2 Questions and Limitations

2.1. Questions
The main question of this thesis is what effect resolutions of the United Nations Security Council have on the application and scope of the European Convention on Human Rights, when there is an apparent or genuine conflict between obligations under those resolutions on one hand and the Convention on the other. This question covers both resolutions which obliges states to act within their borders and in other countries, both inside and outside of the traditional legal space of the European Convention on Human Rights. One focus of the thesis is to examine what possible solutions there are to such conflicts, and Article 103 of the United Nations Charter will be of special interest since it might apply in some situations of conflict. That focus includes both a general examination of different possible solutions, as well as application of those solutions to specific cases – to see if they were actually possible in those cases. The possible solutions will further be discussed in relation to the main question, to see if different solutions lead to different effects for the Convention’s application and scope.

The thesis will ask, first, why these conflicts arise, then what solutions there are to them in theory. This will be followed by an examination of what solutions courts have used in practice, with main focus on case law of the European Court on Human Rights. Finally, the effects of those solutions and other possible solutions will be discussed, to answer the starting question – what effect resolutions by the Security Council have on the application and scope of the Convention in situations of norm conflict.

\textsuperscript{11} Charter of the United Nations, 1 UNTS XVI, 24 October 1945 (“the Charter; the UN Charter”).
The approach is not just to provide what is (i.e., the Court’s standpoint), but also what should be, which includes both what international law actually allows for and what I consider would give the least bad effects for the Convention, keeping in mind its role as the primary human rights protector in Europe.

2.2. Limitations

This thesis cannot and will not provide answers to and discussions on all questions relating to norm conflicts between the United Nations system and the Convention system, some areas will be left out completely and some will only be examined briefly.

The first limitation relates to the European Union (EU). Many European states are not just members of the Council of Europe and the United Nations, but also of the European Union. In fact, as will be evident from a comparison with a case of the Court of Justice of the European Union (CJEU) further below, Security Council resolutions are sometimes implemented at the EU level, binding the EU member states to that implementation act as well. In this thesis, however, I have chosen to look directly at the relationship between obligations of the Convention and obligations based on the UN Charter through the Security Council, and will therefore exclude a discussion on the role of EU law in all this. That is simply because it is not necessary to answer the questions of my thesis. The obligations for states under UNSC resolution are based directly on the UN Charter, regardless of whether states implement it at a regional level or directly at the national level. Further, the states are those bound by the Convention, the EU is not (yet). Finally, not all states bound by the Convention are members of the EU, and EU law therefore does not apply to all those states. For these reasons, EU law will not be examined in detail. The case of the CJEU discussed in this thesis is used for comparison with the ECtHR cases, and to see if it presents another possible solution – from this will follow a discussion if that solution would be possible for the ECtHR, which includes a minor comparison between the EU and the ECHR. A deeper comparison between those two systems will not be provided.

Further, domestic law as such is not covered by the thesis. Whenever domestic cases are discussed for comparison, the focus is on their understanding of how their obligations under the Convention relates to their obligations under a specific UNSC resolution. The

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12 The process of EU accession to the ECHR was halted after the CJEU’s Opinion 2/13 on 18 December 2014.
thesis makes no attempt to provide all the available domestic cases dealing with the relevant norm conflict, it is limited to those which best provide for good comparison with the ECtHR – i.e., the cases of domestic courts which were later brought to the ECtHR.

Except for the cases of the ECtHR, and the few cases of domestic courts and the CJEU, there will be only one additional case examined – from the Human Rights Committee (HRC). The functions and role of the HRC will be described in brief in relation to that case, but the reasons for mentioning that case is that it deals with substance similar to some of the ECtHR cases and is therefore useful for comparison, while being detached from the ECHR as such since it protects a different human rights convention. However, since it is only used for comparison, the thesis makes no attempt in examining all the case law of the HRC on this matter. Further, the thesis will not examine case law of any other judicial bodies than those mentioned, since I consider the chosen cases to be those of relevance for comparison and discussion of the questions of the thesis.

There will be no examination of the substantive rights of the Convention, unless needed to understand the Court’s findings in a situation of possible norm conflict, and then only to the extent necessary.

No other bodies of the UN or the Council of Europe will be discussed than the Security Council and the Convention with its Court.

The ongoing discussion on the constitutional character of the UN Charter, and the similar discussion on human rights law as a self-contained regime, will not be examined to any larger extent in this thesis, since those issues demand much more room than this thesis allows for and are further not considered to be directly decisive for the questions of the thesis.

3 Method and Outline

3.1. Methodology

In order to find out what effect resolutions of the UNSC have on the application and scope of the ECHR in situations of norm conflicts between obligations under these, there are several sources to turn to for insight. The general understanding of which the sources of international law are has been derived from Article 38(1) of the Statute of the Court of Justice, which lists treaties, custom, general principles, judicial decisions and doctrine

13 The Statute, adopted on 18 April 1946, is annexed to the UN Charter and forms an integral part of it; see Art. 92 UN Charter.
as sources, and states that judicial decisions and doctrine are considered subsidiary to treaties and custom.\textsuperscript{14} It is further widely accepted that \textit{ius cogens} norms stand above all other norms,\textsuperscript{15} but to decide exactly what constitutes \textit{ius cogens} has been proven difficult.\textsuperscript{16}

As mentioned above, my take on the questions of this thesis is to discuss both what the effects are of the approach that the Court has chosen so far, and what the effects would be if another approach or solution was chosen. This includes several parts: first, examining what the approach of Court is, and the effects of that approach. This means a textual and contextual review of the cases with help from doctrine, followed by a use of doctrine discussing the effects of the approach. Second, to examine how other solutions, as suggested primarily in cases of other judicial bodies and in doctrine, would change those effects. That examination includes an element of comparison between the different solutions with help from doctrine, but it also requires me to draw own conclusions relying on the sources available. And finally, whether those solutions were possible, by examining the limits of international law in the relevant areas. In examining the limits of international law, I must examine the primary law which in this case would be the UN Charter, the Convention and relevant customary international law, e.g. as expressed in parts of the Vienna Convention on the Law of Treaties (VCLT)\textsuperscript{17}. That examination should be aimed first at the text as such – its expected meaning based on the language of it, its context, and its purpose. For this reason, some background and historical facts on the relevant frameworks is necessary. When that examination is not enough to get an answer, secondary sources such as doctrine will be used.

The special character of international law may call for doctrine being awarded more weight than it is in examinations of domestic law. In a domestic legal system, the rules are created in a co-ordinated way by a specific actor, interpreted by a specific actor with authority to review and provide interpretation, and aimed at a specific and identifiable group (e.g. individuals within a state’s borders). In international law, there are different creators of rules (e.g. states and international organisations), without or with little co-ordination, with no actor that holds authority to interpret all (or even the majority of) the acts of that order in a way that binds all subjects of the order, and the subjects of each act

\textsuperscript{14} Shaw, 2014, p. 50, 87-88; Thirlway, 2014, p. 5-6.
\textsuperscript{15} Article 53 and 64 VCLT; Paulus & Leiss, 2012, p. 2119; De Wet & Vidmar, 2013, p. 203.
\textsuperscript{17} Vienna Convention on the Law of Treaties (VCLT), UN Treaty Series vol. 1155, p. 331, 23 May 1969.
may differ. This means that, unlike in domestic law, it is not enough to look at a legal act as such, the documents leading to its creation, and the interpretation of one specific court, to get an absolute understanding of that act – especially regarding its relationship with other acts. It, therefore, makes sense to let opinions with widespread support in doctrine be weighed against findings of regional or specialized courts, such as the E CtHR. It also both allows me and requires me to draw my own conclusions, but of course based on the material at hand and with respect for their different weights.

3.2. Outline
In chapter 4 and 5, a background to the two systems of interest for this thesis, the UN system and the ECHR system, will be provided. The focus will be to explain the role of each system, which obligations they create, and whom they can bind, since this helps to understand the approach of the Court. Chapter 6 will define what a norm conflict is and why they are likely to occur in international law in general, while chapter 7 will describe why conflicts between obligations based on UNSC resolutions and the Convention are likely to occur specifically. Chapter 8 discusses different solutions to norm conflicts and their likeliness to be useful for the type of conflict discussed in this thesis, and leads into chapter 9 which discusses the specific solution provided by Article 103 of the UN Charter – both when it applies and what its effects are. Chapter 10 is essential, that is where the case law of the E CtHR is examined and compared with case law of other courts, to see which solutions the E CtHR and those other judicial bodies have applied in specific situations. Chapter 11 builds on the previous chapter by discussing the effects of the approach chosen by the E CtHR, specifically for the Convention as such and for its member states. Chapter 12 discusses if any other solutions would have been possible in the cases of the E CtHR, and if they would have limited any of the negative effects found in chapter 11. Finally, chapter 13 summarizes the findings and gives a conclusion, answering the main question of the thesis.
4 The Council of Europe and the European Convention on Human Rights

4.1. Introduction
The aim of this chapter is to examine the role of the ECHR and the obligations it creates for state parties, which is necessary to establish before discussing the main question of this thesis more deeply. To understand the role of the Convention today, I think it is important to know something about its history, since that provides a context. Therefore, the historical background of the Council of Europe (CoE) and the ECHR will be briefly explained, followed by an explanation of the role of the Convention and the obligations it creates.

4.2. The Development of a European Protection for Human Rights

4.2.1. Introduction
The goal of the Council of Europe, as stated in article 1 of its statute,\(^{18}\) can be summarized as more unity and cooperation in several fields on the European continent. However, it is rather clear that its main success lies in cooperation and unity in one specific area: human rights and fundamental freedoms. The acceptance and realisation of these is explicitly mentioned as one of the very basic principles of the CoE,\(^{19}\) and human rights and fundamental freedoms have further been protected by the creation of several documents, of which the European Convention on Human Rights is the most important one. According to the Council of Europe’s (CoE) own website, they are “the continent’s leading human rights organisation”\(^ {20}\).

4.2.2. The Creation of the Council of Europe
In the main lecture hall of the University of Zurich hangs a sign with the famous words of Winston Churchill’s speech held there in 1946 imprinted: “let Europe arise!”\(^ {21}\). In his speech Churchill expressed the urgent need for the formation of a kind of “United States of Europe” in order to avoid repeating the devastating actions of the second world war. The first step was, according to Churchill, the forming of a Council of Europe. Three

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\(^{18}\) Statute of the Council of Europe, ETS No. 001 (CoE Statute).
\(^{19}\) Art. 3 CoE Statute.
\(^{21}\) Churchill, speech delivered on 19 Sept. 1946, Zurich, Switzerland.
years later, in 1949, the Statute of the Council of Europe was signed by ten European states. Since then the organisation has grown and it has today 47 member states. From the 1940s and forward, several organisations of cooperation were created within Europe and between European states and the United States, covering areas stretching from economic to military cooperation.\textsuperscript{22} To some extent, the emergence of other organisations in specific areas might have contributed to the CoE focusing more intensively on cooperation in the field of human rights and fundamental freedoms, and less in other fields. Especially what today is the European Union is considered to have “sidelined” the Council of Europe and removed much of its importance in other areas than human rights and fundamental freedoms.\textsuperscript{23}

In the following year after the creation of the CoE, the European Convention on Human Rights and Fundamental Freedoms was opened for signature, and in 1953 it entered into force. The Convention has been described as the ”crowning achievement” of the CoE.\textsuperscript{24}

\textbf{4.2.3. A European Document on Human Rights}

The creation of a European document of human rights was explained as a way “to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”\textsuperscript{25} – a statement which established a close link to the human rights work of the UN, from which that Declaration originated. It was, however, not until mid 1970s that the role of the Convention started to change and it turned into an important instrument for human rights and fundamental freedoms in Europe in practice.\textsuperscript{26} It, according to Bates, emerged into a proper European bill of rights.\textsuperscript{27} As the role of the Court and the respect for the Convention grew, major steps were taken to further move towards the aim to make certain rights of the Universal Declaration enforceable. In 1995, the Court described the Convention as a “constitutional instrument of European public order”\textsuperscript{28} and in 1998 the influence and role of the Court grew.\textsuperscript{29} Since then, the influence and role of the Convention and its Court have continued to develop to what they are today: “one of the
most advanced systems for the protection of human rights anywhere in the world”\textsuperscript{30} and “undoubtedly the most important human rights body in Europe”\textsuperscript{31}.

4.3. States’ Obligations under the Convention

According to Article 1 of the Convention, the member states have an obligation to “secure to everyone within their jurisdiction the rights and freedoms” of the Convention. This includes an obligation to change both practices and laws in line with the Convention, as ultimately interpreted by the Court through judgments.\textsuperscript{32} The obligation covers all the rights and freedoms of the Convention, with the exception of when derogations are made under Article 15 of the Convention. There is no horizontal effect, i.e. there is no obligation between individuals, but “states” include certain private entities when they perform public powers.\textsuperscript{33} “Everyone” has been considered to include both nationals and aliens, with some exceptions.\textsuperscript{34} “Within their jurisdiction” primarily relates to the traditional understanding of jurisdiction, i.e. within the state’s territory.\textsuperscript{35} However, if some other state exercises control over part of the state’s territory, the state would be excluded from jurisdiction for that other state’s action in that territory.\textsuperscript{36} Similarly, when a state exercises a certain degree of control over territories in other states, e.g. as an occupying power, the Convention obligation has been considered to apply to them there as well.\textsuperscript{37} To what extent states have such extraterritorial jurisdiction outside the traditional legal space\textsuperscript{38} of the Convention will be further discussed below in chapter 7, since it relates to why norm conflicts with obligations under the UN Charter are likely to occur.

4.4. The Role of the Court and the Efficiency of the Convention

The Convention’s efficiency as the primary document for human rights in Europe lies in its wide structure. First, states are primarily responsible for upholding the rights in the Convention and to change their legislation or practice in line with the Convention.\textsuperscript{39} This means that much of the work is, or at least should be, done at the national level. The

\begin{itemize}
  \item Smith, 2014, p. 97.
  \item Cameron, 2014, p. 38.
  \item Harris et al., 2014, p. 20 and 26; Cameron, 2014, p. 49.
  \item Grabenwarter, 2014, p. 3-4; Harris et al., 2014, p. 23-24; Cameron, 2014, p. 50.
  \item Cameron, 2014, p. 51; Grabenwarter, 2014, p. 2-3.
  \item Schabas, 2015, p. 95; Cameron, 2014, p. 52.
  \item Grabenwarter, 2014, p. 7.
  \item Cameron, 2014, p. 52; Grabenwarter, 2014, p. 7.
  \item The traditional legal space is within the borders of all member states combined.
  \item Harris et al., 2014, p. 26.
\end{itemize}
strength of the Convention at the national level is further established by the fact that all state parties have incorporated it into their domestic law, which makes it not only international law but also public law.\textsuperscript{40} Second, when states fail to realise their responsibilities, the individuals claiming their rights or freedoms to have been violated can turn to the Court for review,\textsuperscript{41} but only if they have first exhausted all domestic remedies.\textsuperscript{42} This relationship between national action and Court action makes the Convention system efficient and secure. The existence of a Court further makes the Convention a living document, since the rights and freedoms therein can be applied to specific situations and interpreted with regard to changes in society.\textsuperscript{43} Changes of a more fundamental nature must however be made through protocols, which constitute separate treaties and therefore only bind those states who choose to join them.\textsuperscript{44} The Court also has the possibility to give advisory opinions,\textsuperscript{45} which further strengthens their role as an interpreter.

The efficiency of the Court can be questioned by the fact that it has no efficient enforcement mechanism. The judgments of the Court are binding on the parties,\textsuperscript{46} and in case a violation has been found, the Court has the power to afford “just satisfaction”.\textsuperscript{47} This was traditionally considered to include only monetary compensation, but could be extended to other forms of compensation.\textsuperscript{48} Such measures are, however, not legally binding for the states.\textsuperscript{49} The Committee of Ministers supervise the execution of judgments. That process is, however, without access to financial penalties or other enforcement measures. It highly relies on good faith and respect by the states.

Due to the lack of enforcement mechanisms, the Court has to be carefully bold. While they must make sure that there is sufficient protection for human rights and fundamental freedoms, they must do so in an efficient manner. It is in their interest to take into account that decisions that are considered incorrect by many states will not be subject to any social pressure by those states on other states, perhaps leading to a lower

\textsuperscript{40} Cameron, 2014, p. 49-50.
\textsuperscript{41} Article 19 ECHR.
\textsuperscript{42} Article 35 ECHR; Cameron, 2014, p. 65.
\textsuperscript{43} Schabas, 2015, p. 48; expressed by the Court in its case law, e.g. in \textit{Tyrer v. The United Kingdom}, para. 31.
\textsuperscript{44} Schabas, 2015, p. 49.
\textsuperscript{45} Article 47 ECHR.
\textsuperscript{46} Article 46 ECHR.
\textsuperscript{47} Article 41 ECHR.
\textsuperscript{48} Harris et al., 2014, p. 29; Cameron, 2014, p. 70-72.
\textsuperscript{49} Cameron, 2014, p. 72.
rate of enforcement and respect of the decision in the Convention states. Therefore, being too bold can mean decreased respect for the Court’s decisions.

5 The United Nations

5.1. Introduction

The aim of this chapter is similar to that of chapter 4 – to explain the role of the UN and the obligations it creates for states, with special attention to the work of the Security Council. Just as above, some background to the creation of the UN helps provide a context which makes it easier to understand the role of the organisation.

5.2. A World-Wide Organisation for Co-operation

5.2.1. Introduction

The United Nations is a large and widespread organisation with many different roles. It has six organs with different mandates, and is connected to a number of specialized agencies which cover many areas. The framework of the UN in general is found in its Charter, but many additional documents control the work of the organs and agencies, and have importance for the member states of the organisation.

5.2.2. The Creation of the UN

In October 1945, after the end of World War II, the United Nations officially came into existence after its Charter had been ratified by a majority of the signatory states. The organisation originally consisted of 51 members, but during the years it has expanded and in 2011 South Sudan became the 193rd state to join the UN. The background to the creation of the organisation was a common determination to “save succeeding generations from the scourge of war”, “reaffirm faith in fundamental human rights”, “promote social progress and better standards of life in larger freedom” and to create a world in which “justice and respect for the obligations arising from treaties and other sources of

50 Art. 7(1) UN Charter.
international law can be maintained”.\(^{54}\) The Charter, not only being the document that created the organisation but also its “constitution”,\(^{55}\) sets out the purposes and principles of the organisation in its first two articles. Due to the purposes of the UN being very broad, the work of the organisation “touches on practically every area of human life and endeavour”.\(^{56}\) The work of the UN is done not only in principal and subsidiary organs\(^{57}\), but also in specialized agencies that are responsible for a wide range of areas such as health, finance and meteorology.\(^{58}\) The organs and specialized agencies of the UN have been established so that the purposes of the UN can be efficiently fulfilled.

This thesis will focus on the work of the UN that relates to the purpose “to maintain international peace and security”.\(^{59}\) Of interest is also the purpose to “achieve international co-operation […] in promoting and encouraging respect for human rights and fundamental freedoms”\(^{60}\), which will be discussed further below. The Security Council is the principle organ of the UN which has the primary responsibility to fulfill the purpose of maintaining international peace and security.\(^{61}\) It is under this organ that obligations for states, which may come into conflict with their human rights obligations, are created. The next section will therefore first explain the work of the Security Council, and second outline the obligations created under that organ.

### 5.3. The Security Council

#### 5.3.1. Introduction

The Security Council consists of fifteen members from the UN, of which five are permanent and the other ten are elected by the General Assembly on a two-year basis.\(^{62}\) The five permanent members have veto power in all decisions which are non-procedural.\(^{63}\) This procedure has historical reasons,\(^{64}\) but was also used to legitimize the fact that the Council can make decisions which are binding for states.\(^{65}\) It is arguable that the veto system makes the purpose of maintaining peace and security hard and inefficient,

\(^{54}\) Preamble of UN Charter.
\(^{55}\) Shaw, 2014, p. 876.
\(^{56}\) Akande, 2014, p. 272.
\(^{57}\) Those organs are listed in Art. 7(1) UN Charter.
\(^{58}\) Akande, 2014, p. 273-274.
\(^{59}\) Art. 1(1) UN Charter.
\(^{60}\) Art. 1(3) UN Charter.
\(^{61}\) Art. 24 UN Charter.
\(^{62}\) Art. 23 UN Charter.
\(^{63}\) Art. 27 UN Charter.
\(^{64}\) Shaw, 2014, p. 877.
since the permanent members may block decisions which is unfavourable to them or their allies, something that Russia has done several times in relation to Syria.\textsuperscript{66} The United States have had a similar approach to decisions relating to Israel, with possible change recently.\textsuperscript{67} However, without veto system, there might have been no UN at all, at least not with the competence it currently possesses. That must be considered to have been a bigger loss.

5.3.2. The Power of the Security Council

It is clear that the Security Council is a special organ compared to the other organs of the UN. The UN is built on the principle of state sovereignty and limitation of UN intervention in matters which are “essentially within the domestic jurisdiction of any state”, but the Security Council have the competency to disregard this principle when taking certain action under Chapter VII of the Charter.\textsuperscript{68} While the General Assembly only has the power to discuss and make recommendations, and a limited such power,\textsuperscript{69} the Security Council has the power to create decisions which are binding for states.\textsuperscript{70} It is therefore obvious that the goal to maintain peace and security is considered extra important, and that the successful fulfillment of that goal requires possibilities to take action.

The main work of the Council is divided into two parts, covered by different chapters of the Charter: pacific settlements of disputes (Chapter VI), and adoption of enforcement measures (Chapter VII).\textsuperscript{71} The Security Council acts through resolutions, which are “formal expressions of [its] opinion or will”, usually consisting of a preamble in which the reasons for or background to the resolution is explained, and an operative part where the opinion of the UNSC or the action to be taken is established.\textsuperscript{72} The overall purpose of UNSC resolutions is to maintain international peace and security. Resolutions range from encouragements to parties to solve disputes in peaceful ways, imposing of

\textsuperscript{68} Article 2(7) UN Charter.
\textsuperscript{69} Article 10 and 12 UN Charter.
\textsuperscript{70} Article 25 UN Charter.
\textsuperscript{71} Shaw, 2014, p. 878.
sanctions against states, entities or individuals, and authorizations of collective military action.\(^{73}\)

### 5.4. States’ Obligations Based on Acts of the Security Council

Resolutions can be both binding and non-binding for states.\(^{74}\) Recommendations by the Council are considered non-binding, while decisions are considered binding.\(^{75}\) States are, according to Article 25 of the Charter, under an obligation to “accept and carry out” decisions of the Security Council which are considered binding. The International Court of Justice (ICJ) have expressed that the term “decisions” in Article 25 of the Charter cannot be understood as exclusively related to enforcement measures under Chapter VII, but can include other forms of decisions too.\(^{76}\) There seems to be different views as to whether such binding decisions can be taken also under Chapter VI, and if so which acts of the Security Council under that Chapter that would be covered.\(^{77}\) De Wet argues that to consider acts of Chapter VI binding would mean to “undermine the structural division of competencies foreseen by Chapter VI and VII, respectively”.\(^{78}\) In sum, there seems to be different views as to whether resolutions based on other chapters than Chapter VII could be binding, and if that is the case it at least seems to be limited to certain acts.\(^{79}\) But even such an approach lacks consensus among authors.\(^{80}\)

Another dispute is that of whether authorizations of the Security Council are binding on states. A more in-depth discussion on authorizations can be found in chapter 9 below. Here, it is sufficient to state that not all authorization by the Security Council seem to be binding on all states, but that some authorizations (especially when states have started acted on them) can be considered to create at least some degree of obligation on that state.

For this thesis, as mentioned in the introduction, two types of Security Council resolutions are of extra interest: those including authorizations to act militarily in territories outside the state’s own border, and those setting up targeted sanctions within

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\(^{74}\) Peters, 2012, p. 792.

\(^{75}\) Shaw, 2014, p. 878; Peters, 2012, p. 792; Art. 25 UN Charter.

\(^{76}\) *Namibia* (ICJ), paras. 112-113.


\(^{78}\) De Wet, 2004, p. 39.


the state’s borders. While the first type usually does not contain very specific binding obligations for the states, the latter usually does. This will all be examined further below.

6 Norm Conflicts in Public International Law

6.1. Introduction
Since this thesis highly relies on the concept of “norm conflicts” in the context of international law, it is necessary to explain how a “norm conflict” is defined in this thesis. After the concept has been defined, focus will be shifted to the special features of international law which provides an understanding to why norm conflicts are likely to occur there.

6.2. Definition of “Norm Conflict”
Norms, in this context, can be explained as “legally binding rules establishing certain rights and obligations between subjects of international law”.\(^81\) For example, binding treaties between two or more states establishing trade rules or human rights’ obligations between those states. The exact limitations to what constitutes a norm is of less interest for this thesis, since the further discussion will focus exclusively on states’ obligations based on treaties which definitely must be considered to fall within the concept of “norms”. What is of more interest is how we should understand the concept of “conflict” between such norms.

The “conflict” part of norm conflicts can be defined in different ways. With a broad definition, norm conflicts are understood as situations where there are two norms and they in some way contradict one another, so that the application of one of them leads to some form of limitation of the other.\(^82\) This could even include situations where simply the goal of one norm system is countervailed by the other norm system.\(^83\) The broad definition would, for example, include a situation where a state has both an obligation and a right, and the exercise of the latter is limited by the former. Opponents of the broad definition have argued that this is not a norm conflict, since the state can simply abstain from exercising their right and thereby avoid the conflict.\(^84\) A narrow definition would instead

\(^{81}\) Milanovic, 2009(I), p. 72.
\(^{82}\) De Wet & Vidmar, 2013, p. 197-198; see Pauwelyn, 2003, p. 167-168 for a list of authors with a broad understanding of “norm conflicts”.
\(^{83}\) ILC Fragmentation Report, para. 24.
\(^{84}\) Mujezinovic Larsen, 2012, p. 319.
only include situations where "two norms contain mutually exclusive obligations".\textsuperscript{85} This would, for example, be the case in situations where there are two contradictory obligations, and acting in line with one obligation would mean a breach or violation of the other obligation. Pauwelyn considers this narrow approach to be wrong, in that it not only assumes that obligations should always prevail over rights, but also “leads to predetermined solutions to conflicts before one has even identified the conflict”.\textsuperscript{86} What Pauwelyn seems to mean, is that the narrow definition “confuses the existence of a conflict with one possible solution to the conflict”.\textsuperscript{87} Today, main support seems to be for a broad definition.\textsuperscript{88} I agree with the views of those authors arguing for a broad definition, and therefore that definition will be used in this thesis. This might turn out to be important depending on how authorizations by the Security Council are viewed, see more on that below in chapter 9.

Further, there is a difference between apparent conflicts, which can be avoided by interpretation, and genuine conflicts, which cannot be interpreted away.\textsuperscript{89} Some authors seem to consider that “apparent conflict” is just another name for the broad definition of norm conflicts,\textsuperscript{90} but I would consider this a misunderstanding of the concepts. The apparent/genuine distinction is used to define what possible solutions there are to the conflict, while the “broad definition” is a definition of what constitutes a norm conflict at all and may include both apparent and genuine conflicts. The distinction between apparent and genuine norm conflicts is useful, since only genuine norm conflicts fully activate certain rules of conflict resolution, such as Article 103 of the UN Charter\textsuperscript{91}. However, while the distinction may sound very clear, we will see below that different courts examining the same situation may come to different conclusions as to whether the conflict before them is in fact genuine and must be solved, or is just apparent and can be interpreted away. The distinction between apparent and genuine norm conflicts is not decisive for our understanding of what a norm conflict is, but it helps us distinguish between different kinds of norm conflicts within the broad definition, based on what possible solutions there are to the specific conflict.

\textsuperscript{85} Jenks, 1953, p. 451; Pauwelyn, 2003, p. 167 provides a list of other authors supporting this view.
\textsuperscript{86} Pauwelyn, 2003, p. 170-171 and 175.
\textsuperscript{89} Milanovic, 2009(I), p. 73; Pauwelyn, 2003, p. 272.
\textsuperscript{90} De Wet & Vidmar, 2013, p. 197.
\textsuperscript{91} Article 103 UN Charter will be examined further below.
6.3. The Special Features of International Law

Pauwelyn claims that norms of international law can only interact with each other in two ways: they either accumulate or conflict. This should be true for domestic legal systems as well. In international law, however, it seems that conflicts are more likely to occur than in domestic legal systems – some even contend that “normative conflict is endemic to international law”. The reasons for this are closely linked to the special features of international law, and how it differs from domestic legal systems.

International law is a system lacking a centralized legislator, executive and court system. Norms are created by states, and because states are sovereign equals, the norms are of equal value. There is, in general, no hierarchy. Norms in international law are often aimed at specialized areas (e.g. human rights), and created as autonomous and separate rule systems, leading to “regimes” which are “tailored to the needs and interests of each network but rarely take account of the outside world”. There is a lack of co-ordination between different groups of “sovereign equals” in the creation of norms.

The lack of a centralized court system with “general and compulsory jurisdiction” further means that it is hard to co-ordinate the norms in retrospect. The existence of different non-centralized courts with different jurisdictions even raises the possibility of more conflict, between the findings of those courts when their jurisdictions overlap. Further, some courts which, such as the ECtHR, have the role of keeping the norm system under their jurisdiction a “living document”, may cause the meaning of the norms of that system to change over time, so that accumulation suddenly turns into conflict.

The fact that states give up part of their sovereignty in favour of co-operation in international organisations is also a contributing factor, since states may then be forced to accept norms which they did not specifically agree to, if that organisation creates binding norms on a continuing basis and without the need for consensus. It is expected

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96 Miko, 2013, p. 1363; ILC Fragmentation Report, paras. 7-8 and 482.
97 ILC Fragmentation Report, para. 482.
100 See chapter 4 above.
that the more globalized our world becomes, the more states need to co-operate to tackle problems which stretch beyond their borders.\footnote{Pauwelyn, 2003, p. 19-20.}

In sum, norm conflicts in international law are likely to occur because of a fragmentation inherent to that system. That does not, however, mean that the system should or even could be changed so that norm conflicts are completely avoided. Norm conflicts are, in fact, to some degree existing in all legal systems.\footnote{ILC Fragmentation Report, para. 26; Pauwelyn, 2003, p. 12.} The problem occurs if they are not solved, or if they are unsatisfactorily solved. If a genuine norm conflict is left unresolved, the state in question may find itself in a situation where it has to disregard one of the norms, with the risk of consequences.\footnote{E.g. legal costs, see Milanovic, 2009(I), p. 73-74.} A high frequency of norm conflicts which are not resolved could further cause lack of predictability and legal uncertainty, which ultimately could damage the authority of international law.\footnote{Hafner, 2004, p. 856-858.}

There are, however, positive things about the system and its nature, for example that it makes it more likely for states to want to co-operate in areas which they consider important, and subsequently for them to actually act in accordance with the norms they have created.\footnote{Pauwelyn, 2003, p. 13; Hafner, 2004, p. 859.} The special features of international law have, in sum, both positive and negative sides.

To completely unify international law in order to avoid norm conflicts seems unlikely, due to there being so many different actors with different agendas which are in no hierarchical relationship to each other. There is simply no support for a world-wide legislator which is above all other. Such a change would further possibly endanger the positive effects of the current order. One should, instead, try to reduce the negative effects of the fragmentation of international law by reducing the fragmentation in specific situations. For norm conflicts, this means the providing of useful techniques for solving them in a way which minimizes the consequences of their existence – for example by making it possible for states to honor all the relevant norms simultaneously, if possible. Chapter 8 will examine the different approaches judicial bodies can take in solving norm conflicts in international law, by examining the accepted techniques and principles of international law on that matter.
7 UNSC Resolutions and the ECHR: The Risk of Conflict

7.1. Introduction
While the last chapter discussed why norm conflicts are likely to occur in international law in general, this chapter focuses on the specific conflict which may occur between obligations created by the UNSC and obligations of the Convention, and discusses why that specific conflict is likely to occur. Of specific interest will be a few recent changes to those two orders which may have caused the risk of norm conflict to increase. Recent case law of the Court has made the Convention applicable in situations that earlier might have been considered to fall outside of the scope of the Convention’s jurisdiction. Further, there seems to have been a change in the Security Council’s use of resolutions.

7.2. Human Rights and Norm Conflicts in General
In 2012, De Wet and Vidmar conducted a survey of databases consisting of judicial decisions and found that the cases which so far had generated the most jurisprudence in the area of international norm conflicts were those in which the judicial bodies had to balance human rights obligations against other norms in international law. The findings included, but was not exclusively limited to, conflicts with obligations in the area of international peace and security. This does not mean that these are the most common conflicts to occur overall, since other conflicts might be solved outside of the court systems, but it does indicate that conflicts between human rights obligations and other obligations raise issues that are hard to solve or that it at least is not obvious how they should be solved. This could mean that it is likely for obligations under the Convention to come into conflict with other obligations of states, such as those based on UNSC resolutions, which are tricky to solve.

7.3. The Application of the ECHR

7.3.1. Introduction
In order for norm conflicts to occur between the obligations of the Convention and obligations based on UNSC resolutions, the Convention must first of all be applicable to the situation. If it is not, the conflict is avoided before it has even occurred. As was mentioned above, Article 1 of the Convention is decisive for when it is applicable (i.e.,

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107 Ibid.
when the state has an obligation under it). Two important issues discussed by the Court under that article are important for this thesis. First, it has previously been unclear whether the Convention is applicable also in territories which are not within the borders of the Convention states. Second, there has been some insecurity concerning the attribution of acts when Convention states act on mandate by the UN. The Court’s stand on these two issues, as well as their role in norm conflicts, will be examined below.

7.3.2. Territorial Jurisdiction (ratione loci)

It has, for a long time, been established that Convention states can be responsible for acts outside their own territories, but inside the territory of another Convention state. This was established in the case of Loizidou\textsuperscript{108}, and confirmed in later cases.\textsuperscript{109} What has not been entirely clear though is whether states can be responsible under the Convention also for acts in territories which are outside the borders of the Convention’s legal space (i.e., outside the borders of all Convention states). The Court’s traditional view has been that the Convention is a “constitutional instrument of European public order”.\textsuperscript{110} In \textit{Bankovic}\textsuperscript{111}, the Court seemed to understand that as being a limitation of the Convention’s applicability. The Court stated that “[t]he Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States”.\textsuperscript{112} Such an understanding of the applicability of the Convention would have meant that states had no obligation under the Convention when they acted outside of the “European legal space”, e.g. in peace and security operations in third countries. It would have limited the protection scope of the Convention, but also avoided some norm conflicts between it and obligations under the UN Charter.

Ten years later, in the case of \textit{Al-Skeini}, the Court clarified that the findings of those earlier cases did “not imply, \textit{a contrario}, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States”\textsuperscript{113}. They claimed that the Court had never made such an restriction in their case law, and listed several cases for support.\textsuperscript{114} This meant that a limitation to the responsibilities of Convention states depending on where they acted, was now definitely

\begin{itemize}
  \item \textit{Loizidou}, para. 62.
  \item \textit{Loizidou}, para. 75.
  \item \textit{Bankovic and Others v. Belgium and Others} (cited in this thesis as “\textit{Bankovic}”).
  \item \textit{Al-Skeini and Others v. the United Kingdom} (cited in this thesis as “\textit{Al-Skeini}”), para. 142.
  \item \textit{See \textit{Al-Skeini}}, para. 142; \textit{e.g. Öcalan v. Turkey} and \textit{Issa v. Others} were mentioned.
\end{itemize}
rejected. It further meant that the area of possible conflict between obligations under the Convention and obligations under UNSC resolutions grew, since resolutions authorizing peace and security operations often includes actions in territories not within the European legal space. It should however be noted that UNSC resolutions, of course, do not exclusively relate to actions outside of the European legal space. Actions based on obligations under such resolutions are also to be taken within the borders of the Convention states, e.g. freezing of assets.\(^\text{115}\)

It is further important to note that extraterritorial application of the Convention is limited to situations where the state has a certain degree of control. The Court has found that extraterritorial jurisdiction may occur in situations of “state agent authority and control” or where there is “effective control over an area.”\(^\text{116}\)

7.3.3. Personal Jurisdiction (ratione personae)

The obligation in Article 1 of the Convention only applies to the “High Contracting Parties”. This means that the Convention creates no obligations for others than those parties. It further means that the Court is unable to examine a case where the act which is claimed to be in violation of the Convention is not attributable to a state party, e.g. because it is exclusively attributable to someone else, such as the United Nations.

That was the outcome of the Court’s admissibility decision Behrami and Saramati\(^\text{117}\), in which the Court found that they lacked jurisdiction ratione personae to review the alleged violations. The case concerned actions in Kosovo based on a UNSC resolution. During the time of the alleged violations, the local authorities in Kosovo did not control the territory. Instead, international civil and security presences had been deployed in the area.\(^\text{118}\) The question was whether, as the applicants claimed,\(^\text{119}\) the alleged violations were attributable to the states which acted on the UNSC resolution, or to the UN as such which had mandated the operations through the resolution. The Court found that where action was taken by a subsidiary organ to the UN,\(^\text{120}\) or where the UNSC

\(^{115}\) This was the background of the cases Al-Dulimi and Sayadi and Vinck which will be examined below.\(^{116}\) Schabas, 2015, p. 101-103; one or both forms are discussed in, e.g., Öcalan v. Turkey, Issa and Others v. Turkey, Loizidou and Al-Skeini.\(^{117}\) Behrami and Saramati v. France and Others (Cited in this thesis as “Behrami and Saramati”).\(^{118}\) Behrami and Saramati, para. 69.\(^{119}\) Behrami and Saramati, para. 74.\(^{120}\) Behrami and Saramati, para. 142-143.
“retained ultimate authority and control so that operational command only was delegated”, the actions were attributable to the UN solely. The Court has received much critique for their findings in Behrami. Some of the critique claims that the Court’s decision is legally flawed. For example because the attribution issue was decided based on “ultimate authority and control” rather than “effective control”, even though there is wide support in favour of the latter being the decisive factor. The Court has further received critique for not considering dual or multiple attribution. After finding that the acts were attributable to the UN, the Court automatically assumed that it meant that the acts could not be attributable to anyone else, e.g. the states. There does not seem to be support for such an approach.

These claimed flaws led to widespread worry about the effects of the Court’s decision. De Wet raised the problem of an “accountability vacuum” due to states not being held responsible in such cases, and the UN at the same time being unlikely to accept responsibility. Breitegger considered the Court’s decision to have caused the Convention to no longer be “an effective remedy for individuals complaining of alleged violations of their individual rights through the activities of peace support operations”. Mujezinovic Larsen concluded that “one possible consequence […] is that the Court has now removed participation in international peace operations from the list of practical scenarios for extraterritorial effect”. It was therefore much appreciated when the Court, in the case of Al-Jedda, tried to make things right. The Court, regarding the question of attribution, made an effort to distinguish the case before them from Behrami and Saramati, for example by stating that when the states in Al-Jedda entered Iraq, they did so without support from the UNSC, and that when those states became occupying powers and sought the support of the UNSC, there was never any delegation of powers from the UNSC to them. The

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121 Behrami and Saramati, para 133, 140-141.
122 Behrami and Saramati, para. 140-141.
123 See e.g. ILC Draft Articles on the Responsibility of International Organisations, art. 7; Breitegger, 2009, p. 158-159, 165-166; De Wet in Wolfrum & Deutsch, 2009, p. 21; Mujezinovic Larsen, 2008, p. 517.
124 See e.g. Mujezinovic Larsen, 2008, p. 517; Breitegger, 2009, p. 160;
125 De Wet in Wolfrum & Deutsch, 2009, p. 21; this view is also supported by a 2007 publication of the Human Rights Watch.
128 Al-Jedda v. the United Kingdom (cited in this thesis as “Al-Jedda”).
129 The facts of this case will be explained further below. Here, it is only examined to the extent it relates to the issue of attribution.
130 Al-Jedda, para. 77.
Court’s findings on the attribution issue were, at least partly, decided with an “effective control” approach. In addition, they opened up for the possibility of dual or multiple attribution.

Exclusive attribution to the UN excludes the Convention and the Court from jurisdiction, which further excludes the possibility of norm conflicts between obligations under the Convention versus the UN Charter – one could say that the possible “conflict” is solved in favour of the UN before an actual review of the existence of a conflict. Dual or multiple attribution, on the other hand, would mean that acts can be attributed to both the UN and one or several Convention states. This further means that the Convention may be considered applicable in more situations than before. Because of this, there is now a higher risk of actual conflicts between obligations under the Convention and those based on the UN Charter, where states act on UNSC resolutions.

7.4. The Use of Sanctions by the UNSC

7.4.1. Introduction

Just as there can be no conflict if the Convention does not apply in a situation, there can of course be no conflict if there is no UNSC resolution which creates an obligation. It does not seem like the number of UNSC resolutions as such are increasing or decreasing in any large amounts, the number has gone slightly up and down during the years. It has, however, been suggested that there might have been a change in how UNSC resolutions are used. This, and how it relates to conflicts with the Convention, will be discussed here.

7.4.2. Targeted Sanctions

Under Article 41 of the UN Charter, the Security Council has the power to use sanctions as a tool to maintain international peace and security. Sanctions do not include the use of force, and for this reason they provide an attractive alternative to enforcement actions including use of force, whenever such actions can be avoided. Sanctions can range from broad economic or trade sanctions against a state, to targeted sanctions such as travel

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131 Al-Jedda, para. 84.
134 Cameron, 2003, p. 174-175.
bans against specific individuals, \(^{135}\) and states are put under an obligation to carry them out.\(^{136}\)

The idea behind targeted sanctions is that certain individuals or entities have a strong connection to practice that the UN wishes to stop (ultimately practice that threatens international peace and security), e.g. terrorism.\(^{137}\) By making it harder for certain individuals or entities to contribute to the action, monetarily or physically, the action as such is hindered. Since broad sanctions may be harmful to the innocent population of states that have sanctions directed against them, targeted sanctions have been considered better in that they “limit the collateral impact” of broad sanctions.\(^{138}\) Targeted sanctions have also been considered to better address issues such as terrorism, since such issues are to a less extent bound to a specific state or government.\(^{139}\) However, sanctions targeting individuals are more likely to raise issues regarding human rights of the individuals on which those sanctions are imposed. Having one’s name put on a “blacklist” and assets frozen may, for example, raise issues with the right to property and the right to respect for private and family life.\(^{140}\) Travel bans may raise issues regarding the freedom of movement.\(^{141}\) All kinds of targeted sanctions may raise issues with the right of access to court and the right to effective remedies, if the imposed sanction cannot be appealed against in a sufficient way.\(^{142}\) It is therefore clear that UNSC sanctions that target individuals may cause clashes with human rights protection instruments, such as the ECHR, if the sanction regimes do not successfully set up safeguards for human rights protection of the individuals targeted. European states implementing those sanctions might therefore have issues with conflicts between their obligations under the UN Charter and the ECHR.

A “qualitative change” in the use of sanctions by the UNSC has been noted, meaning that the UNSC has shifted their sanctions’ focus from states to individuals or entities.\(^{143}\) It started in the late 1990s with sanctions towards individuals with certain ties to states or territories, and was later followed by sanctions towards individuals due to

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\(^{136}\) Article 25 UN Charter and chapter 5 above.

\(^{137}\) Cameron, 2003, p. 170-171.


\(^{140}\) *Ibid*, p. 103.

\(^{141}\) Cameron, 2003, p. 167.

\(^{142}\) *Ibid*.

\(^{143}\) Keller & Fischer, 2009, p. 257; Cameron, 2003, p. 159.
certain connections with non-state entities as well.\textsuperscript{144} An example of a targeted sanction aimed at individuals with connections to non-state entities is the sanctions regime aimed at individuals believed to have ties to the terrorist network Al-Qaeda, who are put on a list and, for example, have their assets frozen.\textsuperscript{145}

An increased use of this type of sanctions would mean that there is a greater risk of conflict between UNSC resolutions (in this case targeted sanctions) and human rights instruments, such as the ECHR. As we will see below in the examination of cases, targeted sanctions occur in several of the cases regarding norm conflicts with the ECHR, proving that the changed use of targeted sanctions no doubt has led to an increased risk of possible conflicts with the ECHR.

8 Techniques and Principles for Solving Norm Conflicts

8.1. Introduction

The focus of this chapter is techniques for norm conflict solution in retrospect, i.e. when both norms already exist. In some situations, it might be possible to avoid conflicts before the norms are created, e.g. by states co-ordinating their obligations so that they accumulate.\textsuperscript{146} However, because of the large amount of norms in international law, as well as the amount of different groups by which norms are created, it is inevitable that at least some conflicts will occur. When they do, techniques for solving them are needed, especially for judicial bodies. Those techniques, if used correctly and similarly by all judicial bodies, can increase predictability and legal certainty in an otherwise fragmented system.

8.2. Two Types of Techniques: Avoidance and Proper Resolution

When a norm conflict occurs, there are different ways for judicial bodies to deal with them. Milanovic makes a difference between conflict avoidance on one hand, and conflict resolution on the other.\textsuperscript{147} He claims that a norm conflict is not truly resolved unless “the state bears no legal cost for disregarding one of its commitments in favor of another”.\textsuperscript{148} However, this statement is true also in situations of conflict avoidance, since where there

\textsuperscript{144} Cameron, 2003, p. 163-164.
\textsuperscript{145} Ibid, p. 160.
\textsuperscript{146} Pauwelyn, 2003, p. 237.
\textsuperscript{147} Milanovic, 2009(I), p. 73.
\textsuperscript{148} Ibid, p. 73-74.
is no conflict there is no legal cost for the state to ignore the obligation which has been removed from the picture by, for example, interpretation techniques – at least if it has been done correctly. But what Milanovic seems to mean is that there is a difference between situations where judicial bodies avoid the conflict by different techniques, and where they face the conflict head on and solve it once and for all.

Of these two mentioned techniques, conflict avoidance appears more attractive since it can be used more flexibly and avoid the problem. However, for those who are faced with norm conflicts in practice, e.g. states with conflicting obligations, decisions which actually solve the conflict once and for all are probably better since that clarifies the correct course of action for the future.

According to Milanovic, conflict avoidance techniques are not available when it comes to genuine conflicts. In those cases, techniques for proper resolution are necessary. Otherwise, the conflict is left unresolved. What will become clear in the examination of cases below though, is that what might be considered a genuine conflict by one court, e.g. a national court, might not be considered as such by another court, e.g. the ECtHR.

### 8.3. Conflict Avoidance

Conflict avoidance is when the norms are interpreted in a way that makes them compatible, so that the conflict is erased. The Vienna Convention on the Law of Treaties (VCLT), which partly is considered to reflect customary international law, has several rules on how to interpret treaties. One of them is expressed in Article 31(3)(c), and states that a treaty shall be interpreted by taking into account “any relevant rules of international law applicable in the relations between the parties”. This has been called the principle of systemic interpretation, and it means that the “normative environment” of a treaty should be taken into account. It seems that this principle, although rarely referred to, is often used in situations of norm conflict solution by judicial bodies.

Closely linked to the principle of systemic integration is the presumption of compatibility, which means that when taking into account the “normative environment”,

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149 Milanovic, 2009(I), p. 73; see also Pauwelyn, 2003, p. 272.
151 E.g. Art. 31 and 32 VCLT, see ILC Fragmentation Report, para. 427.
153 De Wet & Vidmar, 2013, p. 210; though it was actually referred to in, for example, Al-Adsani v. The United Kingdom (ECtHR), para. 55, and Oil Platforms Case (ICJ), para. 41.
one should assume that parties do not want to create contradictory norms.\textsuperscript{154} By using these techniques, norm conflicts will only continue to exist if the different norms cannot be interpreted as non-conflicting; i.e., only if they are genuine.\textsuperscript{155}

Paulus and Leiss have suggested that interpretation techniques which serve to avoid norm conflicts should be applied differently depending on the type of norms in conflict. They contend that when treaties that do not serve “community interests” (e.g. human rights protection) come into conflict with primary UN Charter law, it shall be presumed that the treaty intends to be compatible with the Charter and not the other way around. If the treaty protects “community interests” though, it must be noted that the Charter also protects some of those interests and the interpretation must be done accordingly, regardless of whether the conflict includes primary or secondary Charter law (e.g. UNSC resolutions).\textsuperscript{156} This means, at least for secondary Charter law, that it should be interpreted under the presumption that it wants to be compatible with the “community interest” protecting treaty, unless the contrary has been expressed (so that the presumption is rebutted).\textsuperscript{157} How clear such an expression must be is however not further explained, and in reviewing the case law of the ECtHR below it becomes obvious that the approach is problematic.

In conflict avoidance, none of the norms prevail over or abrogate the other. This type of conflict solution is therefore attractive, since it lets both norms continue to exist and “fully” work, which must be the best solution in many situations. However, if these techniques of interpretation are used in situations where there actually is little or no room for interpreting away the conflict, e.g. when there is a genuine conflict, that use is not only incorrect but also highly problematic. It could harm the norms in question by limiting their scope in a way which the interpreter might not have power to do, and cause insecurity or lack of predictability regarding the meaning and scope of the norms. In situations of genuine conflicts, tools for proper resolution needs to be used for a correct outcome.

\textsuperscript{154} Paulus & Leiss, 2012, p. 2118-2119.
\textsuperscript{155} Pauwelyn, 2003, p. 272.
\textsuperscript{156} Paulus & Leiss, 2012, p. 2120; see e.g. the purposes and principles of the UN Charter set out in its Article 1 and 2.
\textsuperscript{157} Paulus & Leiss, 2012, p. 2120.
8.4. Proper Resolution

8.4.1. Introduction

As mentioned above, resolution is when one of the norms “prevail or have priority over another”. This is, for example, the case when there is a hierarchy between the norms, but also in other situations where there are clear rules for which obligation should trump the other. The problem in international law, though, is that there in general is no hierarchy between the norms which end up being in conflict with each other. There are, however, some exceptions to this lack of hierarchy. This section will start by outlining those different rules which may be used to solve a genuine norm conflict, either by being hierarchical or by otherwise trumping the other norm, while eventually zooming in on the most relevant rule for this thesis.

8.4.2. Resolution in the VCLT and Customary International Law

Except for the principle of systemic interpretation, mentioned above, the VCLT contains several other principles for interpretation which might prove useful in solving norm conflicts. There are also some rules which are not in the VCLT but which are still considered customary international law. One could consider these to be rules of conflict avoidance, since they are related to the interpretation of norms, but they are also rules of proper resolution since they in specific cases provide a system resembling a hierarchy between conflicting norms.

The relevant provisions of the principle of lex posterior are found in Articles 30(2), 30(3) and 30(4)(a) of the VCLT and state that if a later treaty is concluded between the same parties, that shall prevail over an earlier, and the earlier can only function to the extent that it does not come into conflict with the latter. The principle of lex specialis is considered customary international law but not found in the VCLT. This principle solves conflicts in favour of the more specialized norm.

The principles of lex posterior and lex specialis have, however, been called “unlikely to be of relevance” in situations of norm conflicts in international law. This is explained by the fact that a situation where lex posterior might occur is unlikely to at

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158 Milanovic, 2009(I), p. 73.
159 Ibid, p. 74.
160 See the relevant provisions of Art. 30 VCLT, and commentaries in Paulus & Leiss, 2012, p. 2117-2118.
the same time include an actual norm conflict. The newer norm has simply replaced the older norm. It is further unclear how this principle could be used when two treaties have different parties. *Lex specialis* is unlikely to be useful due to the fact that the conflicting norms usually both are *lex specialis* against each other. In other words, none of them represent *lex generalis*. For these reasons, which I agree with, neither of these two principles are useful in solving norm conflicts between the ECHR and the UN Charter and will therefore not be further examined in this thesis.

8.4.3. Resolution When One Norm is Ius Cogens

The peremptory character of norms that constitute *ius cogens* is stated in the VCLT, but its existence is also widely accepted outside of the VCLT. Norm conflicts in which one of the norms is *ius cogens*, the other norm (to the extent it is in conflict with *ius cogens*) will be void and null. The problem of *ius cogens* is that its exact content is disputed. *Ius cogens* is “a narrow concept”, and it should be, to ensure its credibility and special standing. However, this limits its use in solving norm conflicts. Regarding the ECHR, at least the prohibition on torture is considered *ius cogens*. This does not apply to the full scope and exact wording of Article 3 ECHR though. Further, *ius cogens* is “rarely, if ever [used] to invalidate supposedly conflicting norms”. Finally, it has been considered to be extremely unlikely that a UNSC resolution would ever create an obligation which would violate *ius cogens*. Its importance for this thesis is therefore limited, but nevertheless it is a rule which needed to be mentioned.

8.4.4. Article 103

There seems, so far, to be few rules which are of any actual use in the practice of solving genuine norm conflicts in public international law. There is however one more rule to
examine, which may have the solution to some norm conflicts of public international law – especially those discussed in this thesis. That is the rule found in Article 103 of the UN Charter. This rule will be examined in detail in the following chapter.

9 Article 103 of the United Nations Charter

9.1. Introduction

Article 103 of the UN Charter has been called “the only truly meaningful prospective conflict clause”. It has further been considered one of the central provisions of the Charter, since it sets out its superior character. Article 103 is of great importance for this thesis since it directly relates to situations of conflicts between obligations under the UN Charter, e.g. through UNSC resolutions, and obligations under “any other international agreement”, e.g. the Convention. This is what it states:

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

When reading it a couple of questions immediately arises. First, of course, what are the reasons for and expected use of this article? And second, regarding the text as such, what is meant by “obligations […] under the present Charter” and “obligations under any other international agreement”, and what does it mean that the first shall “prevail” over the latter? Third, what is the scope and limitations of the article? These questions will be examined in this chapter.

9.2. The Reasons for the Rule

Against the background painted further above, where it was concluded that international law is a fragmented system where norm conflicts are likely to occur, one may ask if some norms or norm systems are more worth protecting than others so that any possible conflict is solved in their favour. According to the International Law Commission (ILC), that is the case: “some norms are more important than other norms and […] in case of conflict,

174 Milanovic, 2009(I), p. 76.
176 Art. 103 UN Charter.
those important norms should be given effect to".\textsuperscript{177} The ILC has further contended, regarding the UN, that already during the drafting of the Charter there was a “general understanding” that Charter obligations deserved extra protection against other obligations.\textsuperscript{178} There seems to be widespread support for the idea that the UN and specifically the UN Charter protects values that are fundamental for world order. The broad geographical application of the Charter, its many members, and the width of areas that the organisation covers, supports that view.

The existence of Article 103 becomes even more understandable when put in the context in which the UN was created and its purposes. To efficiently maintain international peace and security the UN Charter provides for several forms of intervention when there is a threat to peace.\textsuperscript{179} The efficiency of the UN’s purpose would be threatened if states were hindered from acting on an UN obligation to, for example, implement trade sanctions against a state, because of a trade treaty with that state. Article 103 provides a solution to this problem.

\textbf{9.3. The Scope of Article 103}

\textit{9.3.1. Relationship to Other Solution Principles}

Article 103 has been described as a rule of “last resort”, which should only be applied when no other solutions have proven efficient.\textsuperscript{180} For example if there is a genuine norm conflict so that interpretation techniques are insufficient and unavailable, and no other rules for proper resolution applies. Article 103 will set aside the principle of \textit{lex specialis} if the specialized norm is not compatible with an obligation under the Charter.\textsuperscript{181} It will further set aside the principle of \textit{lex posterior} if the norm otherwise given preference is not compatible with an obligation under the Charter.\textsuperscript{182} It will not, however, set aside priority given to norms which are \textit{ius cogens}, but as mentioned above it is highly unlikely that an obligation under the UN Charter would be in conflict with \textit{ius cogens}.\textsuperscript{183} In the case of such incompatibility, it would most likely be interpreted away.\textsuperscript{184}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{177} ILC Fragmentation Report, para. 327.
\item\textsuperscript{178} Ibid, para. 329.
\item\textsuperscript{179} Ultimately, Chapter VII of the UN Charter provides legitimacy for strong actions.
\item\textsuperscript{180} Paulus & Leiss, 2012, p. 2114 and p. 2120.
\item\textsuperscript{181} Ibid, p. 2117.
\item\textsuperscript{182} Article 30(1) VCLT; see also Paulus & Leiss., 2012, p. 2118.
\item\textsuperscript{183} Paulus & Leiss, 2012, p. 2119-2120.
\item\textsuperscript{184} Ibid, p. 2121.
\end{enumerate}
\end{footnotesize}
9.3.2. “Obligations”

Article 103 only applies to conflicts between obligations, under the Charter on one hand and some other international agreement on the other hand. This does not merely include obligations that are found directly in the Charter, but also to decisions by Charter bodies, e.g. the Security Council. As mentioned above in chapter 5, Article 25 of the Charter provides an explicit obligation for the member states to carry out decisions of the UNSC. It is therefore clear that obligations created through UNSC decisions are covered by Article 103.

There has been a discussion about whether Article 103 also includes permissions, e.g. rights, or just obligations. We have already established that this thesis has a broad understanding of “conflict” which includes also permissions. But in relation to Article 103 we cannot answer the question by stating what the general understanding of a conflict is, since Article 103 expressly says “conflict between [...] obligations”. The wording as such therefore seems to exclude the possibility of including permissions. One could, however, discuss what an obligation under the UN Charter is. This question is specifically interesting in relation to “authorizations” by the UNSC, since that term is usually used when the UNSC acts under Chapter VII of the Charter in a way which includes the use of force. The literal meaning of authorization can hardly be understood as putting anyone under an obligation, but it seems better suited to have a more systematic and teleological approach to the concept. Excluding authorizations from the scope of Article 25 and 103 would mean that at least some important UNSC resolutions would not be covered. This further means that the efficiency of the UNSC is at risk, since states might not be willing to act on UNSC authorization if it puts them at risk of being in violation of their other international obligations. Further, one needs to view the question in light of what powers the UNSC were expected to have versus those they actually have. Liivoja explains: “in the absence of standing forces at the disposal of the organisation – as was originally contemplated by Article 43 of the Charter – the Security Council could ‘do little more than give its authorization’ to a State for conducting military operations”.

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186 Therefore, the discussion by Paulus & Leiss, 2012, p. 2122 is partly incorrect; see on this matter Mujezinovic Larsen, 2012, p. 319-320.
188 Ibid., p. 2123; Mujezinovic Larsen, 2012, p. 320; Kitharidis, 2016, p. 117.
The purpose and importance of Article 103 should not be disregarded because the UNSC developed differently than it was expected to. At least, a state should be considered to be under an obligation when it has started acting based on an authorization.\textsuperscript{190} In the \textit{Namibia} case, the International Court of Justice (ICJ) stated that “[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect” and that in finding whether a certain decision of the UNSC should be considered to fall under Article 25 of the Charter, the circumstances of the specific decision should be reviewed.\textsuperscript{191} This would support the view that at least some “authorizations” can be viewed as binding decisions of the UNSC, and therefore “obligations” under Article 103.

\textbf{9.3.3. Limitations}

It seems widely accepted that decisions by the UNSC which are \textit{ultra vires} should not be valid, thereby not successfully establishing any obligations for states, and subsequently causing Article 103 to not be applicable to the situation.\textsuperscript{192} However, what exactly constitutes a decision \textit{ultra vires} is not as clear. There seems to be agreement that decisions which violate \textit{ius cogens} are \textit{ultra vires},\textsuperscript{193} but this view is complicated by the fact mentioned above – that the exact content of \textit{ius cogens} is unclear, and by the fact that this approach seems to be “more theoretical than real”.\textsuperscript{194} Further, it has been contended by some authors that the UNSC in their decisions have to respect certain human rights, and that lack of such respect would make the decision \textit{ultra vires}.\textsuperscript{195} The rationale behind that argument follows from Article 24(2) of the Charter, which says that the UNSC “shall act in accordance with the Purposes and Principles of the United Nations”, which includes human rights respect according to Article 1(3) of the Charter. This understanding of those provisions does not however seem to be widely accepted. Also, it is unclear exactly which rights it would include and what definition of those.\textsuperscript{196}

For these reasons, there is too much uncertainty to what exactly the \textit{ultra vires} limitation includes to state any specific conclusions at this point. The discussion will, however, be continued in chapter 12 below.

\begin{footnotesize}
\footnote{\textsuperscript{190} Liivoja, 2008, p. 587.}
\footnote{\textsuperscript{191} \textit{Namibia} (ICJ), para. 114.}
\footnote{\textsuperscript{192} Mujezinovic Larsen, 2012, p. 323; ILC Fragmentation Report, para. 331; Kitharidis, 2016, p. 122-123.}
\footnote{\textsuperscript{194} Wood, 2008, p. 160.}
\footnote{\textsuperscript{195} This seems to be the approach of Akande, 1997, p. 323 and De Wet, 2004, p. 193.}
\footnote{\textsuperscript{196} Kitharidis, 2016, p. 124-125; Akande, 1997, p. 323.}
\end{footnotesize}
9.4. The Effect of Article 103 Application

Article 103 states that obligations under the UN Charter shall “prevail”. The prevailing effect is source-based rather than substantive, since it is the source of the obligation which gives it its primacy.\textsuperscript{197} However, it could also be viewed as value-based, since its function is to enforce the values and principles of the UN Charter.\textsuperscript{198} That Charter obligations “prevail” does not mean that the other norm is invalid, but merely that it is inapplicable to the extent it conflicts with the Charter obligation.\textsuperscript{199} There is nothing in the wording of Article 103 that suggests that the effect of it goes further than that, e.g. by nullifying or voiding the other norm.\textsuperscript{200} That limitation of its effects strengthens both the UN Charter as such, and the international system as a whole. Judicial bodies might be more willing to award primacy if it does not mean invalidation of other norms of importance. It would further be problematic if whole treaties were invalidated indefinitely because of a conflict with, for example, a UNSC resolution which may only apply for a short period of time. By simply applying Article 103 to the specific conflicting part of a norm, the rest of that agreement and the international system can continue to work.

The effect for a human rights treaty, such as the ECHR, is then that if there is a genuine conflict between the obligations of the Convention and an obligation of the Charter, e.g. through a UNSC resolution, the ECHR obligation will be inapplicable to the extent that it conflicts with the UN Charter obligation. Since Article 103 is binding, the state is obligated to not apply the other obligation to the extent it conflicts with the Charter obligation, and the state suffers no legal costs for disregarding that other obligation.\textsuperscript{201}

10 Case Law on Norm Conflicts

10.1. Introduction

The purpose of this chapter is to review case law of the ECtHR to see in which situations norm conflicts between obligations under the Convention and UNSC resolutions have occurred, and how the Court has solved those specific conflicts. Further, this chapter will examine three cases of national courts, as well as two cases of two other judicial bodies,

\textsuperscript{197} De Wet & Vidmar, 2013, p. 206.
\textsuperscript{198} Ibid.
\textsuperscript{200} ILC Fragmentation Report, para. 334.
\textsuperscript{201} Milanovic, 2009(I), p. 76-77.
which also deal with norm conflicts between human rights obligations and obligations under UNSC resolutions. Those cases are provided as examples of approaches of other judicial bodies, for comparison, and will be useful later in the thesis when discussing if the Court could and should have had a different approach. The chapter will end with a summary of the approaches of the different judicial bodies, related to the techniques, principles and rules set out in chapter 8 and 9, to see if any of these, and if so which, were applied in the specific cases.

10.2. Case Law of the ECtHR

10.2.1. Detention in Iraq: Al-Jedda v. The United Kingdom (2011)\textsuperscript{202}
In the case of Al-Jedda, an Iraqi/British national, Mr. Al-Jedda, had been detained by British troops in Iraq – where the United Kingdom (UK) and some other states were occupying powers at that time. The occupation was followed by a number of UNSC resolution based partly on Chapter VII of the UN Charter. The detention of Mr. Al-Jedda was conducted on the basis that it was “necessary for imperative reasons of security”, but no criminal charges were ever brought against him.\textsuperscript{203} All decisions regarding the detainment were taken by British nationals of the Multinational Forces, occasionally together with Iraqi representatives. Mr. Al-Jedda claimed that the detainment violated certain of his rights under the Convention. Since the British courts had found no violation of his rights due to the application of Article 103 to the case,\textsuperscript{204} Mr. Al-Jedda turned to the ECtHR with his claim.

The case of Al-Jedda was briefly mentioned further above, regarding the attribution of acts. The Courts’ handling of that matter will therefore be excluded here. Since the acts in question were attributable to the UK, the question of possible norm conflict between the Convention obligations and UN Charter obligations arose.

It seemed quite clear that if the Convention were to be fully applied there would be a violation of certain of the rights of it,\textsuperscript{205} meaning that the UK had breached their obligation of the Convention to “secure” those rights. The question arose, therefore, whether there was a conflicting obligation under the UN Charter, through a UNSC resolution, which activated Article 103 of the Charter and displaced the Convention obligation for the UK. UNSC Resolution 1546 (2004) was one of the resolutions

\textsuperscript{202} Cited in this thesis as “Al-Jedda”.
\textsuperscript{203} Al-Jedda, para. 11.
\textsuperscript{204} The case before the House of Lords will be examined in more detail further below.
\textsuperscript{205} Al-Jedda, para. 97-100.
following the occupation of Iraq. The Court considered that they first had to interpret that resolution, to see whether the UK were placed under an obligation to hold the applicant in internment, which could mean that there was a conflict of obligations which could activate Article 103. The Court found that there must be a presumption that the UNSC “does not intend to impose any obligation on member States to breach fundamental principles of human rights”, basically meaning that if there is room to interpret the UNSC resolution as in harmony with the Convention, that is the interpretation they should choose. Such an interpretation would, however, not be possible if the UNSC had in “clear and explicit language” stated that they did not intend their measures to respect international human rights. The Court found that the language of Resolution 1546 gave the occupying powers “authority to take all necessary measures […] in accordance with the letters annexed”, with those letters mentioning internment for “imperative reasons of security”. That did, however, according to the Court, not indicate that the UK had any obligation to exercise powers of internment in a way that would violate the Convention. The “choice of the means to achieve [that] end” was left to the occupying powers. Therefore, according to the Court, there was no obligation under the UNSC resolution which conflicted with the obligations of the Convention, and Article 103 never applied. Instead, the UK’s obligation under the Convention fully applied, and they could therefore be held responsible for breaching that obligation in relation to the applicant.

10.2.2. Travel Ban: Nada v. Switzerland (2012)

This case arose after an application to the Court from an Italian national, Mr. Nada, who had been unable to leave the territory of the Italian enclave Campione d’Italia due to Switzerland imposing a travel ban on him and denying him travel through Swiss territory. The travel ban had been imposed on him on the basis of UNSC Resolution 1390 (2002) and the Swiss Taliban Ordinance, which was the national implementation of Resolution 1267 (1999), 1333 (2000) and 1390 (2002). All those resolutions regarded targeted

206 Al-Jedda, para. 101.
207 Al-Jedda, para. 102.
208 Al-Jedda, para. 102.
209 Al-Jedda, para. 105.
210 Al-Jedda, para. 103.
211 Al-Jedda, para. 105.
212 Al-Jedda, para. 105.
214 Cited in this thesis as ”Nada”.

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sanctions against individuals with connections to the Taliban, Osama bin Laden or al-Qaeda.\textsuperscript{215} Individuals or entities with such connections were put on a list, and subsequently had their assets frozen and were banned from travelling. The applicant was put on this list in November 2001.\textsuperscript{216} Switzerland therefore imposed sanctions on him. Following the criminal investigations against him being dropped, he applied to be removed from the list and have the sanctions lifted.\textsuperscript{217} In November 2007, the Federal Court of Switzerland denied his request.\textsuperscript{218} His name was not deleted from the list until September 2009.\textsuperscript{219} Before that, he had applied to the ECtHR, claiming violations of his rights under several articles of the Convention, for example Articles 8 and 13.

The Court had before them a possible case of norm conflict, since the Swiss government claimed that they had an obligation to impose the sanctions upon Mr. Nada because of him being on the UNSC’s list, while the applicant claimed that such action meant that Switzerland violated rights which they were obligated to grant him under the Convention.

The Court first reviewed the applicant’s claim that Article 8 ECHR (right to private and family life) had been violated, and confirmed the presumption set out in Al-Jedda, i.e. that the UNSC must be presumed to not have intended obligations on member states to “breach fundamental principles of human rights”.\textsuperscript{220} That presumption was, however, rebutted in this case, because the UNSC were considered to have used such “clear and explicit language” which created an obligation which was capable of breaching human rights – they had even expressed that any other international obligations should be set aside in favour of the relevant resolutions.\textsuperscript{221} In other words, it was not obvious that the resolutions could be interpreted as not creating any obligations on states to violate human rights. Even though that presumption was rebutted, the Court still found that there was some room, “limited but nevertheless real”, for Switzerland in how they implemented the UNSC resolution.\textsuperscript{222} They could, according to the Court, have acted in a way that did not violate or breach their obligation under the Convention in relation to Article 8, nor their obligations of the UNSC resolution. By failing to use that possibility to take into account

\begin{footnotes}
\item[215] Nada, paras. 15-22.
\item[216] Nada, para. 21.
\item[217] Nada, paras. 28-29.
\item[218] The decision of the Federal Court of Switzerland will be examined further below.
\item[219] Nada, para. 62.
\item[220] Nada, paras. 171-172.
\item[221] Nada, para. 172.
\item[222] Nada, para. 180.
\end{footnotes}
the specific situation of the applicant, the Swiss authorities had violated his right under Article 8 of the Convention.\textsuperscript{223} Since there was, according to the Court, no genuine conflict between the obligations of the Convention and those of the UNSC resolution, the obligations in relation to Article 8 of the Convention were not displaced – leaving Switzerland fully responsible for the violation of the applicant’s rights.

Regarding Article 13 ECHR (right to an effective remedy), the Court’s arguing took inspiration from the findings of the Court of Justice of the European Union (CJEU) in the case of \textit{Kadi I}\textsuperscript{224}, where that court had found that there was no bar for it to review the “internal lawfulness” of a measure, even if that measure was “intended to give effect to a resolution by [the UNSC]”\textsuperscript{225}. In this case, it meant that Swiss authorities were not barred from reviewing the conformity of the national implementation of the UNSC Resolution (i.e., the Taliban Ordinance) with the Convention.\textsuperscript{226} The Court further stated that Switzerland were not stopped from “introducing mechanisms to verify the measures taken at national level” by anything in the relevant UNSC Resolutions.\textsuperscript{227} Since the applicant did not have any “effective means of obtaining the removal of his name from the list annexed to the Taliban Ordinance”, he had been denied remedy for his arguable claim of Convention violations, and Switzerland had therefore violated his rights under Article 13 ECHR.\textsuperscript{228}

10.2.3. \textit{Freezing of Assets: Al-Dulimi and Montana Management Inc. v. Switzerland (2016)}\textsuperscript{229}

This case originated from an application by Mr. Al-Dulimi and a company which he was the managing director of.\textsuperscript{230} The assets of both applicants had been frozen in Switzerland. This was due to the applicants being put on a list\textsuperscript{231} which led to sanctions against them under UNSC Resolution 1483 (2003), e.g. freezing and confiscation of assets. The resolution had been put in place to return economic resources linked to the Saddam Hussein administration to the Iraqi people. Mr. Al-Dulimi had been the head of finance

\begin{itemize}
\item \textsuperscript{223} \textit{Nada}, paras. 195-198.
\item \textsuperscript{224} That case will be examined in more detail further below.
\item \textsuperscript{225} \textit{Nada}, para. 212.
\item \textsuperscript{226} \textit{Nada}, para. 212.
\item \textsuperscript{227} \textit{Nada}, para. 212.
\item \textsuperscript{228} \textit{Nada}, paras. 213-214.
\item \textsuperscript{229} Cited in this thesis as ”Al-Dulimi”.
\item \textsuperscript{230} \textit{Al-Dulimi}, para. 1.
\item \textsuperscript{231} The listing procedure by the sanctions committee was created under UNSC Resolution 1518 (2003).
\end{itemize}
for the Iraqi secret service under that administration. The Resolution, established under Chapter VII of the Charter, required states to “freeze without delay” economic resources targeted by the Resolution and “immediately” transfer those to a development fund for Iraq. Switzerland imposed the sanctions on the applicants, i.e. froze their assets, relying on the Resolution itself and two national Ordinances with the purpose of implementing the Resolution at the national level. The applicants had appealed against the sanctions imposed on them, with the Federal Court of Switzerland dismissing those appeals. Mr. Al-Dulimi and the company therefore applied to the Court, claiming a violation of their right under Article 6(1) ECHR (right of access to a court).

The Court found that by only examining if the applicants were on the sanctions list and if the assets concerned belonged to them, and refusing to examine the procedure leading to their listing, the Federal Court of Switzerland had not sufficiently fulfilled their obligations under Article 6 ECHR and that right had therefore been limited. The question, then, was whether that limitation was justified. The limitation pursued a legitimate aim: to maintain international peace and security. That is however not enough to find the limitation to be justified, there further needs to be proportionality between that aim and “the means employed to attain it”. When examining the proportionality, the Court takes into account “any relevant rules and principles of international law applicable”, including Article 25 and 103 of the Charter. What the Court basically did was try to figure out what international law (e.g. Article 25 and 103 of the Charter) required Switzerland to do, since actions which are in accordance with those requirements usually cannot be disproportionate. Article 103 of the Charter, however, only applies if there is a norm conflict. The Court therefore had to decide whether there was a conflict or not. In doing so, they interpreted the obligation created by UNSC Resolution 1483 and Article 25 of the Charter. That interpretation aimed for systemic harmonization and led to the presumption set out in Al-Jedda being applied.

The Court did not consider the UNSC to have used such “clear and explicit language” as

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232 *Al-Dulimi*, para. 10.
233 UNSC Resolution 1483 (2003), para. 23; repeated in *Al-Dulimi*, para. 46.
234 *Al-Dulimi*, paras. 2. and 81.
235 *Al-Dulimi*, para. 131.
236 *Al-Dulimi*, para. 133.
237 *Al-Dulimi*, para. 133.
238 *Al-Dulimi*, para. 134-135.
239 *Al-Dulimi*, para. 140.
240 This approach relies on established case law by the Court, see e.g. *Cudak v. Lithuania* para. 57.
241 *Al-Dulimi*, para. 139.
242 *Al-Dulimi*, para. 140.
would have been required for that presumption to be rebutted, and therefore the Court interpreted Resolution 1483 as leaving room for judicial review by the Swiss courts, at least regarding whether the listing was arbitrary.243 The fact that Resolution 1483 required states to “freeze without delay” did not, according to the Court, mean that states were under an obligation to freeze without judicial review regarding the arbitrariness. There was, therefore, no genuine conflict of obligations and since the Swiss Federal Court had not ensured that the listing was not arbitrary, the limitation of Article 6 ECHR was not justified and the Court found a violation of that Article.244 Article 103 of the Charter was therefore never applied to the case.

10.3. Case Law of National Courts

As mentioned above, the case of Mr. Al-Jedda originated from a judicial review claim in the UK. In this section, the case before the House of Lords will be examined. Interestingly enough, the House of Lords came to another conclusion than the ECtHR regarding Article 103. Similar to the Court, they established that the authorization from the UNSC created an obligation under Article 25. The difference lies in how that obligation was understood. Lord Bingham, with whom the majority of the Lords agreed, stated that the UK “did not become specifically bound to detain the appellant in particular” but that they were “bound to exercise [their] power of detention where this was necessary for imperative reasons of security”.246 However, Lord Bingham does not seem to have addressed the question of how that power should be exercised. He merely states that the detention must not infringe the right under Article 5 ECHR “to any greater extent than is inherent in such detention”.247 Lord Baroness touched on that subject though, in stating that it is “not clear” how far the UNSC resolution went in its authorization.248 However, he seemed to think that such a discussion was outside the scope of that case,249 perhaps since Mr. Al-Jedda’s main argument was focused on authorizations not being obligations, and not the content of any such obligation if it was found to exist.

243 Al-Dulimi, para. 146-148.
244 Al-Dulimi, paras. 149-150, 155.
245 Opinions of the Lords of Appeal for Judgment in the Cause R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) (cited in this thesis as “Al-Jedda (UK)”)
246 Al-Jedda (UK), para. 34.
247 Al-Jedda (UK), para. 39.
248 Al-Jedda (UK), paras. 127-128.
249 Al-Jedda (UK), para. 129.
It is difficult to read the House of Lord’s judgment in a clear way, since they were so focused on the question of whether authorizations could give rise to obligations under the Charter. They touched briefly on the issue of the extent of such an obligation, but they did not sufficiently do any interpretation of the UNSC resolution. It seems that they avoided all conflict avoidance techniques, and went straight to solution through Article 103, without sufficiently establishing whether there even was a genuine conflict.

10.3.2. Federal Court of Switzerland: Nada (2007)\textsuperscript{250}

The Swiss Federal Court, when examining the case of Mr. Nada that later ended up in the ECtHR, came to a different conclusion than the ECtHR. The Federal Court found that according to Article 25 of the UN Charter, the UNSC Resolution was binding on Switzerland.\textsuperscript{251} The court further found that there were no rules for conflict solution in Swiss law, meaning that if such a conflict could not be solved by interpretation, they would have to turn to Article 103 of the UN Charter.\textsuperscript{252} The solution would then be in favour of the obligation under the Charter, unless it conflicted with \textit{ius cogens}.\textsuperscript{253} None of the rights claimed to have been violated in this case, however, could be said to constitute \textit{ius cogens}.\textsuperscript{254} The court concluded, further, that the sanctions were described in detail in the relevant UNSC resolutions, that Resolution 1267 (1999) explicitly said that other international agreements should be set aside in favour of the Resolution, and that the procedure for delisting was exclusively in the hand of the Sanctions Committee set up by the UNSC.\textsuperscript{255} Switzerland would therefore breach their obligation under the UN Charter if they removed Mr. Nada from the list or stopped imposing sanctions upon him.\textsuperscript{256} The court also stated that the Swiss implementation of the Resolution did not exceed its scope, and therefore did not grant Swiss authorities any more room for action than it had already found.\textsuperscript{257} By finding that Switzerland were under an obligation to impose a travel ban on Mr. Nada, and that it was not possible to interpret that obligation as leaving room for Switzerland to act differently (e.g. in a way which ensured the applicant’s rights under the Convention), they in practice applied Article 103 of the

\textsuperscript{250} BGE 133 II 450 (1A.45/2007) (cited in this thesis as “Nada (CH)”).
\textsuperscript{251} Nada (CH), para. 5.
\textsuperscript{252} Nada (CH), para. 6.2.
\textsuperscript{253} Nada (CH), para. 7.
\textsuperscript{254} Nada (CH), paras. 7.3-7.4.
\textsuperscript{255} Nada (CH), para. 8.1.
\textsuperscript{256} Nada (CH), paras. 8.1-8.3.
\textsuperscript{257} Nada (CH), para. 10.2.
Charter to the case, which led to the obligation of Resolution 1267 setting aside the Convention obligations.

10.3.3. Federal Court of Switzerland: Al-Dulimi and Montana Management (2008)\textsuperscript{258}

In November 2006, the Swiss Federal Department for Economic Affairs had taken three decisions regarding confiscation of assets belonging to Mr. Al-Dulimi and Montana Management Inc., which were then appealed against in three different appeals to the Federal Court of Switzerland by Mr. Al-Dulimi and the company. This lead to three different judgments by the Swiss Federal Court, although they all relied on the same conclusion by that court regarding their understanding of the possible norm conflict in the case: the confiscation decisions by the Swiss authorities was based on UNSC Resolution 1483 (2003),\textsuperscript{259} there was in fact a genuine conflict between the obligations under that Resolution and those regarding the applicants’ rights under the Convention and Swiss law,\textsuperscript{260} and Article 103 of the UN Charter provided the solution to that conflict – by stating that the obligation under the UNSC Resolution 1483 (2003) prevailed.\textsuperscript{261} Therefore, the Swiss government had not violated any rights of the applicants.\textsuperscript{262} The court further stated that it could not review the UNSC Resolution any further, since it was not authorized to do so.\textsuperscript{263}

10.4. Cases Before Other Judicial Bodies

10.4.1. The Court of Justice of the European Union (CJEU): Kadi I (2008)\textsuperscript{264}

In this case before the Court of Justice of the European Communities (today known as the Court of Justice of the European Union, CJEU), Mr. Kadi and Al Barakaat International Foundation appealed against two judgments of the Court of First Instance of the European Communities (today known as the General Court). The applicants had had their assets frozen based on them being on the lists annexed to certain European

\textsuperscript{258} Federal Supreme Court of Switzerland, judgments 2A.783/2006 (cited in this thesis as “Al-Dulimi (CH) (I)”), 2A.784/2006 (cited in this thesis as “Al-Dulimi (CH) (II)”) and 2A.785/2006 (cited in this thesis as “Al-Dulimi (CH) (III)”).
\textsuperscript{259} Al-Dulimi (CH) (I), (II) and (III), para. 5.4.
\textsuperscript{260} Al-Dulimi (CH) (I), (II) and (III), paras. 9.1.-9.2.
\textsuperscript{261} Al-Dulimi (CH) (I), (II) and (III), paras. 7.2., 9.2.
\textsuperscript{262} Al-Dulimi (CH) (III), para. 10.4.
\textsuperscript{263} Al-Dulimi (CH) (I), (II) and (III), para. 10.1.
\textsuperscript{264} Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, Joined Cases C-402/05 P and C-415/05 P (cited in this thesis as “Kadi I”).
Community regulations, which in turn were based on the lists and sanctions provided under UNSC Resolutions 1267 (1999), 1333 (2000) and 1390 (2002). As we know from the case of Nada, those Resolutions created sanctions against certain individuals and entities with links to the Taliban, Osama bin Laden or al-Qaeda. Of interest for this thesis is the claim by the applicants that the freezing of their assets violated certain of their fundamental rights under EC law. On this matter, the CJEU found that, contrary to what the Court of First Instance had found, they were able to review the EC regulations which implemented the Resolutions, even if they could not review the Resolutions as such. The court considered the EC Treaty to be an “autonomous legal system which is not to be prejudiced by an international agreement”, and therefore the regulations could not have “immunity” from review by the court even if they were just implementations of UNSC Resolutions. Therefore, the court could do an internal review notwithstanding Article 103 of the UN Charter. That review resulted in the court finding the regulations to mean that certain fundamental rights of the applicants had been infringed, and therefore they must be annulled.

The court, by this approach, basically ignored Article 25 and 103 of the UN Charter and solved the case before them based on internal rules of the EU (then EC). This approach was confirmed in a subsequent case by that court, Kadi II.

10.4.2. The Human Rights Committee (HRC): Sayadi and Vinck (2008)

This case before the Human Rights Committee (HRC) also related to the sanction system created under UNSC Resolution 1267 (1999), which we know well by now. Belgium had provided information to the Sanctions Committee which put two Belgian nationals (the applicants of the case) on the UNSC’s sanctions list, leading to their assets being frozen in Belgium and them being under a travel ban. The applicants brought their

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265 Kadi I, para. 248; today “EU law”.
266 Kadi I, paras. 299-300 and 326.
267 Kadi I, paras. 316-317.
268 Kadi I, paras. 353, 371 and 372.
271 A body of the United Nations, consisting of experts which oversee the implementation of the International Covenant on Civil and Political Rights (ICCPR), which can review “communications” from individuals under the First Optional Protocol to the ICCPR. Their findings are however not binding.
case to the HRC, claiming that several of their rights under the International Covenant on Civil and Political Rights (ICCPR) had been violated. Belgium claimed that Article 25 and 103 of the UN Charter put them under an obligation to impose the sanctions on the applicants, and that that obligation prevailed over those under the ICCPR. The HRC, however, took a similar approach as the CJEU: it found itself able to review the national implementation measures taken by Belgium, notwithstanding any possible obligations for Belgium under the UN Charter. In fact, even though Belgium relied on Article 25 and 103 of the Charter as part of their claim for non-violation, the HRC never even mentioned these articles expressly.

10.5. Summary of Solutions

10.5.1. The ECtHR’s Approach

From the three cases examined above, I draw the conclusion that the Court prefers to avoid the application of Article 103 of the UN Charter. The approach they have chosen instead could be summarized as extensive harmonious interpretation. In Al-Jedda, they created the presumption that the UNSC does not intend to impose any obligation on member states to breach fundamental principles of human rights, a presumption which was rebutted only by clear and explicit language by the UNSC. This presumption builds on the principles of systemic integration and the presumption of compatibility, and aims for conflict avoidance through harmonious interpretation. In Nada, that presumption was considered rebutted by such clear and explicit language, but the Court still managed to avoid conflict by finding that there was “limited but nevertheless real” latitude for the state to act in a way which did not violate the Convention nor breach the obligations established by the UNSC Resolutions. The specific situation of the applicant is likely to have been of great importance for those findings, since the solution seemed very tailored for that situation. If so, that would limit the application of the Court’s findings to future cases. The Court further seems to have accepted a Kadi I-like approach regarding what national courts can and should do with national implementations of UNSC resolutions, but the Court failed to provide important information on the effects of that understanding – making the approach hard to apply to future cases.

272 Sayadi and Vinck, para. 10.6.
273 For example, he was stuck in a geographical area of just 1.6 square kilometres. The individual situation of the applicant was such that the effects of the sanctions regime became extra harsh against him – something which probably influenced the Court’s findings.
274 Their findings on Article 13 were, in my opinion, very brief and unclear.
Luckily, the Court had another try at conflict solution in *Al-Dulimi*, where they once again managed to avoid conflict by harmonious interpretation. In this case, they applied the presumption of *Al-Jedda*, finding that “freeze without delay” did not mean that the UNSC had in “clear and explicit language” stated that they did not intend the measures to respect human rights. The Court therefore considered that states were obliged, under the Convention, to review at least whether the listing was arbitrary, without that obligation being in conflict with those created by the relevant UNSC Resolution.

According to me, this must be viewed as extensive harmonious interpretation. If states were under an obligation to *immediately* freeze the assets, then how can they also be allowed to conduct judicial review beforehand? Finding it possible is, in my eyes, no doubt an extensive use of the interpretation techniques for conflict avoidance. The techniques used by the Court are recognised principles of interpretation under the VCLT and customary international law and commonly used to avoid conflicts, so in that regard there is no problem to their findings. However, as stated earlier, techniques for conflict avoidance are not available if there is a genuine conflict. Therefore, an extensive use of the techniques can be problematic if it exceeds the possibilities of those techniques. Whether the Court’s findings were convincing will be discussed in the next chapter, together with the effects of the Court’s approach in these cases.

By never applying Article 103 of the UN Charter, the Court managed to avoid taking a definitive stand on their understanding of that Article in relation to the Convention. It seems that the Court’s solution has been to interpret down the scope of the UNSC Resolutions, while leaving the scope of the rights and freedoms under the Convention mainly intact.

10.5.2. Approaches of National Courts

The case law of national courts examined above is in no way representative for all European states’ national courts. However, those cases examined above are important because they deal with the exact same cases which were later brought before the ECtHR, and in that way they are useful for comparison with the findings of the Court. It should be noted that all three cases pre-date the three judgments of the ECtHR Grand Chamber. While this of court must be taken into account, the cases nevertheless provide insight to how some national European courts have solved the issue so far.

There is no doubt that the national courts in the cases above have had a very different approach to the conflict before them than the ECtHR. In all three cases, the
courts applied Article 103 of the UN Charter to set aside the obligations of the Convention. The findings of the House of Lords in *Al-Jedda (UK)*, however, lacked important discussions on the matter, probably due do the parties focusing on other arguments in their claims. In *Nada (CH)* and *Al-Dulimi (CH)*, the application of Article 103 of the Charter by the Federal Court of Switzerland was done more convincingly – by them first finding the conflict genuine and then solving it through the only way they considered possible.

It seems, from these cases, that the national courts are less likely to make creative and flexible interpretations of obligations stemming from UNSC decisions in order to avoid conflict. However, perhaps with the exception of *Al-Jedda (UK)*, that does not mean that they can be said to have completely ignored or insufficiently applied conflict avoidance techniques – they simply came to different conclusions than the ECtHR.

10.5.3. Approaches of Other Judicial Bodies

The cases before the CJEU and the HRC relate to human rights obligations under other treaties than the ECHR. However, when being faced with possible norm conflicts between those human rights obligations and obligations of UNSC Resolutions, the HRC and the CJEU, just like the ECtHR, had to decide on how to solve those possible conflicts. Therefore, the two cases can be used to compare the approach of these judicial bodies with that of the ECtHR, and perhaps help give insight to other possible solutions than those chosen by the Court.

Both the CJEU and the HRC have had an approach differing from that of the ECtHR. They have, instead of using harmonization techniques, taken an approach which distanced the regional or national measures from the obligation at UN level. The CJEU in the case of *Kadi I* did so by distancing the EC regulations, which were implementations of the UNSC Resolutions, from the UN system, so that they could review those regulations in relation to human rights protection within the EC. They basically considered the EC system to be a separate legal order which did not have to take into account international agreements of their members. This meant that the CJEU ignored the effects of Article 25 and 103 of the UN Charter, which must be considered relevant for their member states. The HRC in *Sayadi and Vinck* also ignored the effects of Article 25 and 103 of the UN Charter, when they found themselves able to review the

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275 With the possible exception being the Court’s finding regarding Art. 13 ECHR in the case of *Nada*. 47
national implementation measures of a state in relation to the human rights protection of the ICCPR. Both judicial bodies in these two cases therefore ignored the question of norm conflict by separating the system they reviewed from that of the UN – an approach which Istrefi calls “detachment”. ²⁷⁶

Whether the ECtHR could and should adopt a similar approach will be discussed in more detail further below.

10.5.4. The Approach of Some National Governments

What I have not so far discussed is the approach of different national governments to the cases before the ECtHR. Through third-party intervention, states which are not parties to the case as such are allowed to submit their views on the cases. In both Nada and Al-Dulimi, the governments of France and the United Kingdom did so. Their views are interesting since they provide additional understanding to how national governments view these issues, alongside the cases of national courts examined above. Further, these views were expressed at a later stage than those in the national cases above, and this makes them relevant.

In the case of Nada, both France and the UK seemed to take the view that Article 103 of the UN Charter should be applied in the case to relieve Switzerland from their obligations under the Convention. ²⁷⁷ The UK government specifically argued that such a conclusion could be drawn by the fact that the presumption of Al-Jedda had been rebutted in the case of Nada. The UK government held a similar view in Al-Dulimi, while also pointing out what the ECtHR later seemed to ignore: if the ECtHR considered states to be under an obligation to conduct a judicial review before giving effect to the sanctions of the UNSC Resolution, and that review led to the finding that, for example, the sanctions should not be imposed on the individual, the state would inevitably find themselves in a situation of conflict, since not implementing the sanctions would definitely interfere with their obligation under the UNSC Resolution. According to the UK government, that would put the state in an “invidious position”. ²⁷⁸ The French government agreed with this and stated that because of that, the Swiss courts must be considered prevented from “reviewing the merits of the national measures”, since such a review ultimately might

²⁷⁷ Nada, para. 110-111.
²⁷⁸ Al-Dulimi, para. 120.
undermine and threaten the efficiency of “the entire international system for the protection of peace and security.” 279

11 The Effects of Those Solutions

11.1. Introduction

Trying to interpret the different obligations at hand as harmonious is not problematic in itself. On the contrary, such an approach is desirable and supported by principles on interpretation in international law, as has been examined above. It helps reduce the effects of the fragmentation of international law and is built on the presumption that states do not want their different international obligations to collide. At a first glance, therefore, the approach of the ECtHR in the cases above may seem genius and unproblematic – an approach which ensures that the Convention is applied effectively, and which manages to dodge the question of subordination to the UN system. However, the approach of the ECtHR can be questioned on at least two important grounds. First, whether the findings of the Court were correct at all. As has been mentioned above, conflict avoidance techniques cannot be used to solve a genuine norm conflict. Doing so anyway could have negative effects for both the norms in question and the system of international law as a whole. 280 Did the Court provide convincingly enough arguments that their findings were correct, that the conflict was not genuine? Second, the Court’s findings are only genius if they actually work for states to implement. This is linked to the argument of the third-party interveners in the case of Al-Dulimi mentioned above. While the finding of the Court might be correct regarding the requirements of the Convention and that there was no conflict at that level, the application of those findings by a state in a specific case may have effects that wake a genuine norm conflict at that level. If that is the case, it is arguable that the norm conflict has not in fact been successfully avoided and solved.

This chapter will discuss those two questions in order to find out what effects the approach of the ECtHR has had and might come to have – for the Convention as such, for member states of the Convention, and for the system of international law. This will then be linked back to the main question of the thesis – to check what effects UNSC

279 Al-Dulimi, para. 125.
280 See chapter 8 above (specifically 8.2. and 8.3.).
resolutions has had on the application and scope of the Convention when there is a norm conflict, based on the Court’s interpretation of those conflicts.

11.2. The Correctness of the Approach

11.2.1. The Case of Al-Jedda

In my opinion, the Court correctly solved the case of Al-Jedda when finding that the UNSC had not put the UK under any obligation to “use measures of indefinite internment without charge and without judicial guarantees”\(^{281}\). Even without the presumption created by the Court, that finding is convincing. Neither the wording of the relevant resolution nor the context of it indicated such an obligation. Judge Poalelungi, however, disagreed with the majority’s finding on this point, and contended that there in fact was an obligation to use internment. However, I find this argument to have the same weakness as the argument of the House of Lords: the question was not whether there was an obligation to use internment at all, but whether there was an obligation to use internment \textit{in a way which violated human rights} – for example without charge or trial. Both Judge Poalelungi and the majority of the House of Lords seems to have presumed that “internment where necessary for imperative reasons of security” could not be understood in any other way than to mean interment in a way inconsistent with the Convention. In my opinion, that finding is not convincing. Instead, I agree with the majority on this point – that there was room for interpretation and for states to choose how to implement the Resolution, and that conflict avoidance techniques favour harmonious interpretation in such cases. Therefore, the presumption and the findings of the Court seem correctly applied in this case, and this is agreed with by others as well,\(^{282}\) and further supported by the fact that the Court was close to unanimous in its judgment.\(^{283}\)

11.2.2. The Case of Nada

The ECtHR’s findings in this case are, in my opinion, less convincing than those in \textit{Al-Jedda}. The Court correctly considered the presumption of \textit{Al-Jedda} rebutted, there was no way around the fact that the UNSC had been very clear as to what obligations states had under the relevant resolution, and that those obligations could cause problems with

\(^{281}\) \textit{Al-Jedda (UK)}, para. 105 and 109.

\(^{282}\) See e.g. Milanovic, 2012, p. 137-138; De Wet, 2013, p. 806.

\(^{283}\) 16 votes to one; compare this with the later cases where the judgments relied on much slighter majorities.
rights under the Convention. The fact that the Court still went on to examine whether there was a way to find some aspects of the rights of the Convention not in conflict with the obligations of the Resolution cannot be considered wrong in itself – the presumption should not be determining; it is merely a creation of the Court to simplify the interpretation. However, the findings of the Court in that next step of interpretation are not very convincing. What they seem to have done is find all the tiny spaces of the UNSC Resolution which left room for human rights protection aspects in the states’ implementation of the Resolution. This is a questionable approach since it will be extremely hard for states to implement, but more on that further below. It seems, according to me, that those tiny spaces were found by incorrect interpretation of the Resolution by the Court. This was also the opinion of Judges Bratza, Nicolaou and Yudkivska284 and Judge Malinvernii285. De Wet contends that the Court’s interpretation was an “over-stretching”, and finds the case “an example of covert rejection of UNSC obligations” rather than an example of harmonious interpretation.286 I agree with that critique of the majority’s findings. Some, however, seem to consider the findings of the Court in Nada convincing.287

11.2.3. The Case of Al-Dulimi

The Court’s findings in the case of Al-Dulimi are also, according to me, partly unconvincing. The Court limited the scope of the Convention obligation so that there only was an obligation to review whether the listing was arbitrary (contrary to a full review of the listing process). The question is, however, whether there was even room for such review with regard to the obligations created by the UNSC Resolution. It is, in my opinion, hard to find it convincing that there is room for any review when the obligation is that states must “freeze without delay” and “immediately” transfer. This was also the opinion of Judges Pinto de Albuquerque, Hajiyev, Pejchal, and Dedov who, in their concurring opinion, considered there to be a genuine norm conflict in this case and no room for any sort of judicial review.288 Judge Keller, in her concurring opinion, agreed with this,289 and further concluded that the approach of the majority comes at a “high

\[\text{Footnotes:}\]
284 Paras. 5-7 of Judge Bratza et al.’s concurring opinion in Nada.
285 Paras. 3-5 of Judge Malinvernii’s concurring opinion in Nada.
288 Paras. 1, 9, 12-13 and 45 of Judge Pinto de Albuquerque et al.’s concurring opinion in Al-Dulimi.
289 Paras. 6 and 26 of Judge Keller’s concurring opinion in Al-Dulimi.
price”, since it includes an over-stretching of the interpretation.\textsuperscript{290} The Chamber, reviewing the case before it was referred to the Grand Chamber, also came to the conclusion that the conflict was genuine.\textsuperscript{291} As Milanovic points out, the final reasoning of the Court on this matter was in fact supported by a very slim majority,\textsuperscript{292} which points to the fact that there is doubt as to whether the Court decided the case convincingly. I agree with those considering the majority’s arguing unconvincing. However, there are those who agree with the approach of the majority.\textsuperscript{293}

11.2.4. Summary

The approach of the Court seems to be protect-at-all-costs; cases have been solved partly unconvincingly because of the Court’s strong will to not restrict Convention application due to UN based obligations. Article 103 of the UN Charter is indeed a rule of “last resort”, and the presumption of compatibility is strong in international law since it helps reduce the effects of norm conflicts. This speaks in favour of an approach which tries really hard to harmonize norms if possible. There are, however, situations where there simply is a genuine conflict and where rules of proper resolution, such as Article 103, must be applied – that is why they exist. I am of the opinion that in the cases of Nada and Al-Dulimi, using Article 103 would probably have been the correct approach.

When the Court uses conflict avoidance techniques to solve genuine conflicts, which they should not be able to do, they must interpret down UNSC resolutions in a way which they can hardly be considered to have the power to do. That can make states unwilling to accept their findings. Further, since the decisions of the Court are only directed at its members and not other states or the UN as such, the interpretations by the Court could cause UN obligations to be understood and applied differently throughout the world. Incorrect decisions by the Court can therefore cause legal uncertainty,\textsuperscript{294} – both regarding the meaning of the two norms as such, but also in the system of international law as a whole. Rather than decreasing the fragmentation of international law and strengthening the Convention, the opposite is achieved. The Convention cannot be effectively implemented if its scope, meaning and rules for application are not clear, and

\textsuperscript{290} Para. 4 of Judge Kellers concurring opinion in Al-Dulimi.
\textsuperscript{291} Chamber judgment of Al-Dulimi v. Switzerland (“Al-Dulimi (Chamber”), para. 117.
\textsuperscript{293} See, e.g., Orakhelashvili, 2016, p. 770.
\textsuperscript{294} De Wet, 2013, p. 799, 806-807.
with the current approach they are not. In my opinion, the norm conflicts in *Nada* and *Al-Dulimi* are, in practice, left unresolved.

**11.3. The Implementation at National Level**

**11.3.1. Predictability & Expectations**

The ECtHR cases above clarify that member states are still bound by their obligations under the Convention to the extent that those obligations do not come into conflict with obligations under the UN Charter, and that the presumption of compatibility means that such conflicts are unlikely to be found. That would be a great clarification, if it meant that it made it possible for states to predict what their obligations were in specific situations, and act accordingly (so that individuals’ rights were never violated). That does not, however, seem to be the case. Consider the case of *Nada* for example – was Switzerland supposed to know how to identify those tiny spaces that allowed for application of Convention rights, and which rights and to what extent they should be applied? It is unlikely. There is therefore low predictability as to how specific cases will be decided by the Court, which also leads to the effect that there is uncertainty for states how to act in specific situations – both in implementation and in court review. The effect could be reduced respect for the Convention system, since states might get annoyed by the fact that it is in practice impossible for them to act correctly – because of the scope of their obligations under the Convention as interpreted by the Court being unclear.

**11.3.2. Difficulties Arising at National Level**

Even if one would consider the outcome in the cases of *Nada* and *Al-Dulimi* correct on that first level (i.e., that there was room for review of the listing decisions at national level and that such review therefore should have been conducted), there is still an issue which the Court seems to have failed to address. What happens if a national authority reviews the listing and finds it, for example, to be arbitrary, and therefore decides not to impose sanctions on the individual? As the governments of the United Kingdom and France argued in *Al-Dulimi*, it would be problematic, since such action could be considered in breach of the obligations created by the UNSC in those cases. There is a difference between holding a review and applying the outcomes of that review, and the Court does not seem to have thought about the effects of the latter. This could indeed create problems
for states, and again connects to the lack of clarity which is needed for successful application of the Convention by states.

Further, it is likely to involve great practical difficulties for states to live up to the arbitrariness review requirement set out in \textit{Al-Dulimi}. The Court considered lack of information “a strong indication” that the listing was arbitrary.\textsuperscript{295} However, it is probable that there often will be such lack of information due to confidentiality, especially regarding sanctions linked to terrorism. It is clear that the Court did not take this into account in their findings, even though it probably will create problems for states.

The Court’s lack of consideration on these issues could mean that the norm conflict was never really avoided or solved.

\textbf{11.3.3. Different Courts – Different Approaches}

The last effect to be discussed in this chapter is that of different courts having different approaches. While ECtHR clearly favours harmonization, both the HRC and the CJEU have favoured detachment. Several European states are bound by both the ECHR and the ICCPR\textsuperscript{296}, and members of both the Council of Europe and the European Union – meaning that they have to take decisions by several judicial bodies into account.\textsuperscript{297} Istrefi, when discussing the three different approaches of European courts at different levels,\textsuperscript{298} states that “[o]scillation on this varied trinity of approaches, affects not only rights of the individuals concerned but also the legal (un)predictability and coherence of international law”.\textsuperscript{299} He seems to favour the harmonization approach in all courts since it, according to him, both reduces fragmentation of international law and protects human rights.\textsuperscript{300} There may be reasons as to why different courts come to different conclusions, for example their different roles. That will be briefly touched upon the next chapter. For now, however, it is enough to state that states can find themselves in tricky situations if the different judicial bodies that they have to listen to come to different conclusions, especially since those courts do not have a hierarchical relationship to each other.

\textsuperscript{295} \textit{Al-Dulimi}, para. 147.
\textsuperscript{296} Though the First Optional Protocol of the ICCPR, setting up the individual complaints mechanism, has fewer parties. The United Kingdom is, for example, not a party to that Protocol.
\textsuperscript{297} \textit{De Wet}, 2013, p. 790.
\textsuperscript{298} He categorises the cases into three different approaches: subordination (e.g. House of Lords in \textit{Al-Jedda (UK)}), detachment (e.g. CJEU in \textit{Kadi I}) and harmonization (e.g. ECtHR in \textit{Al-Jedda}).
\textsuperscript{299} \textit{Istrefi}, 2012, p. 103.
\textsuperscript{300} \textit{Ibid}, p. 117.
11.4. Summary of Effects

It seems that UNSC resolutions have not directly affected the application and scope of the Convention to any larger extent,\(^{301}\) since the Court has been very reluctant to find any conflicts to be genuine. However, it is clear that UNSC resolutions have caused cases to be brought before the ECtHR – cases with outcomes which, at least some of them, have been very questionable. The effects of the Court’s handling of those cases are unsatisfying for both the Convention as such and for member states. Rather than strengthening the Convention and bringing clarity to its application, there is confusion which ultimately endangers the application of and respect for the Convention. This raises the question of what other possible solutions the Court could have chosen, and if any of those would have limited the negative effects. That question will be discussed in the following chapter. That discussion will also consider what the effects would have been if the Court would have taken an approach which, according to me, would have been the correct one according to the rules and principles of international law – namely subordination by application of Article 103 of the UN Charter.

12 Other Possible Solutions

12.1 Introduction

The purpose of this chapter is to examine what other solutions the ECtHR could have chosen, or should choose in future cases of possible norm conflict. The focus will be to discuss different solutions both regarding whether they are correct according to international law (i.e., if they are actually available for the Court to use), and whether they reduce the negative effects of the current approach (e.g. the lack of legal certainty and risk of reduced respect for the Convention). First, the possibility of limiting UNSC resolutions when they lack of respect for human rights will be discussed – since that might make it possible for the Court to put the Convention obligation first without there being confusion or scepticism towards the Court’s findings. Second, different types of detachment will be examined – to see if the Court could take such an approach, and if that would have been better. Third, the perhaps most obvious alternative solution will be discussed: subordination following the application of Article 103 of the UN Charter.

\(^{301}\) With the exception being Al-Dulimi, where the Convention obligation was slightly reduced.
12.2. Limiting the Security Council

12.2.1. Introduction

Human rights are in a way already “limiting” the Security Council and its resolutions. The rationale behind the presumption set out in Al-Jedda is that human rights promotion is one of the purposes of the UN, and that the UNSC is required to act in accordance with that as well as the other purposes and principles of the UN. The presumption means that other possible interpretations of specific UNSC resolutions will be inferior to the interpretation which favours human rights protection. It could therefore be considered a “limitation” of the Security Council and its resolutions, by human rights. The question is if human rights protection should be limiting the Security Council to an even larger extent than it is now.

Mujizinovic Larsen argues that in the case of Sayadi and Vinck, the HRC appears to have taken the controversial view that the UNSC cannot successfully create obligations that violate human rights (of the ICCPR), which indicates that the HRC thinks that the UNSC should be even more limited by human rights. One way to argue just that is through ultra vires, which will be discussed below.

12.2.2. Ultra Vires and Human Rights

As was discussed above in chapter 9, it seems widely accepted that decisions of the UNSC which are ultra vires are not valid and therefore cannot engage Article 103 of the UN Charter (due to them simply not creating any obligations). If a decision is considered ultra vires there would therefore be no norm conflict. What decisions should be ultra vires is not as clear though, at least not outside the scope of ius cogens. Some authors have, as mentioned earlier, argued that Article 24(2) and 1(3) of the Charter should be understood as creating an obligation for organs of the UN to respect human rights. If this is true, it could mean that decisions by the UNSC which fails to respect human rights would be ultra vires. There seems to be agreement among authors that Article 24(2) constitutes some sort of limitation for the UNSC, but what exactly that limitation is seems far less clear. Milanovic considers the argument that the UNSC should be obliged to respect at

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302 Al-Jedda, para. 102; Art. I(3) UN Charter.
303 Article 24(2) UN Charter.
least some human rights norms “persuasive”, but in my opinion that argument has several uncertainties which weakens it. First, it is unclear which human rights Article 1(3) refers to – all rights ever accepted in UN treaties, or just a selection of rights considered more fundamental? If so, which are those fundamental rights? Second, it is unclear if all conduct of the UNSC is covered by the limitation or if it is restricted to certain action, and further if there is a difference regarding which rights are concerned. Finally, it is unclear which court should have authority to find that the UNSC has taken a decision ultra vires, since this is likely to include interpretation of the relevant decision.

In sum, there is too much uncertainty to clearly state that the ECtHR could rely on this approach as a possible solution to norm conflicts between rights of the Convention and UNSC Resolutions. Even if such an approach was available, it might not actually provide a better solution than that chosen by the Court so far.

In cases including resolutions which are flexible (e.g. cases resembling Al-Jedda), this approach is likely to lead to the same outcome as that found in the ECtHR case, since the UNSC resolution would be interpreted as not violating human rights (the UNSC created no such obligation), leading to the resolution not being ultra vires, and both the Convention and the resolution would therefore be fully applicable. In cases including less flexible resolutions, which might be interpreted as creating obligations that violate human rights (e.g. cases resembling Nada or Al-Dulimi), the situation might be different. In those cases, the resolution would be considered ultra vires and therefore have no binding force. That would in turn ensure full application of the Convention and protection of human rights, since the conflict is erased by one obligation simply not existing. However, such an understanding would not only require the ECtHR to interpret resolutions by the UNSC in a controversial area, it would also invalidate whole resolutions leading to the efficiency of the UN system being endangered, especially in the area of international peace and security, and this must also be considered a serious effect.

All in all, it is hard to say if this approach would simplify the situation and create a better outcome than the current approach of the ECtHR – partly because it is unlikely that the ECtHR could ever successfully and in a form which the UN accepts invalidate

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309 This view seems to be supported by De Wet, 2004, p. 199.
311 De Wet, 2004, p. 200-204 discusses for example whether there is a difference between derogable and non-derogable rights.
312 Milanovic, 2009(I), p. 536 discusses, in relation to the HRC, that such authority to review UNSC decisions is far from obvious that it should exist.
decisions by the UN’s organs by interpretation, and if so, states would still be left with different obligations according to different actors. Further, the Court might be tempted to interpret resolutions in a way that favours the Convention (i.e. as ultra vires) in an over-stretching way. The Court has, in my opinion, proved willing to do so in at least two cases above, Nada and Al-Dulimi. Using the ultra vires approach would, if so, not solve the problems related to predictability and expectations of member states.

12.3. Detachment

12.3.1. Another Presumption: Equivalent Protection

The Chamber judgment in the case of Al-Dulimi favoured the application of a different kind of presumption than the one in Al-Jedda, and this approach was subsequently favoured in some of the concurring opinions to the Grand Chamber judgment in Al-Dulimi. The Chamber relied, in their findings, on the case of Bosphorus, in which the Court had decided the extent of state responsibility when states act due to obligations stemming from membership in an international organisation, in that case the EU. The Court decided that case by creating the “equivalent protection test”, which was meant to balance the interests of effective international cooperation in organisations versus effective application of the Convention. 313 The Court found that when a state acts because of an obligation under an international organisation, the presumption is that the state in question has not “departed from the requirements of the Convention”. 314 This is however only the case if that organisation provides protection of rights and freedoms “in a manner which could be considered at least equivalent to that which the Convention provides”. 315 The presumption can be rebutted if the protection, in the specific case, is “manifestly deficient”. 316 The EU system at that time was found to provide such “equivalent protection” 317 and the presumption was not rebutted. 318 Therefore, the respondent state in that case had not violated the Convention. 319 The presumption of Bosphorus was also mentioned in the case of Behrami and Saramati, though the Court decided that the

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313 Bosphorus, para. 151-154.
314 Bosphorus, para. 156.
315 Bosphorus, para. 155.
316 Bosphorus, para. 156.
317 Bosphorus, para. 165.
318 Bosphorus, para. 166.
319 Bosphorus, para. 167.
presumption did not apply in that case because the actions were not attributable to the respondent states and therefore there was no conflict of obligations for that state.320

The Chamber in *Al-Dulimi* repeated the presumption of *Bosphorus* and stated that it did not apply if an act fell outside the state’s “strict international obligations”, which especially was the case if the state had “exercised […] discretion”.321 The Chamber considered that the respondent state had not enjoyed any latitude in the implementation of the relevant UNSC resolution, and that therefore harmonious interpretation was not possible. The equivalent protection test should therefore, for the first time, be applied to a UN obligation.322 The system set up by the UNSC did not, however, provide such equivalent protection and the presumption was therefore not applicable.323 This, then, led to the examination of the case on the merits, in which the Chamber found a violation of the applicant’s right under the Convention. The Chamber completely ignored the question of Article 103 of the Charter when coming to that conclusion. Judge Keller, in her concurring opinion to the Grand Chamber judgment, had a similar approach in that she also ignored the existence of Article 103 of the UN Charter without providing any discussion on why.324

Arcari criticized the Chamber for ignoring Article 103, and further contended that they were wrong in applying the equivalent protection test to solve a norm conflict.325 The main problem with the equivalent protection test in these situations, in my opinion, is that it cannot be applied in favour of the Convention – as long as Article 103 exists. If there would in fact be a genuine conflict between obligations under the Convention and obligations stemming from a UNSC resolution, harmonious interpretation would be excluded as a possible solution. Without the equivalent protection test, this would mean direct application of Article 103 of the Charter. With the equivalent protection test, however, it could be possible to find that the state had not departed from their obligations under the Convention, if the UN provides protection which is not identical but equivalent, and which is not manifestly deficient in the specific case. This is, in fact, a solution in favour of the Charter obligation (just as Article 103). Since Article 103 of the Charter puts the UNSC obligation over the Convention obligation when it applies, and the “lower-

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321 *Al-Dulimi (Chamber)*, para. 114.
322 *Al-Dulimi (Chamber)*, para. 116-117.
323 *Al-Dulimi (Chamber)*, para. 118-121.
324 See Judge Keller’s concurring opinion in *Al-Dulimi*.
ranked norm” (in this case the Convention obligation) should not be able to set any conditions on the “higher-ranked norm” (in this case the UNSC obligation), there can never be a solution in favour of the Convention with the equivalent protection test – as soon as there is no equivalent protection, the Charter prevails, and where there is equivalent protection, the Charter still “prevails” (since the state is considered to not have breached their Convention obligation). As a side note, it is very questionable if the UN provides such equivalent protection. This means that in practice, all cases which do not allow for harmonious interpretation as a solution, would lead to application of Article 103 instead. There is therefore, according to me, no practical use for the equivalent protection test.

The only way for that test to be of use, would be if one ignored Article 103. To successfully do so, Milanovic argues, the ECtHR would have to claim the Convention legal order to be autonomous from international law and the UN Charter, like the CJEU has done. Judges Pinto de Albuquerque, Hajiyev, Pejchal and Dedov argued just that in their concurring opinion to Al-Dulimi. They first stated that the UN Charter lacked constitutional nature, and that because of this, obligations under the Charter could not be hierarchically superior to other treaties. Further, they contended that the Council of Europe was an “autonomous legal order” and that the Convention had “supra-constitutional” effects. The Judges argued that the equivalent protection test therefore should apply to obligations stemming from the UN, meaning that Article 103 would not apply. It is difficult to see that the Court could successfully take such a definitive stand on the constitutionality of the Convention, since there does not seem to be enough support for such an approach.

Applying the equivalent protection test without respecting Article 103 would allow for human rights protection also when harmonious interpretation is not possible, and it also provides some clarity for states: if there is (actual) room for application of the Convention – apply it; if there is not – apply it anyway if the other system does not provide an equivalent level of protection. However, the problem is that Article 103 likely cannot be disregarded, and if so the equivalent protection is of no practical use. If Article 103 was to be disregarded, however, the equivalent protection test would be great in that it

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328 Concurring opinion of Judge Pinto de Albuquerque, para. 8.
329 Concurring opinion of Judge Pinto de Albuquerque, para. 59.
330 Concurring opinion of Judge Pinto de Albuquerque, paras. 61-64.
would not indefinitely put the Convention obligation over the UNSC obligation – it would let the UNSC obligation “prevail” if it could provide equivalent protection. This could be a good solution if there ever comes a post-Article 103 time.

12.3.2 Kadi-detachment

In *Kadi I*, the CJEU found that the EU system is an “autonomous legal system which is not to be prejudiced by an international agreement” and that they could review the compliance of the implementation act with internal rules for human rights protection – without application of Article 103. This meant that CJEU detached the EU system from the UN system. Milanovic contends that there is “little doubt” that the findings of the CJEU in *Kadi I* put pressure on the UNSC to change its practice regarding listings in general, as well as changing the situation for the specific applicants of those cases. The question is whether the ECtHR could and should adopt a similar approach. Arcari doubts that it is possible, since the ECtHR holds a significantly different role than the CJEU; its review is not of its own internal regulations, but of states’ obligations regarding the Convention. Those states are bound by Article 103 and the ECtHR can hardly ignore that. The EU is not itself bound by Article 103 and their internal review is therefore more reasonable, and further it seems easier to consider the EU as a legal order separate from international law – something that can hardly be argued regarding the Convention. For example, the French government intervening in the case of *Al-Dulimi*, also argued that the approach of the CJEU was not available for the ECtHR, since such an approach would go against the Court’s repeated claim of being an “integral part of international law”, contrary to the CJEU which, according to the French government, had “always held” that the EU legal order was “distinct from the international legal order and based on treaties of a constitutional nature”.

The CJEU has, however, received critique for its approach, for example because of its ignorance towards international law and because the approach risks strengthening the view of international law as “non-law” – which could lead to the weakening of international law. Miko contends that detachment from the UN system by the Court could further fragment the system of international law, and that it could have “centrifugal”

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331 *Kadi I*, paras. 316-317.
333 Arcari, 2014, p. 33-34.
334 *Al-Dulimi*, para. 123.
effects because of the Court’s influential role.\textsuperscript{336} The approach is further likely to lead to continuing conflicts of obligations for states, since the Court cannot independently invalidate a UNSC resolution – the state will still be bound by both obligations. That could in turn lead to negative effects for both the Convention and the UN system.\textsuperscript{337}

It is, for these reasons, unlikely that the Court could successfully argue a similar approach as that of the CJEU. It is further unclear if such an approach is actually desirable, especially if not accepted by the system of international law, specifically the UN.

\textbf{12.4. Surrendering to Article 103}

Article 103 of the Charter has been called a rule of last resort. This means that it should not be applied if there is another correct possible solution, for example the use of conflict avoidance techniques. However, as argued above, it is rather questionable if any other possible solution was actually available in the cases of \textit{Nada} and \textit{Al-Dulimi}. This would mean that the last resort was reached – and that Article 103 of the Charter should have been applied. Article 103 has been already been examined in detail above, and this section will therefore focus on what application of Article 103 would mean for the scope and application of the Convention.

Because of its prevailing effect, it would limit the application and scope of the Convention. That is no doubt a negative effect for the Convention since it would mean that it is set aside by the UNSC in certain situations. However, the positive effect (compared to the approach the ECtHR has had so far) is that states could more easily predict what their obligations are in different situations – they would be obliged to act in accordance with the Convention to as large an extent as possible, but when there is a genuine conflict they would be allowed to set aside their Convention obligation in favour of their obligation under a UNSC resolution. In this way, there is less risk of legal uncertainty and less risk of reduced respect for the Convention. This should mean that the Convention’s application and scope is limited in some situations and to some extent, but in all other situations it could continue to function without limits – and do so in a clear and expected way. Further, states are less likely to be reluctant to act in accordance with UNSC decisions if they know they can do so without repercussions.

\textsuperscript{336} Miko, 2013, p. 1379.
\textsuperscript{337} \textit{Ibid}, p. 1381-1382.
It could, however, be argued opposite: that by surrendering to Article 103, the Court opens up for the UNSC to limit the Convention more frequently and allowing them to not respect human rights. This could lead onto a dangerous path where states’ respect for human rights in peace operations or when imposing sanctions on individuals is reduced, since they know they are unlikely to be held accountable for their actions if they are backed up by a UNSC resolution.

However, it remains probable that applying Article 103 of the Charter would have been the correct solution according to international law in Nada and Al-Dulimi, regardless of the effects of that approach.

12.5. Summary
In sum, it seems that while there are solutions that may reduce some of the effects that follow from the approach the Court has chosen so far, they might not be better since they have other effects. The biggest problem with most of those approaches, though, are that they are not available for the Court – there is no support for their definitive existence in international law. It seems, therefore, that the Court is left with only one option: applying Article 103. This has effects for the Convention’s application and scope, but may reduce some of the negative effects following the Court’s current approach. It is, however, not certain which effects its application would ultimately have.

13 Conclusion
This thesis has shown that conflicts between obligations created by UNSC resolutions and obligations under the Convention are likely to occur, both due to the special nature of international law and due to factors that are linked to the specific kind of conflict discussed in this thesis. These conflicts need to be solved, since states may otherwise find themselves in tricky situations which can lead to further serious effects, e.g. for the authority of international law. Courts, such as the ECtHR, have an important role in providing solutions in specific situations. The possible solutions differ depending on whether the conflict is considered apparent or genuine.

The review of case law showed that the ECtHR has not so far considered any conflicts between the Convention and UNSC resolutions to be genuine. By finding all conflicts before them so far to have been only apparent, and by interpreting those conflicts away, it may at first seem like UNSC resolutions have not in fact had any effect on the
application and scope of the Convention. However, this is not completely true. I have argued above that at least two of the cases of the Court can be seriously questioned and considered partly wrong: Nada and Al-Dulimi. Some of the Court’s findings are simply not supported by rules and principles of international law – for example, techniques for conflict avoidance cannot be applied to genuine norm conflicts. This in turn has led to effects, both for the Convention and for its member states. For example, the Court’s approach causes confusion regarding the relationship between the two types of obligations, which ultimately endangers the application of and respect for the Convention. The wrongfulness of the Court’s findings can cause states to be unwilling to accept them. The approach further does not seem to decrease legal uncertainty and fragmentation. The conclusion on the what is part is therefore that even though UNSC resolutions have not directly affected the application and scope of the Convention in situations of norm conflicts, they have nevertheless caused problems which the Court has had to solve – and in doing so (wrongly) the Convention’s application and scope is likely to be affected. This, in my opinion, means that the Court’s approach so far has not been ideal.

In the what should be part I examined other possible solutions for the Court, but found most of these inapplicable or unsatisfying. Some of these may become applicable in the future, since international law largely develops through common understandings and acceptance by states. That, however, does not mean that those solutions will be fully satisfying either. The finding that other solutions were inapplicable or unsatisfying as of now led to the finding that the only correct solution for the Court in the cases of Nada and Al-Dulimi would have been the application of Article 103 of the UN Charter. This would have had direct effects on the application and scope of the Convention (by setting it aside in favour of a UNSC resolution), but it would also have reduced the negative effects of the approach of the Court so far – for example it would have decreased fragmentation of international law and increased legal certainty.

It seems that in situations where UNSC resolutions create obligations which come into conflict with obligations of the Convention, one has to choose between a solution which is correct (i.e., which is accepted in international law) and an approach which protects human rights (i.e., leads to full application of the Convention). Both solutions will have effects for the Convention system, for the UN system, and for the system of international law. Until the Court finds a way to deal with this type of conflict which is both correct and respects human rights, problems will continue to occur. Milanovic has contended that “Al-Dulimi is definitely not going to be the last word when it comes to
litigating UN sanctions”, and one can assume that the same is true for other forms of UNSC created obligations which come into conflict with the Convention. It will certainly be interesting to see how future cases are dealt with by the Court, and if the relationship between international peace and security and human rights is finally sorted out.

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