THE DIVERGING APPROACHES OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASES OF *NADA* AND *AL-DULIMI*

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Abstract The UN Security Council's practice of targeted sanctions has resulted in serious limitations on the enjoyment of targeted individuals' human rights. The European Court of Human Rights pronounced on this issue in two instances. In the cases of *Nada* (Grand Chamber judgment) and *al-Dulimi* (Chamber judgment) the Court was asked to evaluate the lawfulness of the domestic implementation of sanction measures against the ECHR. Surprisingly, each Chamber opted for a different solution. The present article will discuss these solutions and evaluate them within the broader framework of international law, the Court's jurisprudence, and the conflicting interests involved.

Keywords: access to court, effective remedy, equivalent protection, European Convention on Human Rights, European Court of Human Rights, presumption of compliance, Security Council, targeted sanctions.

I. Introduction

The UN Security Council's practice of targeted sanctions has significant repercussions for the enjoyment of human rights by targeted individuals. Under this practice the Security Council creates an obligation for all UN Member States to take sanction measures, such as the freezing of assets and the imposition of travel bans, against specific individuals and private entities, as designated by the sanctions committees.[1] From a due process perspective it is problematic that the targeted individuals are not

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[1] The most familiar example of a targeted sanctions regime is probably that imposed against the Taliban and al-Qaida, established by UNSC resolutions 1267 (15 October 1999) UN Doc S/Res/1267; UNSC Res 1333 (19 December 2000) UN Doc S/Res/1333; and UNSC Res 1390 (28 January 2002) UN Doc S/Res/1390. Subsequently adopted resolutions separated this regime into two sanctions regimes, one concerning the Taliban (UNSC Res 1988 (17 June 2011) UN Doc S/Res/1988) and one concerning al-Qaida (UNSC Res 1989 (17 June 2011) UN Doc S/Res/1989). For an overview of Security Council's presently operative sanction regimes and the Sanctions Committees involved see <http://www.un.org/sc/committees/>. This research will, for readability

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afforded any opportunity to pursue a judicial or other effective remedy. Currently an individual may bring an application for delisting to the UN Office of the Ombudsperson; however this is very unlikely to qualify as an effective remedy.[2] Moreover, the Ombudsperson can take complaints only from individuals targeted under the al-Qaida sanctions regime.[3] Therefore, individuals who are targeted by other sanctions regimes cannot make use of this procedure.[4] In addition, when asked to decide upon the lawfulness of the implementation of a sanction measure, domestic courts cannot review the decision to list a particular individual because they do not have access to the confidential information underlying an individual's designation. Furthermore, any remedy possibly provided for by these courts is bound to remain of limited effect. Domestic courts can decide on the validity of the domestic implementation of the sanction measures against a particular individual, but they cannot remove that individual from a sanction committee's list.

As a consequence, States are confronted with a norm conflict between, on the one hand, an obligation to obey a binding decision of the Security Council and, on the other hand, an obligation to observe international human rights treaties. Under these treaties States are obliged to guarantee a targeted individual certain rights such as the rights to peaceful enjoyment of property, respect for private and family life, access to court, and an effective remedy. Since the relevant provisions in the applicable Security Council resolutions do not leave States any scope of discretion to implement the sanction measures in accordance with these human rights obligations, they are placed in a position in which they cannot observe both international obligations at the same time. This norm conflict surfaces when a targeted individual challenges the domestic implementation of the sanction measures before domestic and regional courts. These courts are then required to address the conflict.

Solving this issue is a particularly challenging task for the European Court of Human Rights (ECtHR), because it would be difficult for the Court to accept the consequences of the rule of precedence laid down in Article 103 of the UN Charter.[5] According to this provision, obligations under the UN Charter prevail over all other obligations States may have under any other international agreement.[6] In principle, this includes obligations following from human rights treaties such as the European Convention on Human Rights (ECHR).[7] However, for a court that is specifically established to supervise State parties' observance of human rights law, the explicit acknowledgment of this

purposes, refer only to individuals and not also to private entities. Targeted individuals and private entities are to a large extent in a similar position.

[2] E de Wet, 'From *Kadi* to *Nada*: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions' (2013) 12 ChineseJIL 787, 789–90. See also D Tladi and G Taylor, 'On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting' (2011) 10 ChineseJIL 771, 788–9.

[3] UNSC Res 1989 (17 June 2011) UN Doc S/Res/1989 [21]. See (n 1).

[4] They can only resort to the Focal Point established by UNSC Res 1730 (19 December 2006) UN Doc S/Res/1730. This Focal Point functions merely as an intermediary between individuals who request delisting, and the Sanctions Committee. It does not have any powers of review. It forwards an individual's request to members of the Committee upon which any member can recommend delisting. See also Tladi and Taylor (n 2) 785–6.

[5] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) art 103.

[6] ibid.

[7] See *R (on the application of al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, ILDC 832 (UK 2007) [35].

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interpretation would not come easily.[8] In addition, it is impossible for a court such as the ECtHR to follow the dualist approach that is taken by some domestic courts. Courts that adopt such approach essentially consider their own domestic legal order in isolation from the international legal order.[9] The ECtHR cannot follow a dualist approach since its own legal order is inherently part of the international legal order; the two cannot be separated. The rule of precedence in Article 103 UN Charter is therefore clearly and unavoidably applicable to the present collision of norms. How does the Court seek to solve this conflict?

The ECtHR has had two opportunities to discuss the issue of the Security Council's targeted sanctions. In the cases of *Nada* (Grand Chamber judgment)[10] and *al-Dulimi* (Chamber judgment)[11]—both against Switzerland—the Court was asked to evaluate the lawfulness of the domestic implementation of sanction measures. In the following section II, this article will briefly set out the relevant facts and the Court's decisions in these two cases. Section III will then discuss and analyse the Grand Chamber's application of the presumption of compliance and the technique of harmonious interpretation in the *Nada* case. Section IV will critically assess the Chamber's divergent approach of employing an equivalent protection doctrine in the *al-Dulimi* case. That case was distinguished from the *Nada* case on the basis of an alleged difference in the scope of the discretion left by the relevant Security Council resolution. Section V will comment on and reject this distinction. Finally, section VI will contribute to the analysis of the difference between the two cases regarding the application of the right to an effective remedy, and the right of access to court.

II. THE TWO CASES: *NADA* AND *AL-DULIMI*

The case of *Nada* concerned an Egyptian businessman targeted by the sanctions regime established under Security Council resolution 1267.[12] As a consequence, Switzerland was required to freeze his assets and to impose a travel ban. This latter measure

[8] M Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 DukeJComp&IntlL 69, 86.

[9] S Hollenberg, *Challenges and Opportunities for Judicial Protection against Decisions of the Security Council* diss. University of Amsterdam, 11 June 2013, 17 and 221–5. Tzanakopoulos refers to such occurrence as dissociation. A Tzanakopoulos, 'The Solange Argument as a Justification for Disobeying the Security Council in the *Kadi* Judgments' in M Avbelj, F Fontanelli and G Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the* Kadi *Judgment* (Routledge 2014) available at SSRN <http://ssrn.com/abstract=2364764> 2ff. For examples in case law see: *HM Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2 & UKSC 5; ILDC 1533 (UK 2010) (*Ahmed*); *The Netherlands v A and Others* [2011] LJN: BQ4781 [5.5]; and *The Netherlands v A and Others* [2012] LJN: BX8351; ILDC 1959 (NL 2012) [3.6.2]. See also the *Kadi I* case in which the Court of Justice (CJ) clearly separated the EU legal order from general international law. Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351 (*Kadi I*, CJ) [288]. It relied on the constitutional principles of the European legal order, which it found could not be prejudiced by obligations imposed by an international agreement. ibid [285]. In this context, it equated to a certain extent the EU legal order with a domestic legal order. On the basis of the Court of Justice of the EU's (CJEU) characteristics that are most relevant for the analysis, it will be considered a domestic court for the purpose of the present discussion.

[10] *Nada v Switzerland* [2012] ECHR 1691.

[11] *al-Dulimi & Montana Management Inc. v Switzerland* [2013] ECHR 1173. The case was referred to the Grand Chamber 14 April 2014, see the Press Release issued by the Registrar of the Court, ECHR 105 (2014) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4735701-5755259>.

[12] See (n 1).

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effectively led to a house arrest, since he was living in a 1.6 km^2 Italian enclave in Switzerland.[13] Mr Nada complained before the ECtHR that the travel ban made it difficult for him to consult his doctors and to visit his friends and family.[14] In addition, Mr Nada argued that being designated as an alleged supporter of terrorism constituted an attack on his honour and reputation.[15]

The Grand Chamber found a violation of Mr Nada's right to respect for his private and family life[16] because Switzerland had not sufficiently taken into account the realities of the case when it implemented the sanction measures against Mr Nada.[17] In addition, the Court found a violation of the right to an effective remedy[18] because Mr Nada had not been granted effective means to obtain a removal from the blacklist.[19]

The case of *al-Dulimi* concerned an Iraqi national, allegedly the finance manager for the Iraqi secret services under the regime of Saddam Hussein.[20] His assets, and those of a company of which he was managing director, were frozen following a Security Council resolution that imposed sanction measures against the former Iraqi regime.[21] These measures were then implemented against him by Switzerland. In contrast to the measures implemented against Mr Nada, Switzerland was required to not only freeze Mr al-Dulimi's assets, but also to confiscate and transfer them to the Development Fund for Iraq.[22]

It is here relevant to note that the Chamber found the lack of an avenue by which Mr al-Dulimi could challenge these measures constituted a breach of his right of access to court, particularly since no equivalent protection is afforded at the UN level.[23]

III. HARMONIOUS INTERPRETATION

In the *Nada* case the Grand Chamber relied on the principle of harmonious interpretation to solve the (apparent) conflict between the international norms involved.[24] This principle stipulates that if a provision creating an international obligation leaves room

[13] See *Youssef Mustapha Nada v Staatssekretariat für Wirtschaft* [2007] 1A.45/2007 [10.2].

[14] *Nada* (n 10) [149], [154].

[15] *Nada* ibid [149]. The Court did not evaluate this complaint separately from the other issues under art 8 ECHR. However, see *Concurring Opinion of Judge Malinverni to Nada v Switzerland* [2012] ECHR 1691 [27]–[29]. See also A Willems, 'The European Court of Human Rights on the UN Individual Counter-Terrorist Sanctions Regime: Safeguarding Convention Rights and Harmonising Conflicting Norms in Nada v. Switzerland' (2014) 83 NordicJIntlL 39, 58.

[16] Art 8 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221; CETS 5 (ECHR). Mr Nada further complained about violations of the prohibition of torture and other inhumane treatment (art 3 ECHR); right to liberty and security (art 5 ECHR); and the right to freedom of religion (art 9 ECHR), which the Court all found to be manifestly ill-founded. *Nada* (n 10) [234] and [237].

[17] *Nada* (n 10) [196].

[18] Art 13 ECHR.

[19] *Nada* (n 10) [213].

[20] *al-Dulimi* (n 11) [10].

[21] UNSC Res 1483 (22 May 2003) UN Doc S/Res/1483 [23]. The Sanctions Committee which had to designate the individuals and entities that had to be targeted was established by UNSC Res 1518 (24 November 2003) UN Doc S/Res/1518. See also 'Non-Paper on the Implementation of Paragraph 23 of Resolution 1483 (2003)' available at <http://www.un.org/sc/committees/1518/pdf/Non-paper.pdf>.

[22] UNSC Res 1483 (2003) ibid.

[23] Art 6 (1) ECHR. *al-Dulimi* (n 11) [134]. Mr al-Dulimi also invoked arts 6(2), 6(3), 8 and 13 ECHR. See ibid [136]–[140].

[24] There are different understandings of the notion 'norm conflict', compare: J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003); E de Wet and J Vidmar, 'Introduction' in E de Wet and

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for interpretation, this latitude should be used to construct a meaning of that provision which is in harmony with the provision that created the allegedly conflicting obligation. With this technique the Court was able to solve the conflict between the international obligations without pronouncing on their mutual hierarchy. This principle of harmonious interpretation is endorsed by the general presumption against normative conflict in international law.[25] From this perspective, courts may presume that a State's obligations under one international instrument were not intended to conflict with obligations under another. Support for this approach can be found in the general rule on interpretation contained in the Vienna Convention on the Law of Treaties.[26] This rule states that for the purpose of interpreting the meaning of a treaty, 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account, together with the context.[27]

Subsection A will discuss the Court's application of the principle of harmonious interpretation, specifically in the context of an obligation created by the Security Council under Chapter VII. Subsection A will also introduce the doctrine of presumption of compliance. Subsection B will critically comment on the Court's rebuttal of the presumption in the case of *Nada*, and will analyse the effect of that rejection.

A. Interpretation in Context and Presumption of Compliance

The ECtHR first pronounced on how to solve a conflict between the implementation of an obligation created by the Security Council and an obligation under the ECHR in the case of *al-Jedda*. This case concerned an individual who was interned in Iraq by UK forces, acting within a Multi-National Force (MNF), allegedly upon authorization by the Security Council.[28] Interning this individual, which was done for reasons of security, was in direct conflict with his right to liberty under Article 5(1) of the ECHR. The Court solved that issue by relying on the principle of harmonious interpretation.[29] It presumed that the obligations created by the Security Council were not intended to be in conflict with fundamental principles of human rights law.[30] It constructed this presumption by interpreting the resolution concerned in the context of the UN Charter. The Charter holds that the Security Council 'shall discharge its duties in accordance with the Purposes and Principles of the United Nations'.[31] The Court established that, in

J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 2; and Milanović (n 8) 75.

[25] International Law Commission (ILC), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' UN Doc A/CN.4/L.682 [37]; Pauwelyn (n 24) 240.

[26] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31.

[27] ibid art 31(3)(c).

[28] *al-Jedda v The United Kingdom* [2011] 53 EHRR 23.

[29] ibid [102].

[30] ibid [102]. Sir Nigel Rodley, in his individual (concurring) opinion to the Human Rights Committee's view on the *Sayadi and Vinck* case, formulated a similar interpretative principle in relation to obligations created by the Security Council. UN Human Rights Committee 'Views of the Committee Concerning the Communication Submitted by Sayadi and Vinck' (29 December 2008) CCPR/C/94/D/1472/2006, 36. See to the same effect J Alvarez, 'The Security Council's War on Terrorism: Problems and Policy Options' in E de Wet and A Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003) 135–7, and A Tzanakopoulos, *Disobeying the Security Council* (OUP 2011) 118, 120. See also de Wet (n 2) 800.

[31] UN Charter (n 5) art 24(2).

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addition to maintaining international peace and security, the purposes of the UN also include encouraging respect for human rights and fundamental freedoms.[32] From this it derived that it must be presumed that the Security Council does not intend States to take measures that would result in a breach of their obligations under international human rights law.[33] The Court thus determined that if the meaning of a particular provision in a resolution is unclear, the interpretation that must be followed is that which effectively harmonizes the obligation created by the Security Council with the State's obligations under international human rights law. It added, however, that the presumption could be rebutted when the Security Council uses clear and explicit language to that effect.[34]

In the *al-Jedda* case a letter annexed to the relevant Security Council resolution explicitly mentioned internment as one of the options available to the MNF to counter ongoing threats to the security of Iraq.[35] Even so, the ECtHR did not find that the resolution provided the legal basis for Mr al-Jedda's internment. The Court argued that the resolution itself did not refer to the possibility of internment; the preamble to the resolution expressed the commitment of all forces to act in accordance with international law, which would include the ECHR; and the UN Secretary General (SG) explicitly condemned the use of security internment by the MNF in Iraq.[36] Therefore, the Court established that the impugned Security Council resolution did not explicitly or implicitly require the UK to put individuals who are regarded as posing a risk to the security of Iraq into 'indefinite detention without charge'.[37] As a consequence, the Court found no conflict to exist between the UK's obligations under the Security Council resolution and the ECHR.[38]

B. A Rebuttal of the Presumption of Compliance and its Subsequent Effect

As previously mentioned, the presumption of compliance can be rebutted when the Security Council uses sufficiently clear and explicit language to that effect. It could be argued that it is then for the Security Council to squarely confront its actions and to accept the political cost of superseding international human rights law.[39] In the *al-Jedda* case the Court applied a very strong presumption which did not appear to be easily rebutted.[40] The Court even considered the explicit referral to the option of internment in the letter annexed to the relevant resolution as insufficient to rebut the presumption.[41]

However, in the subsequent case of *Nada*, the Grand Chamber concluded that the presumption was rebutted in regard to obligations upon Switzerland, which followed

[32] ibid art 1(1) and 1(3) in conjunction with arts 55 and 56. See *al-Jedda* (ECtHR) (n 28) [102].
[33] *al-Jedda* (ECtHR) ibid.
[34] ibid.
[35] UNSC Res 1546 (8 June 2004) UN Doc S/Res/1546. The annexed letter of US Secretary of State Colin Powell refers to 'internment where this is necessary for imperative reasons of security'.
[36] *al-Jedda* (ECtHR) (n 28) [105]–[106].
[37] ibid [109].
[38] ibid. This interpretation conflicts with the House of Lords' earlier finding in the same case, *al-Jedda* (UKHL) (n 7). See also C Eckes and S Hollenberg, 'Reconciling Different Legal Spheres in Theory and Practice: Pluralism and Constitutionalism in the Cases of *Al Jedda, Ahmed* and *Nada*' (2013) 20 Maastricht Journal of European and Comparative Law 220, 237.
[39] By way of analogy with the concept of parliamentary sovereignty as applied in the UK: see eg *Ahmed* (n 9) [111], [193] and [240]. See also Hollenberg (n 9) ch 6.4.1.
[40] M Milanović, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 EJIL 121, 138.
[41] ibid.

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from Mr Nada's right to respect for his private and family life.[42] The Court concluded that the Security Council employed clear and explicit language when it imposed an obligation upon States to take measures that were capable of breaching individuals' human rights.[43] Yet the high threshold applied in the *al-Jedda* case did not appear to be so strictly adhered to. The Court did not invoke particularly strong evidence of the Security Council's intention to override international human rights law. It relied on a provision in Security Council resolution 1390 (2002) that merely imposes the obligation to implement the impugned sanctions.[44] Nowhere in this provision did the Security Council explicitly consider how these measures should relate to States' obligations under international human rights law.[45] Thus the presumption was rebutted by implication only. A provision from resolution 1267 (1999) to which the Court also referred, merely called upon States to act in accordance with that resolution, notwithstanding the existence of any rights conferred by any international agreement, contract, licence, or permit.[46] This very general statement does not specifically address the position of international human rights law. Moreover, that resolution was enacted long before the adoption of the measures at issue.[47] If the Court had instead considered the preamble of resolution 1624 (2005), then it might have come to a different conclusion. That preamble holds that '[s]tates must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights law'.[48]

The Court did not consider what would be the effect of a rebuttal of the presumption of compliance. It simply continued by examining whether the obligation created by the Security Council resolution left sufficient scope for Switzerland to implement that obligation in accordance with its obligations under the ECHR.[49] The Court considered that Switzerland was under an obligation to harmonize both obligations as far as possible. This obligation to harmonize appears to reach further than the obligation considered in the earlier *al-Jedda* case, where the Court held that the State must choose the interpretation of a Security Council resolution that is most compatible with its obligations under the Convention.[50] However, the case of *Nada* concerned an obligation upon Switzerland to adapt its implementation of the obligation created by the Security Council as far as possible to the designated individual's specific situation.[51] This is not only a matter of interpretation. Rather, it puts an obligation of conduct upon States when implementing Security Council resolutions. In that regard, the Court found that Switzerland had failed to sufficiently mitigate the effects of the sanctions regime on Mr Nada.[52] For example, Switzerland could have informed the Sanctions Committee sooner of the findings of a criminal investigation which

[42] *Nada* (n 10) [172].
[43] ibid.
[44] UNSC Res 1390 (2002) (n 1) [2b].
[45] ibid.
[46] *Nada* (n 10) [172]. See UNSC Res 1267 (1999) (n 1) [7].
[47] The travel ban in this sanctions regime was first adopted in UNSC Res 1390 (2002) (n 1) [2b].
[48] UNSC Res 1624 (14 September 2005) UN Doc S/Res/1624 preamble. See similarly the declaration contained in UNSC Res 1456 (20 January 2003) UN Doc S/Res/1456 [6]. See also Special Rapporteur 'Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (26 September 2012) UN Doc A/67/396 [18]–[19].
[49] *Nada* (n 10) [176]–[180].
[50] *Al-Jedda* (n 28) [102].
[51] *Nada* (n 10) [196].
[52] ibid. See also *Concurring Opinion of Judges Bratza, Nicolaou and Yudkivska to Nada v Switzerland* [2012] ECHR 1691 [9].

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concluded that the allegations against Mr Nada were unfounded,[53] and it could have assisted Mr Nada in filing petitions with the Sanctions Committee for exemptions from the travel ban.[54] The Court concluded that Switzerland could not validly confine itself to relying on the binding nature of the obligation created by the Security Council. It should have shown to the Court that it had taken into account the particular circumstances of the specific case when it applied the travel ban to Mr Nada.[55]

The Court concluded that by arriving at these findings it was dispensed from determining the question of hierarchy between an obligation created by the Security Council and an obligation under the Convention.[56] It therefore remains unclear what the Court actually considers to constitute the effect of a rebuttal. It would be logical to reason that obligations under a Security Council resolution would prevail over the ECHR if the Security Council intends it to have that effect. However, whether that is really what the Court has in mind remains, for the moment, a matter for scholarly interpretation.[57]

What is clear is that the Court did not engage with the essence of the matter. It did not evaluate whether the measure of the travel ban itself constituted a lawful interference with Mr Nada's enjoyment of the right to respect for his private and family life. It only considered what Switzerland could have done differently within the confines of the obligation imposed upon it by the Security Council.[58] By doing so the Court left domestic action, as far as it strictly implemented the obligations created by the Security Council, outside its scope of scrutiny. This may add to the suggestion that Mr Nada's right to private and family life was indeed set aside, in so far as required by the relevant Security Council resolution.

With regard to Mr Nada's right to an effective remedy, as laid down in Article 13 of the ECHR, the Court arrived at an entirely different finding.[59] It considered that nothing in the relevant resolutions prevented Switzerland 'from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions'.[60] Although the Court did not explicitly state this, it appeared to find that, with regard to the right to an effective remedy, the presumption of compliance was not rebutted. If this is indeed the case, then it would mean that the Court did not think that the Security Council intended to override the targeted individual's right to an effective remedy, and that the obligation under the UN Charter should have been interpreted in harmony with the obligation under the ECHR.

Alternatively, the Court might have had in mind another doctrine from its jurisprudence when considering the right to an effective remedy. It concluded that Mr Nada's right had been violated after having established that he had no effective means available, domestically or at the UN level, to have his name removed from the Security Council's sanctions list.[61] This investigation into alternative options, albeit superficially, is analogous to the equivalent protection doctrine, which will be

[53] *Nada* ibid. [187]–[188]. [54] ibid [193]. [55] ibid [195]–[196].
[56] ibid [197]. [57] See eg Milanović (n 40) 138. [58] See *Nada* (n 10) [195].
[59] Art 13 ECHR. [60] *Nada* (n 10) [212].
[61] *Nada* (n 10) [210]–[213]. It found no such remedy, but did not include in its review the latest amendments, which established and further developed the Office of the UN Ombudsperson. It merely relied on the Swiss Federal Court's evaluation of such protection, which that court had made five years earlier in its decision on the case of Nada. *Nada* ibid. [211]; see also *Nada* CH (n 13) [8.1] and [8.3]. That was well before all the recent amendments were made to the de-listing procedure, such as the institution of the Ombudsperson in 2009. See especially UNSC Res 1904 (17 December 2009) UN Doc S/Res/1904 [20] and UNSC Res 1989 (17 June 2011) UN Doc S/Res/1989 [23].

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explained in the following section. However, this would not have been possible within the logic of the Court's own reasoning in the *Nada* case. It had established that the relevant obligations created by the Security Council left States with scope for discretion,[62] whereas the equivalent protection doctrine can be applied only in situations where an international organization has imposed a strict obligation upon a State.[63]

IV. EQUIVALENT PROTECTION DOCTRINE

The equivalent protection doctrine should be clearly distinguished from the interpretative technique of the presumption of compliance. The latter is a form of harmonious interpretation, which is based on the general assumption in international law that States do not intend to enter into conflicting obligations.[64] In contrast, the equivalent protection doctrine, which defers towards the work of international organizations, has been developed by the ECtHR for the benefit of international cooperation.[65] Whether the Court grants such deference in a specific instance depends upon its assessment of the quality of human rights protection within the international organization at issue. If the Court considers that the organization protects human rights in a manner at least equivalent to the protection offered by the Convention, it will presume that if it did no more than implement a strict obligation, the State concerned did not act in contravention to the ECHR.[66] If a presumption of equivalent protection is established, this can only be rebutted if in a particular instance the protection is shown to be manifestly deficient.[67]

The Court applies the equivalent protection doctrine only when it has been asked to review a given State's conduct that was strictly required as a result of that State's obligations following from its membership of an international organization. Since the Chamber distinguished the *al-Dulimi* case from the *Nada* case on the ground that the obligations created by the Security Council in regard to Mr al-Dulimi left States no scope of discretion,[68] it had reason to apply the equivalent protection doctrine. In applying this doctrine to the case of *al-Dulimi* the Chamber engaged in a review of the measures of protection available to the targeted individuals at the UN level. Here, it relied upon a recent report submitted by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Making reference to this report, the Court held that the protection provided by the Ombudsperson procedure does not afford targeted individuals sufficient guarantees.[69] The Court then continued to deduce that the mere Focal Point available to Mr al-Dulimi, which obviously affords a lower level of protection than the Ombudsperson,[70] can *a fortiori* never provide sufficient guarantees.[71] Accordingly, the Chamber concluded that (at least for the moment) no equivalent protection could be presumed at the UN

[62] See on this issue also Judges Bratza, Nicolaou and Yudkivska (n 52) [1]–[8], and Judge Malinverni (n 15) [2]–[10]. On scope of discretion see further section VI.

[63] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* [2005] 42 EHRR 1 [157].

[64] See introduction to section III, and nn 25 and 26.

[65] *Bosphorus* (n 63) [150].

[66] See ibid [155]. See also *M & Co v Germany* (App 13258/87) (1990) 64 DR 138.

[67] *Bosphorus* (n 63) [156].

[68] *al-Dulimi* (n 11) [117]–[121]. As to the meaning of scope of discretion see section V.

[69] ibid [119].

[70] See (n 4).

[71] ibid [120].

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level.[72] Therefore, no deference was granted, and the Chamber ruled on the merits of the complaint.[73] It is quite remarkable that the Chamber applied the equivalent protection doctrine – which has been developed primarily in the context of ECtHR's relationship with the EU[74] – in a similar fashion to a situation involving a decision taken by the UN Security Council. This is especially so since, in previous case law, the ECtHR appears to have arduously avoided applying such a test in that context due to the special task and position of the Security Council.[75] Furthermore, it is hardly conceivable that an organization such as the UN, which is highly intergovernmental in nature, would ever be able to provide a measure of equivalent protection to individuals directly affected by Security Council resolutions.[76]

In addition, as regards the Grand Chamber's decision in *Nada*, it does not appear sound to apply the equivalent protection doctrine to a situation concerning a Security Council decision that leaves States no scope of discretion. It would be more cogent to consider such a strict obligation to constitute a rebuttal of the presumption of compliance, a point that will be developed further in the following section. Furthermore, if the Chamber's decision can be understood to mean that the presumption of compliance is only employed in cases where there is scope for discretion, the Court would always assess a respondent State's conduct that is not necessarily obligated by the Security Council. In such a situation, within the latitude left by the scope of discretion there is an opportunity for States to implement the Security Council resolution in accordance with their other obligations; a conflict between the international norms involved is therefore not necessary and inevitable. It cannot reasonably be maintained that pursuant to Article 103 of the UN Charter the respondent State was under an obligation to give precedence to an obligation created by the Security Council over obligations under other international agreements. Therefore a rebuttal of a presumption would not be relevant because the respondent State could have acted otherwise within the scope of their discretion.

V. SCOPE OF DISCRETION AND ROOM FOR INTERPRETATION

The reason why the Chamber in the *al-Dulimi* case did not find the lack of scope of discretion to constitute a rebuttal of the presumption of compliance, but rather an indication for applying the equivalent protection doctrine, is that the Court distinguishes between situations in which there is room for interpretation and those in which there is scope for discretion. The use of clear wording by the Security Council, which leaves no

[72] ibid [121] and also [134].
[73] ibid [122]. See section VI.
[74] See Bosphorus (n 63), and also ibid. [116]. The Court has however also extended its application to other international organisations. See C Ryngaert, – AND the opening quote mark which follows is the wrong way around 'The European Court of Human Right's Approach to the Responsibility of Member States in Connection with Acts of International Organisations' (2011) 60 International and Comparative Law Quarterly 997.
[75] See the argument developed in Hollenberg (n 9) 118–25. See also similarly *Mothers of Srebrenica v The Netherlands* [2013] App No 65542/12 [154] and [161]–[164], in which the ECtHR rejected the application of the reasonable alternative means test—which would normally apply in the context of assessing the lawfulness of limitations on the access to court due to IO immunities—in relation to conduct following from Security Council action under Chapter VII of the UN Charter.
[76] See S Hollenberg, 'The Security Council's 1267/1989 Targeted Sanctions Regime and the Use of Confidential Information: A Proposal for Decentralization of Review' (2015) 28 LJIL 49.

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latitude for interpretation, and therefore no possibility for harmonization with obligations under international human rights law, will prompt the Court to decide that the presumption of compliance is rebutted, as it did in *Nada*. However, a lack of scope of discretion would result in the Court employing an equivalent protection doctrine, as exampled by the Chamber in *al-Dulimi*. Nevertheless, this distinction between the scope of discretion and room for interpretation is difficult to maintain; the two concepts are closely intertwined. Determining what scope of discretion is left by a Security Council obligation is itself dependent upon an interpretation of the language employed in the particular provision of the relevant resolution.[77] Therefore, using the logic of the Grand Chamber's application of the presumption of compliance in the *Nada* case, an obligation that leaves States no scope of discretion would necessarily have to result in a rebuttal of that presumption.

The Court, however, uses a different approach to determine the scope of discretion left by obligations created by the Security Council. When the Grand Chamber considered in its *Nada* decision that the Security Council had left States some scope of discretion, it did not take account of the text or aim of the resolutions.[78] Rather, it arrived at this result primarily by arguing that the UN Charter does not prescribe how States should implement Security Council resolutions.[79] This approach is not very convincing because if applied consistently every obligation created by the Security Council would leave States a scope of discretion, since all these obligations find their basis directly in the same provision of the UN Charter.[80] Plainly, this was not the outcome arrived at when the Chamber accepted, in the subsequent *al-Dulimi* case, that the obligation created by the Security Council left no scope for discretion.[81] Thus the Chamber is clearly not of the opinion that all obligations stemming from the UN Charter leave States with scope for discretion regarding their implementation.[82]

Moreover, if the Security Council were to impose a clearly circumscribed obligation then any scope of discretion that might originate from the fact that the UN Charter does not prescribe how to implement that obligation would become illusory. States can then do no other but to engage in the conduct required. In the present instances the resolutions dictate that specifically prescribed measures must be taken against the designated individuals. This obligation leaves States no scope for discretion as to the result that should be achieved.[83] No matter what, the targeted individual's assets must be frozen and he must be stopped from travelling to other countries. As previously mentioned, compliance with these strict requirements may be impaired by providing the designated individuals with an opportunity for fair trial or an effective remedy. The outcome of an independent (judicial) review may very well be that the measures are found to be unjustified, disproportionate or otherwise illegal, and have to be terminated as a consequence. Therefore, despite the fact that the relevant resolutions remain silent on possibilities to afford due process guarantees while implementing sanction measures,

[77] Hollenberg (n 9) ch 5.2.1. Indeed, also among courts opinions may differ on the extent of scope of discretion left by the Security Council. Compare the General Court's (GC) decision in Case T-85/09 *Kadi v European Commission* [2010] ECR II-05177 (*Kadi II*, GC) [116] to *Kadi I*, CJ (n 9) [298].

[78] It engaged in some half-hearted and unconvincing attempts in *Nada* (n 10) paras [177] and [178]. See also Judge Malinverni (n 15) [3]–[4].

[79] *Nada* (n 10) [176] and [212]. Referring to the Court of Justice in *Kadi I* (n 9) [298] and [299].

[80] UN Charter (n 5) art 25.

[81] *al-Dulimi* (n 11) [117].

[82] Still courts may disagree on this matter; see (n 77).

[83] Tzanakopoulos (n 9) 3.

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this must be assessed as falling outside a State's scope of discretion. Genuinely and effectively providing these guarantees would necessarily mean considering the possibility that implementing measures could be annulled in respect of a particular individual,[84] and would therefore go against the obligation created by Security Council resolutions.

From this perspective it is also difficult to maintain that there is a distinction between the obligations created by the Security Council with regard to Mr Nada and those created with regard to Mr al-Dulimi.[85] When comparing the provisions of the two Security Council resolutions, a distinction based on the scope of discretion, as the Chamber employed in its *al-Dulimi* decision, is not immediately obvious. The distinction becomes even less apparent when the limitation of Mr al-Dulimi's right to a fair trial is compared to the limitation of Mr Nada's enjoyment of his right to an effective remedy; the relevant provisions are arguably significantly similar. Both resolutions merely decide that States should take the measures prescribed against the designated individuals.[86] The resolutions do not explicitly address the issue of a fair trial or an effective remedy, but it is clearly implied in the system of the centralized sanctions regime that the Security Council did not foresee such due process guarantees.[87] Providing these guarantees at a domestic level would automatically impair the effectiveness of the sanction measures, and would result in a fragmented application.[88] Therefore, considering the text and aim of the relevant resolutions, the sanction regimes should be viewed as leaving States no scope for discretion in their implementation. The cases of *Nada* and *al-Dulimi* therefore cannot be distinguished on this ground.[89]

VI. RIGHTS TO A FAIR TRIAL AND EFFECTIVE REMEDY

As previously mentioned, the Grand Chamber in the *Nada* case did not find the application of the right to an effective remedy to be affected by the obligation created by the Security Council. It could be argued that this reasoning encouraged or mandated domestic courts to adopt a dualist approach in these instances.[90] Such an approach would most likely result in the annulment of domestic measures against the

[84] See similarly *Kadi II*, CFI (n 77) [171].

[85] *al-Dulimi* (n 11) [117]–[121].

[86] Compare UNSC Res 1390 (n 1) [2] to UNSC Res 1483 (n 21) [23].

[87] Tzanakopoulos (n 9) 3; N Blokker, 'Reviewing the Review: Did the European Court of Justice in *Kadi* Indirectly Review Security Council Resolutions? On the Downside of a Courageous Judgment' in M Bulterman *et al* (eds), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Kluwer Law International 2009) 315, 323–4. See also Kadi II, CFI (n 77) [171].

[88] For a suggestion to decentralize the designation procedures for the targeted sanctions regimes see Hollenberg (n 76).

[89] The Security Council resolution relevant to Mr al-Dulimi does mention that 'claims made by private individuals or non-government entities on [funds transferred to the Development Fund for Iraq] may be presented to the internationally recognized, representative government of Iraq.' UNSC Res 1483 (n 21) [23]. This might suggest that Mr al-Dulimi's only remedy foreseen by the Security Council is via the Iraqi government, and *a contrario* excluding other possibilities. But the context of this provision indicates that it must be concerned with the claims of others than the targeted individual. Moreover, the Court does not consider this aspect of the provision at all.

[90] T Theniel, 'Nada v Switzerland: The ECtHR Does Not Pull a Kadi (But Mandates It for Domestic Law)' (12 September 2012) Invisible College Blog <http://invisiblecollege.weblog.leidenuniv.nl/2012/09/12/nada-v-switzerland-the-ecthr-does-not-pu/>.

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designated individual, because a review of the merits would not be possible.[91] Under a dualist approach, the right to an effective remedy would, in effect, prevail over the obligation created by the Security Council. Nevertheless, even if domestic remedies were successful for the individuals concerned they would provide the individuals with only limited relief. The domestic implementation measures may be annulled; yet the individuals would still remain on the Security Council's universally applicable blacklist.

Moreover, it is ambiguous what exactly a full application of the right to an effective remedy would entail, if it is accepted that the relevant material human right is set aside. The right to an effective remedy is intended to secure the independent domestic supervision of States' observance of other human rights.[92] It follows from its ancillary nature that if a certain human right is set aside by the Security Council the right to an effective remedy cannot be applied with regard to that particular human right. Or at least the working of the right to an effective remedy would be limited to guaranteeing a domestic review only of those aspects of the human right at issue that fall outside of the part suspended by the Security Council.

Indeed, in the *Nada* case the Court began by determining that the complaint was 'arguable'[93] 'in view of its finding of a violation of Article 8′.[94] However, as previously considered, the reason why the Court concluded that Article 8 was violated was that Switzerland could have done more within the confines of the obligation that was created by the Security Council. It assessed only the observance of duties that follow from Article 8, which were not affected by the obligation created by the Security Council.[95] As a consequence, any competent national authority conducting a review within the context of guaranteeing the designated individual an effective remedy would have to arrive at the conclusion that Article 8 of the ECHR is partly suspended. The national authority would therefore evaluate only the guarantee of the 'residual' obligations imposed upon the State. Accordingly, and contrary to the Court's reasoning,[96] it does not logically follow from the application of Article 13 of the ECHR that Mr Nada should have been afforded a judicial review of the original decision to designate him. Specifically, an assessment of the legality of the imposition of the travel ban itself is beyond the scope of protection provided by Article 8. Therefore an effective remedy in relation to that article could only concern a State's duty to take into account the particularities of a case when implementing that measure, and the efforts it undertakes to mitigate as far as possible the adverse effects on the designated individual.

Alternatively, it could be argued that the Security Council can only override the protection of human rights of individuals who are targeted justifiably. However, what does the option of rebuttal then entail, if it is still for domestic authorities to scrutinize the Security Council's findings in individual cases? If it was accepted that the Security Council could set aside obligations under international human rights law when it expresses its intention to do so, then a domestic authority that guarantees an effective remedy could in principle only scrutinize the protection of the (unaffected aspects of the) still applicable rights.

[91] See Hollenberg (n 76) 60–1.

[92] For the ancillary character of the right to an effective remedy, see B Rainey, E Wicks and C Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 130–1.

[93] A prerequisite for the application of art 13 ECHR. See ibid 131ff.

[94] *Nada* (10) [209].

[95] ibid [188], [193] and [195]–[196].

[96] See ibid [213].

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This would be different under Article 6 of the ECHR, which was invoked by Mr al-Dulimi. The right of access to court, as part of the right to a fair trial,[97] assumes to a considerable extent the function of the right to an effective remedy.[98] Both rights, in addition to being human rights themselves, play a functional role in ensuring the protection of (other) human rights.[99] They provide the procedural guarantees necessary to monitor the compliance with human rights law in individual instances.

An important difference, however, is that the right of access to court guarantees only the judicial protection of civil rights, not human rights. Whether there is a civil right (or obligation) within the meaning of Article 6 ECHR is derived from domestic law.[100] Yet many human rights have aspects that could be qualified as civil within the meaning of the right of access to court.[101] Relevant exceptions are possibly the right to liberty and security,[102] and the right to freedom of movement. Civil rights, being domestic in nature, cannot be set aside by an international obligation created by the Security Council, which pursuant to Article 103 of the UN Charter would prevail only over obligations under other international agreements. Therefore, in principle, rights and obligations under domestic law would fall outside its scope.[103] Accordingly, unless the right of access to court itself would be set aside or restricted in its application by the Security Council, it cannot be indirectly emptied of its meaning by overriding the civil rights concerned.

Finally, it has to be noted that as regards the possibility to ensuring a targeted individual's due process rights, a distinction must be made between individuals such as Mr Nada, on the one hand, and Mr al-Dulimi, on the other. The first is an individual allegedly involved in financially supporting international terrorism. Such allegations can often only be substantiated by relying on confidential material gathered by national intelligence agencies, which is not likely to be shared with the targeted individual or with foreign courts.[104] In contrast, the question whether Mr al-Dulimi was indeed the finance manager for the Iraqi secret services under Saddam Hussein is in principle publicly available information. In a cable made public by Wikileaks, the US State Department, which already in 2008 foresaw this decision by the ECtHR, asked for additional information on the allegations against Mr al-Dulimi. The cable notes that 'Al-Dulimi denies he was ever a member of the Baath Party, and further denies he was "a director of investments for the Iraqi Intelligence Service" under Saddam Hussein'.[105] Therefore, the US Embassy in Baghdad was instructed to ask the Iraqis whether they could provide further information on what Mr. al-Dulimi did for the Saddam Hussein regime. According to the Iraqis it was publicly known that Mr al-Dulimi held the alleged position, and that he was one of the senior officials of the former Iraqi regime. This statement might not be sufficient, but perhaps some

[97] *Golder v The United Kingdom* [1975] 4451/70 [36].
[98] Rainey *et al.* (n 92) 137–9.
[99] See *Golder* (n 97) [34], and Ahmed (n 9) [146].
[100] Civil rights and obligations have autonomous meanings, but it is clear that they must be granted or exist under domestic law. It is then for the Court to ascertain whether that is the case. Rainey *et al.* (n 91) 259.
[101] ibid 535–8.
[102] *Golder* (n 97) [33]. But see Rainey *et al.* (n 92) 536.
[103] See, however, Hollenberg (n 9) 139.
[104] See Hollenberg (n 76) 53–4.
[105] Wikileaks Cable Viewer 'cable 08STATE116615, UN FOCAL POINT DELISTING REQUEST FOR KHALAF' <http://wikileaks.org/cable/2008/10/08STATE116615.html> (last visited 25 March 2014).

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official documents would suffice. At least this makes it easier to organize a fair trial for individuals such as Mr al-Dulimi than for individuals such as Mr Nada. Since Mr al-Dulimi would clearly be in a position to know which allegations he needed to refute, the evidence underlying these allegations could be safely presented to him.[106]

VII. CONCLUSION

The decisions by the ECtHR in the cases of *Nada* and *al-Dulimi* add to the existing jurisprudence that indicates that the European judiciary is not going to retreat easily in the struggle for the protection of human rights.[107] Rather, the courts are seeking full confrontation with the Security Council. This approach places Member States in an extremely difficult position; they are positioned between two conflicting international obligations, which are very difficult to harmonize. Still, this confrontational approach might eventually result in better protection at the UN level.[108] The Security Council, seeing its efficacy and efficiency of action undermined by substantial annulments of domestic implementations,[109] might be willing to adjust its measures to reflect the requirements of these courts.[110] However, for such approach to be effective these courts must maintain a dialogue with the Security Council. The Chamber's use of the equivalent protection doctrine in the *al-Dulimi* case might be an indication that it is prepared to engage in such a dialogue.[111] Yet the difficulty remains that any form of equivalent protection at the UN level is very unlikely to ever be achieved in respect of individuals who are directly affected by a Security Council resolution. It would not suffice to merely establish an avenue for independent review and an effective means of redress, substantive human rights guarantees would have to be secured as well.[112] This would not be easily realized in the highly intergovernmental setting of the UN. Moreover, the problem of relying on confidential information to substantiate an individual's designation would continue to significantly limit the possibilities for any future procedure being fair.[113]

The approach employed by the Grand Chamber in the *Nada* case may present a more promising technique for judicial deference. A harmonious interpretation including a presumption of compliance can draw a careful balance between the conflicting interests concerned; on the one hand, maintaining international peace and security and, on the other hand, guaranteeing the protection of an individual's human rights. Yet in order to accord sufficient weight to the latter interest, the threshold for rebuttal of the presumption needs

[106] An example can be found in the recent decision of EU's General Court in the case of Makhlouf, concerning sanction measures against members of the Syrian regime. Case T-383/11 *Makhlouf v Council* [2013] ECR-II 0000.

[107] See *Kadi I*, CJ (n 9); *Kadi II*, GC (n 77); Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and United Kingdom v Yassin Abdullah Kadi* [2013] ECR I-0000 (*Kadi II*, CJ); *Ahmed* (n 9).

[108] See for example the preamble of the resolution establishing the Office of the Ombudsperson, in which the Security Council took 'note of challenges, both legal and otherwise, to the measures implemented by Member States'. UNSC Res 1904 (n 61). See also de Wet (n 2) 799.

[109] Special Rapporteur 'Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (26 September 2012) UN Doc A/67/396 [23]. See also Blokker (n 87) 325.

[110] Hollenberg (n 9) 255.

[111] This in contrast to the Court of Justice's decision in its latest *Kadi* case, in which it largely ignored the progress being made at the UN level. See *Kadi II*, CJ (n 107) [133].

[112] See *Bosphorus* (n 63) [159].

[113] See for a solution Hollenberg (n 76).

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to be higher than that applied by the Grand Chamber in the *Nada* case. By relying on a relatively lenient standard the presumption of compliance loses much of its potential power as a means of protecting individuals' enjoyment of their human rights. Therefore, instead of relying on mere implications, the Court should have required the Security Council to explicitly create an obligation upon UN Member States to deviate from specifically prescribed international human rights. This obligation should be stipulated in the operative paragraphs of the relevant resolution, and not in merely in the preamble. For example, when imposing targeted sanctions, the Security Council should add a provision such as 'The Security Council decides that States should carry out the obligations created in paragraph … notwithstanding any of their obligations under international human rights law to guarantee the individuals concerned a fair trial or an effective remedy.' Moreover, the Court should require the Security Council to take this step every single time it adopts a resolution to that effect, and also when it concerns a subsequent resolution merely confirming earlier obligations. If such a high threshold was applied, it could be expected that the Security Council would not be able to deviate readily from international human rights law. The members of the Security Council would probably struggle to agree upon the precise, clear, and explicit language that would be required in such a provision, since it would force the Council and its members to fully confront their actions and accept the political cost.[114]

[114] See (n 39).

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