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Norm Conflict, Fragmentation, and the European Court of Human Rights

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NORM CONFLICT, FRAGMENTATION, AND THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract: In *Al-Jedda v. United Kingdom*, the European Court of Human Rights addressed the petition of a person detained by U.K. occupation forces in Iraq pursuant to United Nations Security Council authorization. One issue before the court in *Al-Jedda*—whether the petitioner's rights against the U.K. government under the Convention for the Protection of Human Rights and Fundamental Freedoms might disapply the Security Council authorization—illustrates the problem of norm conflict between intergovernmental regimes. The *Al-Jedda* court avoided directly pitting the differing norms at issue (Security Council resolutions versus European human rights treaty provisions), but in doing so left open such a conflict for where one such norm explicitly requires violation of the other. When this question arises, the court should not hold that the applicability of European treaty norms disapplies Security Council resolutions or other United Nations acts, because so holding would further fragment the international system and leave states in positions where they will be bound to violate at least some of their international obligations.

Introduction

On July 7, 2011, the European Court of Human Rights (ECtHR) Grand Chamber ruled on the landmark case of *Al-Jedda v. United Kingdom*.[1] This case dealt with the legality of the security internment of dual British-Iraqi citizen Hilal Abdul-Razzaq Ali Al-Jedda in Iraq by British forces pursuant to a United Nations (UN) Security Council resolution.[2] In *Al-Jedda*, the ECtHR meaningfully confronted the conflict of human rights norms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) with those of secu-

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[1] Al-Jedda v. United Kingdom, App. No. 27021/08, 53 Eur. H.R. Rep. 789, 789 (2011).

[2] *Al-Jedda*, 53 Eur. H.R. Rep. at 794, 815–16.

rity.[3] By holding that the rights to personal liberty and security enshrined in Article 5 of the ECHR were not displaced in this instance, the Grand Chamber for the first time confronted the norm conflicts it had previously avoided,[4] and embarked down a path of interpretation that is both definitive and uncertain.[5] On one hand, the Grand Chamber's decision is definitive because it reaffirms the constitutional nature of the ECHR[6] and establishes a firm rule for interpreting Security Council resolutions that errs on the side of human rights protection and Security Council accountability.[7] On the other hand, the Grand Chamber's decision is also uncertain because such a move by the court will soon require the ECtHR to decide how much of a human rights restraint on the Security Council it intends to be, and what level of fragmentation in the international system it is willing to accept in order to assert such authority over its states parties.[8]

Part I of this Note provides a background on the facts of *Al-Jedda* and the circumstances of Al-Jedda's detention, as well as the legal landscape in which British forces in Iraq were operating. Part II presents a discussion of norm conflict, fragmentation of the international system, and the particular difficulties in assessing norm conflicts regarding human rights. Part II further recounts the U.K. House of Lords decision in *Al-Jedda* as well as that of the ECtHR. Part II concludes with a discussion of the subsequent case *Nada v. Switzerland*, in which the ECtHR applied the Grand Chamber's *Al-Jedda* reasoning. Part III argues that the ECtHR should value international legal cohesion and be reluctant to challenge the Security Council by asserting itself as an independent legal order, a move that could compromise the universality of the treaty's protections by encouraging states parties to seek formal derogations.

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[3] *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; Marko Milanović, Al-Skeini *and* Al-Jedda *in Strasbourg*, 23 Eur. J. Int'l L. 121, 136–37 (2012).

[4] *See* Marko Milanović & Tatjana Papić, *As Bad As It Gets: The European Court of Human Rights's* Behrami and Saramati *Decision and General International Law*, 58 Int'l & Comp. L.Q. 267, 268, 293–95 (2009).

[5] *See Al-Jedda*, 53 Eur. H.R. Rep. at 845; Milanović, *supra* note 3, at 138; *infra* notes 6–7 and accompanying text.

[6] *See Al-Jedda*, 53 Eur. H.R. Rep. at 842–43; Milanović, *supra* note 3, at 136.

[7] *See* Milanović, *supra* note 3, at 137–38.

[8] *Cf. id.* at 138 (noting that the ECtHR's decision created an avenue for a meaningful human rights check on the Security Council and the court's unease with the prospect of determining the relationship between the ECHR and the Security Council).

I. Background

A. *Occupation of Iraq and the Internment Regime*

On November 8, 2002, the UN Security Council adopted Resolution 1441 under its Chapter VII[9] authority from the UN Charter.[10] The Resolution asserted that, in failing to disarm and cooperate with the UN and the International Atomic Energy Agency weapons inspectors, Iraq continued to be in material breach of its obligations under previous Security Council resolutions.[11] Resolution 1441 gave Iraq a final opportunity to disarm and cooperate fully with the inspectors or "face serious consequences as a result of its continued violations of its obligations."[12]

On March 20, 2003, the United States led a unified coalition of armed forces including the United Kingdom, Poland, Australia, and Denmark in the invasion of Iraq.[13] By April 9, 2003, British forces overtook the city of Baghdad, and by May 1, 2003, the coalition declared major combat operations in Iraq complete, turning its efforts toward reconstruction.[14] In early May 2003, the occupying states created the Coalition Provisional Authority (CPA) to serve as an interim quasi-governmental administrative body with legislative authority until the area became secure and it became possible to establish an Iraqi government.[15] Coalition States appointed representatives to the CPA and divided Iraq into regional areas, with CPA South to be controlled by the United Kingdom and responsibility for the area to be vested in a U.K. Regional Coordinator.[16]

On May 22, 2003, the Security Council passed Resolution 1483.[17] Resolution 1483 authorized the UN Secretary-General to appoint a Special Representative for Iraq to report regularly to the Security Council on activities in Iraq.[18]

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[9] *See* U.N. Charter arts. 39, 42–43. Under Chapter VII, if the Security Council determines that there is "any threat to the peace" it may call upon member states either to impose nonmilitary sanctions, like embargoes, under Article 41, or to take military action "as may be necessary to maintain or restore international peace and security" under Article 42. *Id.* arts. 41–42; Henry J. Steiner, *International Protection of Human Rights*, *in* International Law 757, 762–63 (Malcolm D. Evans ed., 2003).

[10] S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

[11] *Id.* pmbl.

[12] *Id.* ¶¶ 11, 13.

[13] *Al-Jedda*, 53 Eur. H.R. Rep. at 806.

[14] *Id.*

[15] *Id.* at 807–08.

[16] *Id.*

[17] S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

[18] *Id.* ¶ 8.

The Governing Council of Iraq was established in July 2003.[19] From this point forward, the occupying forces required the CPA to cooperate with the Governing Council on all matters relating to the temporary governance of Iraq.[20] In October 2003, the Security Council passed Resolution 1511 which authorized a multinational force that was empowered to "contribute to the maintenance of security and stability in Iraq."[21]

On June 5, 2004, U.S. Secretary of State Colin Powell wrote to the President of the Security Council "to confirm that the MNF [Multi-National Force] . . . is prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism and protecting the territory of Iraq."[22] Powell stated that the MNF was prepared to pursue combat operations against "forces seeking to influence Iraq's political future through violence" and to pursue "internment where . . . necessary for imperative reasons of security."[23]

This letter was annexed to Resolution 1546 during its consideration by the Security Council, which adopted the measure on June 8, 2004.[24] With that Resolution, the Security Council supported the formation of a sovereign Interim Government of Iraq to assume responsibility by June 30, 2004.[25] The Security Council further required the Special Representative of the Secretary-General and the UN Assistance Mission for Iraq (UNAMI), to "promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq."[26] Finally, the Security Council

> [d]ecide[d] that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing . . . the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that . . . the United Nations can fulfil its role in assisting the Iraqi people . . . and the Iraqi people can implement freely and without intimidation the timetable and

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[19] *Al-Jedda*, 53 Eur. H.R. Rep. at 810.
[20] *Id.*
[21] S.C. Res. 1511, ¶ 13, U.N. Doc. S/RES/1511 (Oct. 16, 2003).
[22] S.C. Res. 1546, annex, U.N. Doc. S/RES/1546 (June 8, 2004).
[23] *Id.*
[24] *See id.*
[25] *Id.* ¶ 1.
[26] *Id.* ¶ 7.

> programme for the political process and benefit from reconstruction and rehabilitation activities.[27]

On June 28, 2004, the Interim Government assumed control of Iraq, leading to the CPA's disbanding.[28] Thereafter, the MNF, including a large contingent from the United Kingdom, remained in Iraq pursuant to Security Council authorization and the request of the Iraqi government.[29]

Resolution 1546 also required the Secretary-General to report to the Security Council on the progress in Iraq.[30] With regard to the internment regime, the Secretary-General stated in his report on June 7, 2005:

> The volume of reports on human rights violations in Iraq justifies serious concern. . . . One of the major human rights challenges remains the detention of thousands of persons without due process. According to the Ministry of Justice, there were approximately 10,000 detainees at the beginning of April, 6,000 of whom were in the custody of the [MNF]. Despite the release of some detainees, their number continues to grow. Prolonged detention without access to lawyers and courts is prohibited under international law, including during states of emergency.[31]

By the end of 2006, the Secretary-General's estimation was that 13,571 detainees were confined in MNF detention centers.[32] UNAMI, which had been charged in Resolution 1546 with promoting the protection of human rights in Iraq,[33] expressed similar reservations about the growing number of detainees.[34] In its report from Fall 2005, UNAMI stressed the "urgent need to provide [a] remedy to lengthy internment for reasons of security without adequate judicial oversight."[35] Of the

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[27] *Id.* ¶ 10.

[28] *Al-Jedda*, 53 Eur. H.R. Rep. at 816.

[29] *Id.* at 806, 816.

[30] S.C. Res. 1546, *supra* note 22, ¶ 30.

[31] U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546 (2004)*, ¶¶ 70, 72, U.N. Doc. S/2005/373 (June 7, 2005).

[32] U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546 (2004)*, ¶ 45, U.N. Doc. S/2006/945 (Dec. 5, 2006).

[33] S.C. Res. 1546, *supra* note 22, ¶ 7.

[34] *Al-Jedda*, 53 Eur. H.R. Rep. at 817–18.

[35] U.N. Assistance Mission for Iraq, Human Rights Report: 1 September–31 October 2005 para. 6 (2005), *available at* http://unami.unmissions.org/LinkClick.aspx?fileticket=_FMe6vcxql4%3d&tabid=3174&language=en-US.

13,571 detainees in MNF detention centers, UNAMI reported in mid-2006 that eighty-five were in U.K. custody, while the remaining 13,486 individuals were in U.S. custody.[36]

When the MNF failed to reduce the number of security internees detained by late 2006, UNAMI's January–March 2007 report expressed its concern:

> The practice of indefinite internment of detainees in the custody of the MNF remains an issue of concern to UNAMI. Of the total of 16,931 persons held at the end of February, an unknown number are classified as security internees, held for prolonged periods effectively without charge or trial. . . . The current legal arrangements at the detention facilities do not fulfill the requirement to grant detainees due process.[37]

One such security internee was Hilal Abdul-Razzaq Ali Al-Jedda.[38]

B. *The Detention of Al-Jedda*

Al-Jedda was born in Iraq in 1957.[39] He left Iraq in 1978, first for the United Arab Emirates and later Pakistan, after refusing to join the Ba'ath Party.[40] In 1992, Al-Jedda travelled to the United Kingdom where he claimed asylum and was granted indefinite leave to remain, later becoming a British citizen in June 2000.[41] In September 2004, "for family reasons"[42] Al-Jedda and four of his children journeyed to Iraq, where they arrived on September 28, 2004.[43] Acting on information provided by British intelligence services, U.S. soldiers arrested Al-Jedda at his sister's home in Baghdad on October 10, 2004.[44] Al-Jedda was taken to the British-run Sha'aibah Divisional Temporary Detention Facility in Basrah, where he was held in internment until December 30,

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[36] U.N. Assistance Mission for Iraq, Human Rights Report: 1 July–31 August 2006 para. 58 (2006), *available at* http://unami.unmissions.org/LinkClick.aspx?fileticket=gCQM_aC54jI%3d&tabid=3174&language=en-US.

[37] U.N. Assistance Mission for Iraq, Human Rights Report: 1 January–31 March 2007 para. 71 (2007), *available at* http://www.ohchr.org/Documents/Countries/jan-to-march2007_engl.pdf.

[38] *See Al-Jedda*, 53 Eur. H.R. Rep. at 794.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Iraq Detainee Loses Court Appeal*, BBC News (Mar. 29, 2006, 14:04 GMT), http://news.bbc.co.uk/2/hi/uk_news/4856406.stm ("Mr Jedda denies the allegations and has said his visit was for family reasons and nothing to do with terrorism.").

[43] *Al-Jedda*, 53 Eur. H.R. Rep. at 794.

[44] *Id.*

2007—a period of three years, two months, and twenty days in custody.[45]

The basis for Al-Jedda's internment was that it "was necessary for imperative reasons of security in Iraq."[46] Though no criminal charges were brought against him, British authorities believed he had enabled the travel of an explosives expert into Iraq and conspired with him to attack coalition forces near Fallujah and Baghdad with improvised explosive devices.[47] They also believed that Al-Jedda had conspired with members of an Islamist terrorist cell to smuggle high-tech detonation equipment into Iraq to achieve this purpose.[48] Although the British Secretary of State for Defence noted that there was probably insufficient evidence to sustain a criminal charge in court, he nevertheless signed an order depriving Al-Jedda of his U.K. citizenship because it was "conducive to the public good."[49]

Upon his December 30, 2007, release, Al-Jedda travelled to Turkey where he appealed against the deprivation of his British citizenship.[50] This appeal was dismissed on April 7, 2009, by the Special Immigration Appeals Commission, which "was satisfied on the balance of probabilities . . . that [Al-Jedda] had facilitated the travel to Iraq of a terrorist explosives expert and conspired with him to smuggle explosives into Iraq and to conduct improvised explosives device attacks against coalition forces around Fallujah and Baghdad."[51]

In early 2005, Al-Jedda began proceedings in the British High Court challenging the legality of his detention under the Human Rights Act and requesting transfer to the United Kingdom.[52] Al-Jedda claimed that his detention was unlawful because it violated ECHR Article 5, which says that, absent a formal derogation, "[e]veryone has the right to liberty and security of person" and that "[n]o one shall be deprived of

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[45] *Id.*; *see* Alex Barker, *UK Army Accused of Letting Iraq Killers Go*, Fin. Times (Feb. 15, 2008, 12:28 AM), http://www.ft.com/cms/s/0/1adfdd02-db3a-11dc-9fdd-0000779fd2ac.html ("[Al-Jedda] claim[ed] that British military officers agreed on a schedule to release all detainees in return for a pledge by the militia to cease attacks on British forces.").

[46] *Al-Jedda*, 53 Eur. H.R. Rep. at 794.

[47] *Id.* at 794–95.

[48] *Id.*

[49] *See id.* at 795; Michael Wood, *Detention During International Military Operations: Article 103 of the UN Charter and the* Al-Jedda *Case*, 47 Mil. L. & L. War Rev. 139, 149 (2008).

[50] *Al-Jedda*, 53 Eur. H.R. Rep. at 795–96.

[51] *Id.*; Al-Jedda v. Sec'y of State for the Home Dep't, Appeal No. SC/66/2008, para. 17 (Spec. Immigr. App. Comm'n Apr. 7, 2009) (U.K.).

[52] Francesco Messineo, *The House of Lords in* Al-Jedda *and Public International Law: Attribution of Conduct to Un-Authorized Forces and the Power of the Security Council to Displace Human Rights*, 56 Neth. Int'l L. Rev. 35, 36 (2009).

his liberty" except in limited enumerated cases and "in accordance with a procedure prescribed by law."[53] In short, Al-Jedda argued that the ECHR does not allow for such preventative security detention.[54]

The U.K. government countered that, pursuant to Article 103 of the UN Charter, the authorization of security internments in Resolution 1546 prevailed over any provision of the ECHR.[55] Al-Jedda's case was heard by the Divisional Court, the Court of Appeal, and the House of Lords.[56] Each dismissed his claim.[57]

C. Al-Jedda *Before the House of Lords*

The House of Lords—the highest appellate court in the United Kingdom at the time—decided the *Al-Jedda* case on December 12, 2007.[58] The primary issue before the court was whether, by virtue of the U.K. Human Rights Act of 1998,[59] Al-Jedda's detention was unlawful under the ECHR, or whether the human rights guarantees of that treaty were qualified or displaced by Resolution 1546 by virtue of UN Charter Article 103.[60] Article 103 provides that "[i]n the event of a con-

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[53] ECHR, *supra* note 3, art. 5(1); Messineo, *supra* note 52, at 36.

[54] Wood, *supra* note 49, at 153 ("It was common ground [between the parties] that the detention was not in conformity with article 5(1) if that provision applied, since it clearly fell within none of the exceptions listed therein.").

[55] Marko Milanović, *Norm Conflict in International Law: Whither Human Rights?*, 20 Duke J. Comp. & Int'l L. 69, 81 (2009).

[56] Messineo, *supra* note 52, at 36; *see* R (on the application of Al-Jedda) v. Sec'y of State for Def., [2007] UKHL 58, [2008] 1 A.C. 332 (appeal taken from Eng.); R (on the application of Al-Jedda) v. Sec'y of State for Def., [2006] EWCA (Civ) 327 (Eng.); R (on the application of Al-Jedda) v. Sec'y of State for Def., [2005] EWHC (Admin) 1809 (Eng.).

[57] *See R (on the application of Al-Jedda)*, [2007] UKHL 58 at [155]; *R (on the application of Al-Jedda)*, [2006] EWCA (Civ) 327 at [110], [113]–[114]; *R (on the application of Al-Jedda)*, [2005] EWHC (Admin) 1809 at [154]; Messineo, *supra* note 52, at 36.

[58] *See R (on the application of Al-Jedda)*, [2007] UKHL 58 at [155]. Al-Jedda also argued before the House of Lords that the conduct of British forces toward him was attributable to the United Kingdom or to the UN as a result of Resolution 1511. *See id.* at [149]; Wood, *supra* note 49, at 140. If the acts of soldiers in the MNF ceased to be attributable to their home nations and were instead attributable to the UN, the United Kingdom would not be liable before the ECtHR for the soldiers' acts. *See Al-Jedda*, 53 Eur. H.R. Rep. at 837. On this issue, Lord Bingham, speaking for the majority, held that the actions of U.K. troops in interning Al-Jedda were not attributable to the UN. *See R (on the application of Al-Jedda)*, [2007] UKHL 58 at [24]–[25]. This ruling was predictably affirmed by the ECtHR on appeal, with the court noting that it "[did] not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force . . . ceased to be attributable to the troop-contributing nations." *Al-Jedda*, 53 Eur. H.R. Rep. at 837.

[59] Milanović, *supra* note 55, at 80 (explaining that ECHR rights were accepted into English law by the Human Rights Act 1998).

[60] *Id.* at 81; Wood, *supra* note 49, at 140, 153.

flict 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."[61] The prevalence of a state's "obligations under the Charter" extends to binding Security Council resolutions, a fact established by the International Court of Justice and by the practice of states.[62]

The government conceded "that [Al-Jedda's] detention was not in conformity with Article 5(1) [ECHR] if that provision applied, since it clearly fell within none of the exceptions listed therein."[63] As to the treaty's applicability, Al-Jedda argued "that the Security Council resolution placed no obligation on the United Kingdom, but only authorized his detention, with the consequence . . . that Article 103 had no application."[64] Lord Bingham, writing for the majority, disagreed with this argument, pointing to the robust and persuasive scholarship which supports the idea that Article 103 is equally "applicable where conduct is authorised by the Security Council as where it is required."[65] This scholarship explains that Security Council resolution authorizations have largely replaced the Charter's collective security regime as originally envisioned.[66]

Lord Bingham emphasized that "the reference in article 103 to 'any other international agreement' leaves no room for any excepted category," including responsibilities under human rights instruments.[67] His Lordship summarized the House of Lords' holding, in which it ruled that

> the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by [Resolution] 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention.[68]

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[61] U.N. Charter art. 103.

[62] Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.S.), Provisional Measure, 1992 I.C.J. 114, ¶¶ 39–40 (Apr. 14); Rep. of the Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 58th sess, May 1–June 9, July 3–Aug. 11, ¶ 331, U.N. Doc. A/CN.4/L.682 (2006).

[63] Wood, *supra* note 49, at 153.

[64] *Id.*

[65] *R (on the application of Al-Jedda)*, [2007] UKHL 58 at [33].

[66] *See, e.g.*, Milanović, *supra* note 55, at 78.

[67] *R (on the application of Al-Jedda)*, [2007] UKHL 58 at [35].

[68] *Id.* at [39].

Baroness Hale concurred, articulating the concern latent in Lord Bingham's discussion.[69] She noted that in such situations "[t]he right [to liberty and security of person] is qualified but not displaced. . . . The right is qualified only to the extent required or authorized by the resolution. What remains of it thereafter must be observed."[70]

After his claim was dismissed by the House of Lords, Al-Jedda appealed to the ECtHR.[71]

II. Discussion

A. *Norm Conflict Generally*

Al-Jedda v. United Kingdom presents a problem of norm conflict: human rights (obliged by the ECHR) versus security (authorized by Resolution 1546).[72] Norms are legally binding rules establishing distinct rights and responsibilities between subjects of international law.[73] Conflict between two norms exists "if one norm constitutes, has led to, or may lead to, a breach of the other."[74] Such conflict can be handled either by avoidance or resolution.[75] Instances in which the two norms are at first glance contradictory, but where the conflict can be avoided by interpretive means, are called apparent conflicts.[76] Courts usually respond to the "powerful tendency in international law toward harmonization and systemic integration that abhors conflicts and seeks to avoid them."[77] In cases where no interpretative techniques of conflict avoidance satisfy the court, a genuine, as opposed to an apparent, norm conflict results.[78]

If a state enters into an agreement that genuinely conflicts with some previous agreement to which it is a party, but which does not abrogate the original treaty, the state will incur the legal cost of being

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[69] *See id.* at [126].

[70] *Id.*

[71] *See Al-Jedda*, 53 Eur. H.R. Rep. at 805.

[72] *See* Milanović, *supra* note 3, at 138.

[73] Milanović, *supra* note 55, at 72.

[74] Joost Pauwelyn, Conflict of Norms in Public International Law 175–76 (2003); *see also* Erich Vranes, *The Definition of 'Norm Conflict' in International Law and Legal Theory*, 17 Eur. J. Int'l L. 395, 401–07 (2006) (discussing narrower and broader definitions of norm conflict).

[75] Marko Milanović, *A Norm Conflict Perspective on the Relationship Between International Humanitarian Law and Human Rights Law*, 14 J. Conflict & Security L. 459, 465 (2010).

[76] *Id.*

[77] Milanović, *supra* note 55, at 73.

[78] Pauwelyn, *supra* note 74, at 272.

held responsible to both.[79] In other words, "though this second treaty might be contrary to the provisions of an earlier one, and thus 'illegal,' it is not thereby invalidated and still has legally binding force as the product of valid state consent."[80]

Though unavoidable, these conflicts might still be resolvable.[81] Rather than interpreting away incompatibility, resolution requires one of the conflicting norms to trump the other.[82] Furthermore, resolution only occurs "if the state bears no legal cost for disregarding one of its commitments in favor of another."[83] This would be true if, for example, under the UN Charter's prospective conflict clause (Article 103), a treaty were to conflict with an obligation under the Charter.[84] Prospective conflict clauses are provisions inserted into treaties which preemptively establish whether that instrument will take priority over another.[85] Article 103 is "the only truly meaningful" such provision for at least two reasons.[86]

First, it does not follow from the Article 103 declaration that Charter obligations prevail over all others that the conflicting norm is invalidated, as it would be if it conflicted with a *jus cogens* norm.[87] The conflicting norm continues to exist, but the state is not permitted to follow it.[88] Second, Article 103 absolves the member state of any fault for breaching the conflicting norm.[89] A member state cannot therefore be impugned for failing in its obligations under the conflicting norm.[90]

Although Article 103 is not technically a rule of hierarchy like the peremptory status of a *jus cogens* norm, it has in practice elevated the status of the UN Charter when conflicting with other treaties.[91] Taken

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[79] Milanović, *supra* note 55, at 76.

[80] *Id.*

[81] Milanović, *supra* note 75, at 465.

[82] *Id.*

[83] Milanović, *supra* note 55, at 73–74.

[84] *Id.* at 76.

[85] Milanović, *supra* note 75, at 467.

[86] Milanović, *supra* note 55, at 76.

[87] *Id.*; *see, e.g.*, Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 311 (stating a treaty is void if it conflicts with a peremptory norm of international law). For a more in-depth discussion of *jus cogens* and norm conflict, see Rep. of the Int'l Law Comm'n, *supra* note 62, ¶¶ 361–373.

[88] Milanović, *supra* note 55, at 76. For an explanation of relevant international law on the primacy of Article 103 and UN Security Council resolutions, see Wood, *supra* note 49, at 146–47. For a more detailed discussion of fragmentation and Article 103 conflicts, see Rep. of the Int'l Law Comm'n, *supra* note 62, ¶¶ 333–334.

[89] Milanović, *supra* note 55, at 77.

[90] *Id.*

[91] *Id.*

in tandem with the Security Council's Chapter VII authority, Article 103 empowers the Security Council to legally bind states with its decisions.[92] Article 103 provides the mechanism that allows States to participate in Chapter VII operations authorized by the Security Council despite conflicting obligations under regional human rights agreements.[93]

Analyzing norm conflicts between human rights and security in the international system is very different than resolving similar conflicts within domestic legal structures.[94] Whereas domestic legal systems like the United States' are, in general, centralized and hierarchical in the way they address norm conflicts, the international legal system lacks the key features that enable domestic legal systems to resolve genuine norm conflicts[95]— "a centralized system with a developed hierarchy, and at that a hierarchy based on the *sources* of norms."[96] For instance, in domestic systems, constitutional norms usually prevail over statutory norms.[97] In international law, the only real instances of hierarchy are the few *jus cogens* norms—for example, the prohibition of genocide.[98] While *jus cogens* norms void any conflicting treaty obligation, resolving the conflict, they are "used rarely, if ever, to invalidate supposedly conflicting norms."[99]

Furthermore, domestic legal systems are centralized in that there are preset rules regarding the supremacy of norms passed by different legislators (as in federal systems).[100] Conversely, actors in the international system are sovereign "equals who . . . exercis[e] their powers through multiple, heterogeneous law-making processes, during which they rarely take into account the possibility of conflict with other norms or legal regimes."[101] As a result, not only are many of the conflict resolution techniques useful in domestic legal systems unavailable to international courts hearing cases involving norm conflict, but also the "plural legislators" of the decentralized international legal system frequently

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[92] Wood, *supra* note 49, at 146.

[93] *Id.*

[94] *See* PAUWELYN, *supra* note 74, at 94–95; Milanović, *supra* note 55, at 74.

[95] PAUWELYN, *supra* note 74, at 94–95; Milanović, *supra* note 55, at 74.

[96] Milanović, *supra* note 55, at 74; *see also* Dinah Shelton, *International Law and 'Relative Normativity,' in* INTERNATIONAL LAW 145, 146–47 (Malcolm D. Evans ed., 2003).

[97] Milanović, *supra* note 55, at 74.

[98] *Id.* ("Though a treaty will usually prevail over custom, this is so only because the customary rule is *jus dispositivum*, meaning that it can be contracted out of, and applies only by default if the parties in question have not agreed differently.").

[99] *Id.* at 71; *see infra* text accompanying notes 141–148 (discussing why elevating a certain norm to *jus cogens* status is rarely used to invalidate a conflicting norm).

[100] Milanović, *supra* note 55, at 74.

[101] *Id.* at 75.

enter into contradictory agreements.[102] This results in an international system wherein it is entirely plausible—even likely—that norm conflicts, both unavoidable and unresolvable, may present themselves to international courts.[103]

B. *Fragmentation in International Law*

The increasing likelihood of norm conflict is a feature and consequence of the problematic phenomenon of fragmentation in international law.[104] Fragmentation is one aspect of the trend in modernity toward "increasing specialization of parts of society and the related autonomization of those parts," or what sociologists call functional differentiation.[105] In other words, though globalization has greatly homogenized some aspects of social life, it has also caused greater fragmentation through the proliferation of specialized and independent areas of social activity and organization.[106]

This global social fragmentation has been reflected in the international legal arena through the development of specialized and relatively independent regimes, institutions, and practice areas.[107] General international law, which once governed most issues, has been edged out, especially since the end of the Cold War,[108] by such specialist systems as trade law, human rights law, and environmental law, each of which applies its own principles and institutions.[109] Unfortunately, the creation of legal rules in these specialized spheres of practice tends to transpire with little cognizance of the legislative and institutional activities of other spheres or of the principles and practice of general international law.[110]

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[102] Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 854–55 (2004); Milanović, *supra* note 55, at 75.

[103] *See* Milanović, *supra* note 55, at 75; *see also* Hafner, *supra* note 102, at 854–55 (explaining the causes of norm conflict, such as why incompatible legal obligations tend to arise in the international system and why the system lacks rules to resolve those conflicting norms).

[104] *See* Milanović, *supra* note 55, at 69. *But see generally* Mario Prost & Paul Kingsley Clark, *Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?*, 5 CHINESE J. INT'L L. 341 (2006) (challenging the presumption that the proliferation of international organizations and concurrent fragmentation of the international system alone weaken the coherence of international law).

[105] Rep. of the Int'l Law Comm'n, *supra* note 62, ¶ 7.

[106] *Id.*; Hafner, *supra* note 102, at 850.

[107] Rep. of the Int'l Law Comm'n, *supra* note 62, ¶ 8.

[108] Hafner, *supra* note 102, at 849.

[109] Rep. of the Int'l Law Comm'n, *supra* note 62, ¶ 8.

[110] *Id.*

This trend is especially disconcerting in that some specialist systems, particularly regional ones whose multilateral founding agreements contain human rights elements, have begun to declare themselves independent legal orders or self-contained regimes, separate from the legal order of the United Nations.[111] For example, in *Kadi v. Council*, the European Court of Justice (ECJ) held that European Union (EU) member states' obligations to uphold EU human rights guarantees could not be superseded by Security Council resolutions, despite UN Charter Article 103, because EU law constitutes an "internal" and "autonomous legal system which is not to be prejudiced by an international agreement."[112]

In so holding, the ECJ called into question "the most fundamental operating assumption of Article 103."[113] "Like any rule of hierarchy (or something closely resembling one), [Article 103] can only prevail over a norm *which is part of the same legal order*."[114] The constitution of one nation is the supreme law only in that domestic legal system, but not in the legal orders of other countries.[115] In the same way, Article 103 is "superior law only in the international legal system."[116] According to the *Kadi* holding, however, "the UN Charter and Security Council resolutions, just like any other piece of international law, exist on a separate plane and cannot call into question or affect the nature, meaning, or primacy of fundamental principles of [EU] law."[117] In short, a Security Council

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[111] *See, e.g.*, Gráinne de Búrca, *The International Legal Order After* Kadi, 51 Harv. Int'l L.J. 1, 23–24, 49 (2010) (showing that, in *Kadi*, the ECJ recognized that the European Community is independent from the UN and recognized superiority of the Community's human rights rules over the UN Charter).

[112] Joined Cases C-402 & 415/05, Kadi v. Council, 2008 E.C.R. I-6351, paras. 4, 282, 285, 316–317. *Kadi*, which was an extremely complex case, dealt with the anti-terrorist sanctions enacted by the Security Council in Resolution 1267 and subsequent resolutions made to target the Taliban in Afghanistan and the Al-Qaida network. *See* Milanović, *supra* note 55, at 87. These resolutions established a subsidiary body (the Sanctions Committee) tasked with maintaining lists of suspected terrorists against whom UN member states were obliged to enforce sanctions. *Id.* The EU member states decided to implement these sanctions through the EU, rather than through their domestic legal systems by adopting several common positions and regulations through the EU Council, which included a list of suspected terrorists from the Sanctions Committee whose assets were to be frozen. *Id.* Kadi's assets were frozen, an act he complained violated his fundamental rights under EU law, "including the right to a fair hearing, the right to property and the right to judicial review." *Id.*

[113] Milanović, *supra* note 55, at 88.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] de Búrca, *supra* note 111, at 24.

resolution could not displace Kadi's fundamental rights guaranteed by the EU because "it could not penetrate this independent legal order."[118]

The concern about fragmentation in international law is not a new one; the international system has always lacked a centralized legislative body.[119] Furthermore, deviations in the ways states parties to treaties agree to deal with various problems are to be expected as the result of differing policy preferences.[120] After all, "[i]n conditions of social complexity, it is pointless to insist on formal unity."[121] Fragmentation, then, is in many respects merely indicative of the accelerated spread of international legal activity into new areas, each of which might necessitate a different approach.[122] In this respect, fragmentation could be a positive phenomenon, encouraging states to comply with international norms that better capture the state's preferences because they are regional in nature.[123] Nevertheless, "sociologically speaking, present fragmentation contains many new features, and its intensity differs from analogous phenomena in the past."[124]

Importantly, the splintering of the international legal system into "'self-contained regimes' and geographically or functionally limited treaty-systems" produces numerous negative effects, namely: conflicting norms, diverging institutional practices, and the erosion of a coherent perspective on international law.[125] When new and independent legal orders are established that deviate from the current understanding of international law, the unity of the international legal regime suffers[126] because of serious concerns about forum-shopping, overlapping jurisdiction, conflicting jurisprudence, and the loss of legal security.[127] These overlaps and conflicts threaten the legitimacy of international law by making international law unreliable and unpredictable.[128]

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[118] Milanović, *supra* note 55, at 88.

[119] Hafner, *supra* note 102, at 850; *see* C. Wilfried Jenks, *The Conflict of Law-Making Treaties*, 30 Brit. Y.B. Int'l L. 401, 403 (1953).

[120] Rep. of the Int'l Law Comm'n, *supra* note 62, ¶ 16.

[121] *Id.*

[122] *See id.* ¶ 14.

[123] *See* Hafner, *supra* note 102, at 850–51, 859–60.

[124] Rep. of the Int'l Law Comm'n, *supra* note 62, ¶ 17.

[125] *Id.* ¶¶ 8, 15.

[126] *Id.* ¶ 15.

[127] *Id.* ¶ 9; Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 Leiden J. Int'l L. 553, 554–55 (2002).

[128] *See* Hafner, *supra* note 102, at 856.

C. *Fragmentation and Human Rights*

The fragmentation phenomenon is particularly problematic in the context of norm conflicts involving human rights.[129] When appearing before tribunals such as the ECtHR, human rights advocates argue that "because of the community interest and values that human rights norms enshrine, norm conflict situations involving human rights are . . . of *constitutional importance*, even though human rights norms are per se not hierarchically superior to other norms of international law."[130] By arguing that human rights norms are "of constitutional importance," human rights lawyers are appealing to the meaning of "constitutional" as describing "law that recognizes no source of superior law, that does not draw validity and legitimacy from any other legal order."[131]

The ECtHR, for example, also views its founding multilateral agreement as "constitutional" in nature.[132] It has notably described its founding treaty as the "constitutional instrument of European public order."[133] In doing so, however, the court arguably draws upon a different meaning of the term "constitutional."[134] That is, one "used to emphasize the importance of a document [here, the ECHR] that embodies the fundamental values of a community"—in this case, the Council of Europe.[135]

If courts were to adopt human rights lawyers' "constitutional" perspective on their founding instruments, a fairly logical (though audacious) next step would be for courts to reason that those instruments are foundational to a legal order separate and distinct from that of other spheres of international law.[136] By extension, courts would be

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[129] *See* Milanović, *supra* note 55, at 70.

[130] *Id.* (emphasis added).

[131] *See id.* at 70, 126, 130.

[132] *See, e.g.*, Bosphorus v. Ireland, App. No. 45036/98, para. 156 (Eur. Ct. H.R. June 30, 2006), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69564; Behrami v. France, App. No. 71412/01, para. 145 (Eur. Ct. H.R. May 2, 2007) (admissibility decision), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830.

[133] *Behrami*, App. No. 71412/01, para. 145.

[134] *See* Milanović, *supra* note 55, at 130.

[135] *See id.* One can infer that the ECtHR meant the "community" definition of constitutional because in the same opinion (*Behrami*) that it asserts the ECHR as "the constitutional instrument of European public order," the court also asserts that the ECHR must be interpreted in light of the UN Charter. *See Behrami*, App. No. 71412/01, paras. 145, 147. If the court at that time considered itself constitutional in the "no higher law" sense, than it would not have felt compelled to interpret its obligations in light of the UN Charter—weighing the competing considerations of the conflict in Kosovo—and would have decided *Behrami* differently. *See id.*

[136] *See* Milanović, *supra* note 55, at 70, 126, 130.

forced to conclude that states parties' obligations under these founding instruments are impervious to dismissal by conflicting treaty obligations drawn from other international spheres.[137]

As a result, public international lawyers claim that human rights "are one of the principal culprits of fragmentation" in the international legal landscape.[138] From the perspective of those advocating a general approach to international law, "the human rights lawyer's misguided belief that wishful thinking is a law-making process . . . lead[s] him to assert that the special nature of human rights somehow warrants deviations from general international law."[139] Some scholars perceive this demand for special status and solutions as disconcerting because it precipitates greater fragmentation and "disrupts the systemic quality of general international law."[140]

Given that several *jus cogens* norms are human rights norms, one might wonder why, when conflict arises involving human rights norms (as embodied, say, in the ECHR), courts and states do not simply articulate a *jus cogens* argument in favor of that human rights norm, thereby trumping the conflicting norm.[141] In practice, *jus cogens* is nearly always advanced merely "as a rhetorical device or as a 'weapon of deterrence.'"[142]

This is because, fundamentally, "*jus cogens* is a blunt instrument."[143] Were a human rights norm elevated to *jus cogens* status, the result would be the invalidation of the conflicting norm.[144] If the conflicting norm is embodied in a treaty, the entire instrument would be invalidated regardless of the conflicting norm's relative importance within that treaty.[145] Furthermore, as soon as it is accepted that the human rights norm is *jus cogens*, there can be no balancing of interests against the conflicting norm, no consideration of competing values or consequences.[146] It should be noted, for example, in the context of *Al-Jedda*, that "the prohibition of preventative detention certainly does not qualify as *jus cogens*, if for no other fact than that internment is expressly allowed in armed

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[137] *See id.*

[138] *Id.* at 70.

[139] *Id.*

[140] *Id.*

[141] *See id.* at 70–72.

[142] Milanović, *supra* note 55, at 71.

[143] *Id.* at 72 n.14. For a detailed and thoughtful analysis of *jus cogens*, see Shelton, *supra* note 96, at 150–59.

[144] Milanović, *supra* note 55, at 72 n.14.

[145] *See id.*

[146] *Id.*

conflict."[147] Given these facts, human rights advocates continue to invoke the spirit of *jus cogens*—that human rights norms ought to be hierarchically superior—but instead, as the applicants did in *Al-Jedda*, champion human rights treaties as constitutional instruments of independent legal spheres wherein Security Council resolutions have no bearing.[148]

Cases like *Al-Jedda*, which force the ECtHR—tasked with upholding a crucial human rights instrument—to confront the conflict between human rights norms and norms contained in instruments allowing, for example, preventative detention for the purpose of maintaining security are becoming more frequent and politically important.[149] With targeted sanctions against terrorists having become more common in recent years, such cases have worked their way through domestic legal systems and are now reaching the ECtHR's docket, placing the court at a crossroads where it needs to determine whether it administers an independent legal order separate from that of the United Nations.[150]

D. Al-Jedda *in the ECtHR: Context for the Ruling and Its Implications*

Some authors have characterized the distinctive features of UN Charter Article 103 as a "confirmation of the *constitutional* character of the Charter as the founding instrument of the post-Second World War international legal order."[151] As noted above, the UN Charter is not the only document so perceived—the ECtHR also envisions the ECHR to be constitutional in nature.[152] For the ECtHR, the Convention is the "'constitutional instrument of European public order,' of which the Court itself is the ultimate guardian."[153]

Until recently, the ECtHR was able to evade ruling on norm conflicts between the "founding instrument of . . . international legal order"[154] and the "constitutional instrument of European public order."[155] But a policy of ignoring norm conflict has become increasingly

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[147] *Id.* at 93.

[148] *See id.* at 70–71.

[149] *See id.* at 69.

[150] *See* Milanović, *supra* note 55, at 69, 131.

[151] *Id.* at 77. *See generally* Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 Colum. J. Transnat'l L. 529 (1998) (describing the UN Charter as the founding document of the international legal order in the post-Second World War era).

[152] *See Behrami*, App. No. 71412/01, para. 145; *supra* text accompanying notes 132–135.

[153] Milanović, *supra* note 55, at 86; *see also Behrami*, App. No. 71412/01, para. 145.

[154] Milanović, *supra* note 55, at 77.

[155] Milanović & Papić, *supra* note 4, at 289, 293.

difficult for the court to maintain.[156] For example, in the widely criticized[157] case of *Behrami v. France*, the court struggled with the tension between the ECHR and the crucial role of the UN's peace and security functions expressed in the Security Council's Chapter VII authority.[158] The court observed the importance of maintaining harmony between the ECtHR's case law and general international law, saying the ECHR "has to be interpreted in the light of any relevant rules and principles of international law"—in particular, UN Charter Article 103.[159] The court further noted that although ensuring respect for human rights is a purpose of the UN represented in the Charter's preamble, the Security Council is tasked with fulfilling the organization's primary objective under Chapter VII: maintaining international peace and security.[160] This having been said, the court was reluctant "to openly defy the [Security] Council or interfere with the Chapter VII system and peacekeeping operations such as Kosovo."[161] The court sidestepped ruling on norm conflict, instead concocting an untenable test that attributed the impugned conduct to the UN, rather than to the contracting states.[162]

After *Behrami*, the wave of litigation produced by Security Council resolutions that targeted sanctions against suspected terrorists made it clear that dodging norm conflict would soon become impossible for the ECtHR.[163] Most influential in this respect was the ECJ ruling in *Kadi*, discussed above, that the EU's human rights guarantees could not be superseded by Security Council resolutions because EU law constituted an "autonomous legal system which [was] not to be prejudiced by

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[156] *See id.* at 293 (describing the great interpretative lengths the ECtHR went to in *Behrami* to avoid ruling on norm conflict).

[157] *See* Messineo, *supra* note 52, at 39–43 (recounting *Behrami*'s faults); Milanović & Papić, *supra* note 4, at 289, 293.

[158] *See Behrami*, App. No. 71412/01, paras. 145, 147; Milanović, *supra* note 55, at 86, 126, 129; Wood, *supra* note 49, at 145. The joined cases of *Behrami* and *Saramati* (commonly referred to simply as *Behrami*) dealt with the actions of UN peacekeepers under North Atlantic Treaty Organization (NATO) command, which resulted in the deaths of several children by cluster-bombing, whose survivors alleged violation of ECHR Article 2 (right to life) and the security detention of a man in Kosovo, allegedly in violation of ECHR Article 5. Milanović & Papić, *supra* note 4, at 269. Those forces were in Kosovo pursuant to Security Council Resolution 1244. *Id.* In *Behrami*, the ECtHR ruled that the actions of peacekeepers in Kosovo were attributable neither to NATO, nor to any of the member states that contributed troops, but only to the UN. *Id.* at 267.

[159] *Behrami*, App. No 71412/01, paras. 147–148.

[160] *Id.* paras. 148–149.

[161] Milanović, *supra* note 55, at 86.

[162] *Id.* at 85–86; Milanović & Papić, *supra* note 4, at 294–95.

[163] *See* Milanović, *supra* note 3, at 134; Milanović, *supra* note 55, at 69.

an international agreement."[164] With such persuasive authority in his pocket, Al-Jedda arrived in Strasbourg and asked the ECtHR to follow in the ECJ's footsteps.[165]

On appeal to the ECtHR, Al-Jedda's arguments underscored the ECtHR's own opinion of the ECHR as the "constitutional instrument of European public order."[166] Because the ECtHR discussion of norm conflict in its case law was minimal at best, Al-Jedda urged the court to rely on *Kadi*'s persuasive authority, arguing that the ECtHR creates "a self-contained regime" overridden only by an official derogation of a state party[167] and not by a matter of norm conflict.[168] Al-Jedda again contended that Resolution 1546 was a mere authorization rather than an obligation of member states under the UN Charter, and that Article 103 was therefore inapplicable.[169] He further argued that even if Article 103 did apply, the Security Council could not simply wipe away the ECHR

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[164] *Kadi*, 2008 E.C.R. I-6351, para. 316.

[165] *See* Al-Jedda v. United Kingdom, App. No. 27021/08, 53 Eur. H.R. Rep. 789, 843 (2011).

[166] Milanović, *supra* note 3, at 136; *see Al-Jedda*, 53 Eur. H.R. Rep. at 843.

[167] The ECHR derogation procedure is laid out in Article 15, which reads:

> (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
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> (2) No derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [the prohibition on torture], 4 (paragraph 1) [prohibition on slavery] and 7 [no one held guilty of an *ex post facto* law] shall be made under this provision.
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> (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

ECHR, *supra* note 3, art. 15.

[168] *See Al-Jedda*, 53 Eur. H.R. Rep. at 843.

[169] *Id.* In arguing that Resolution 1546 was a mere authorization rather than an obligation required of UN member states, Al-Jedda was not referring to the debate regarding the operative language employed in Security Council resolutions (i.e., the resolution stating that it "authorizes" certain measures, not that it "obliges" member states to take those measures). *See id.* at 842. Rather, Al-Jedda pointed out that Resolution 1546 made security internment only one of many types of security measures MNF states were authorized to use. *Id.* The language of the Resolution, as Al-Jedda characterized it, "did not require a state to take action incompatible with its human-rights obligations, but instead left a discretion to the state as to whether, when and how to contribute to the maintenance of security." *Id.*

seemingly as an afterthought.[170] By so arguing, Al-Jedda effectively asked the court to divide the ECHR's legal order from the UN system.[171]

On the issue of apparent norm conflict, the court began its assessment from the starting point of "the purposes for which the United Nations was created" as embodied in UN Charter Article 1.[172] Noting first the well-accepted and crucial purpose of maintaining international peace and security, Article 1's third subparagraph also "provides that the United Nations was established to 'achieve international cooperation in . . . promoting and encouraging respect for human rights and fundamental freedoms.'"[173] Keeping these dual purposes in mind, the court reasoned that Article 24(2) compels "the Security Council, in discharging its duties with respect to its primary responsibility. . . . to 'act in accordance with [all of] the Purposes and Principles of the United Nations.'"[174] From this line of reasoning the court delivered a clear rule:

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[170] *See id.* at 843. It should be noted that Al-Jedda advanced an alternative argument, that the court should "rely on its own decision in *Bosphorus* and say that . . . resolutions could potentially displace the ECHR only if the UN provided equivalent protection of human rights, which it obviously [did] not in this particular instance." Milanović, *supra* note 3, at 136; *see Al-Jedda*, 53 Eur. H.R. Rep. at 842. This argument similarly asked the ECtHR to establish itself as part of a legal order separate from the UN, but based on a different line of reasoning. Milanović, *supra* note 55, at 127. Because the ECtHR did not follow this line of reasoning, I have omitted discussion of it here, but *Bosphorus* and the "equivalent protection" doctrine is described at length in Milanović, *supra* note 55, at 112–27.

[171] Milanović, *supra* note 3, at 136.

[172] *Al-Jedda*, 53 Eur. H.R. Rep. at 845. UN Charter Article 1 reads, in full:

> The Purposes of the United Nations are:
>
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
>
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

U.N. Charter art. 1.

[173] *Al-Jedda*, 53 Eur. H.R. Rep. at 845.

[174] *Id.*

> [I]n interpreting its resolutions, there must be a *presumption* that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. *In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.*[175]

The court then stated several reasons why, in its assessment, the terms of Resolution 1546 failed to clearly show the Security Council's intent to obligate ECHR states parties to employ indefinite summary internment in breach of their Convention obligations.[176] The court found particularly persuasive the fact that although internment was (per Secretary of State Powell's letter) given as an example of the "broad range of tasks" the MNF was prepared to assume, "the terminology of the Resolution appears to leave the choice of the means to achieve this end" to the MNF.[177] Finally, the court found it "difficult to reconcile the argument that Resolution 1546 placed an obligation on Member States to use internment with the objections repeatedly made by the United Nations Secretary and [UNAMI] to the use of internment by the [MNF]."[178] Given these findings, the court held:

> In the absence of a clear provision to the contrary, the presumption must be that the Security Council intended States with the [MNF] to contribute towards the maintenance of peace and security in Iraq while complying with their obligations under international human rights law [and therefore in the U.K.'s case, the ECHR].[179]

In so ruling, the court addressed the norm conflict using a technique of avoidance that made several interpretative presumptions, most fundamentally: "a presumption that the Security Council does not in-

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[175] *Id.* (emphasis added).
[176] *Id.* at 846.
[177] *Id.*
[178] *Id.* at 847.
[179] *Al-Jedda*, 53 Eur. H.R. Rep. at 847.

tend to impose any obligation on Member States to breach . . . human rights."[180] The court then assumed that, given the prominent status of human rights protection as one of the UN's roles, it was fair to presume further "that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law."[181] For the factual reasons noted above, the court held that the language of the authorization in Resolution 1546 was not explicit, or at least not unambiguously so, and the United Kingdom's obligation to guarantee Al-Jedda's rights under the ECHR stood.[182]

E. Nada v. Switzerland*: The* Al-Jedda *Presumption Tested*

The *Al-Jedda* holding created the presumption that the Security Council does not intend to authorize behavior not compliant with human rights treaties.[183] Where the court remained markedly silent, however, was on the crucial issue of whether a resolution could prevail over the ECHR if it *did* rebut the presumption with such explicit language.[184] The ECtHR sidestepped this question in *Al-Jedda*.[185] It deftly maneuvered to do so again in the subsequent case of *Nada v. Switzerland*.[186]

Nada concerned Italian and Egyptian national Youssef Moustafa Nada, a resident of the Italian enclave Campione d'Italia in the Swiss Canton of Ticino.[187] Under Security Council Resolutions 1267, 1333, and 1390, the Swiss Federal Council adopted measures to target the suspected associates of Osama bin Laden and Al-Qaida, whose names were on a list maintained by the Security Council's Al-Qaida Sanctions Committee.[188] The measures froze the assets of listed persons (as in the *Kadi* case) and also restricted their entry into or travel through Switzer-

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[180] *Id.* at 845.

[181] *Id.*

[182] *Id.* at 847.

[183] *Id.* at 845.

[184] Milanović, *supra* note 3, at 138.

[185] *Id.* ("But note also what the Court did not say. It did not at all examine the fundamental question whether Resolution 1546 could have prevailed over the ECHR even if it did satisfy the presumption . . . the Court's silence speaks volumes . . . .").

[186] *See* Nada v. Switzerland, App. No. 10593/08, paras. 196–197 (Eur. Ct. H.R. Sept. 12, 2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113118.

[187] *Id.* paras. 1, 11.

[188] *Id.* paras. 15–18; *see also* Vanessa Arslanian, Comment, *Great Accountability Should Accompany Great Power: The ECJ and the U.N. Security Council in* Kadi I *&* II, 35 B.C. Int'l & Comp. L. Rev. E. Supp. 1, 1–3 & nn.1–2 (2012), http://lawdigitalcommons.bc.edu/iclr/vol35/iss3/1 (discussing the background of the Al-Qaida Sanctions Committee and the "listing" process).

land.[189] This list included Nada, whose name was added on November 9, 2011.[190] Nada requested his name be deleted from the list, but this request and subsequent appeals were denied.[191] Nada claimed that this left him confined as if under house arrest to Campione d'Italia, preventing him from seeking medical treatment, visiting his relatives, or worshipping at a mosque because exiting the enclave in any direction would require him to pass through Switzerland.[192] Nada further claimed that the addition of his name to the Sanctions Committee's list had the effect of publicly alleging his association with Al-Qaida, an association that impugned his reputation and that he fervently denied.[193] Before the ECtHR, Nada argued that he had been deprived of several rights under the ECHR, including (1) the right to liberty and security under Article 5, (2) the right to respect for private and family life, honor, and reputation under Article 8, and (3) the right to an effective remedy for those harms under Article 13.[194]

The ECtHR Grand Chamber considered international legal fragmentation in its assessment of Nada's Article 8 claim.[195] It acknowledged that Switzerland's obligations under Article 8 were in apparent conflict with its obligations under the Security Council resolutions, but reiterated that diverging commitments between the ECHR and other obligations of states parties should "be harmonized as far as possible."[196] The court next confirmed the reasoning of *Al-Jedda*, but distinguished it because Resolution 1390 "expressly required" Switzerland to infringe on Nada's Article 8 freedoms.[197] Because of this "clear and explicit language, imposing an obligation to take measures capable of breaching human rights," the court found the *Al-Jedda* presumption had been rebutted.[198]

Nonetheless, rather than next holding either that the authority of the resolutions prevailed under UN Charter Article 103 or that the ECHR is a separate legal order wherein Article 103 does not apply, the court avoided the question altogether.[199] It found—to the considerable

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[189] *Nada*, App. No. 10593/08, paras. 15, 18, 70.
[190] *Id.* para. 21.
[191] *Id.* paras. 29–36.
[192] *Id.* para. 38.
[193] *Id.*
[194] *Id.* para. 3.
[195] *See Nada*, App. No. 10593/08, paras. 168–172.
[196] *Id.* paras. 170, 172.
[197] *Id.* para. 172.
[198] *Id.*
[199] *Id.* paras. 195–197.

disagreement of the concurring judges[200]—that "Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant resolutions of the UN Security Council."[201] Because of this, the court reasoned that Switzerland had "failed to show that [it] attempted, as far as possible, to harmonise the obligations that [it] regarded as divergent."[202] In other words, the government could have done more, even within the confines of its Resolution 1390 obligations, to minimize the intrusions on Nada's human rights.[203]

Such a fact, the ECtHR found, "dispense[d] the Court from determining the question . . . of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the United Nations Charter, on the other."[204] The norm conflict between the ECHR and the resolution was avoidable, in the court's opinion, through harmonious interpretation, leaving no reason to involve Article 103 as a means for resolving the conflict.[205]

III. Analysis

In *Al-Jedda v. United Kingdom*, the ECtHR finally acknowledged the problem of norm conflict between the ECHR and Article 103.[206] But in *Nada v. Switzerland*, though given the opportunity, the court failed to rule conclusively on whether Security Council resolutions could, by virtue of Article 103, displace the ECHR.[207] In spite of the progress brought by *Al-Jedda*, the question therefore remains: when again confronted with a conflict between the ECHR and explicit language from the Security Council, will the ECtHR admit that Article 103 trumps the ECHR or will it declare itself part of a separate legal order wherein Article 103 has no bearing?[208]

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[200] *Id.* para. 1 (Bratza, Nicolaou, and Yudkivska, JJ., concurring).

[201] *Nada*, App. No. 10593/08, para. 180 (majority opinion).

[202] *Id.* para. 197.

[203] *Id.*; Marko Milanović, *European Court Decides* Nada v. Switzerland, EJIL: Talk! (Sept. 14, 2012), http://www.ejiltalk.org/european-court-decides-nada-v-switzerland/.

[204] *Nada*, App. No. 10593/08, para. 197.

[205] *Id.* paras. 196–197; Milanović, *supra* note 206.

[206] *See* Milanović, *supra* note 3, at 121–22.

[207] *See* Nada v. Switzerland, App. No. 10593/08, para. 197 (Eur. Ct. H.R. Sept. 12, 2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113118.

[208] *See* Milanović, *supra* note 3, at 138.

When the court inevitably hears such a case again, it will be tempted by fragmentationist impulses[209] to assert the ECHR as a separate legal order wherein Article 103 cannot displace the ECHR even if a Security Council resolution explicitly purports to do so.[210] Such an assertion would be detrimental to the coherence of international law and to the human rights project of the ECHR.[211] Instead, the court should maintain its *Al-Jedda* presumption that where the Security Council intends to authorize behavior not compliant with human rights treaties it will do so explicitly, *but* acknowledge that where the Council does unambiguously authorize, the ECHR is necessarily displaced by Article 103.[212]

A. *The Interpretative Presumptions of* Al-Jedda *Alone Are Significant*

The interpretative presumptions established in *Al-Jedda* are extremely meaningful in and of themselves, and their implications will be felt by human rights advocates, the Security Council, and ECHR states parties alike.[213] In fact, these are precisely the interpretative presumptions for which some scholars in the field have long advocated.[214] The result of *Al-Jedda* will be the tacit promotion of Security Council ac-

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[209] *See* Milanović, *supra* note 55, at 127, 131 ("If pushed hard enough by the Security Council . . . even the [ECtHR] will be sorely tempted to declare independence from general international law.").

[210] *See* Milanović, *supra* note 3, at 138 ("[I]t is not easy for [the ECtHr] to accept that the Security Council can displace the ECHR, the 'constitutional instrument of European public order,' of which it is the ultimate guardian."); Milanović, *supra* note 55, at 127, 131.

[211] *See* de Búrca, *supra* note 111, at 7, 42; Gráinne de Búrca, *The European Courts and the Security Council: Between* Dédoublement Fonctionnel *and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci*, 20 Eur. J. Int'l L. 853, 857–58 (2009) [hereinafter de Búrca, *Three Replies*]; Milanović, *supra* note 3, at 138; Milanović, *supra* note 75, at 467; Milanović, *supra* note 55, at 97–102; Wood, *supra* note 49, at 143; Katja Ziegler, *Strengthening the Rule of Law, but Fragmenting International Law: The* Kadi *Decision of the ECJ from the Perspective of Human Rights*, 9 Hum. Rts. L. Rev. 288, 297, 304 (2009); Lisa-Claire Hutchinson, Comment, 14 Austl. Int'l L.J. 261, 268 (2007).

[212] *See* de Búrca, *supra* note 111, at 7, 42; de Búrca, *Three Replies*, *supra* note 211, at 857–58; Milanović, *supra* note 3, at 138; Milanović, *supra* note 75, at 467; Milanović, *supra* note 55, at 97–102; Wood, *supra* note 49, at 143; Ziegler, *supra* note 211, at 297, 304; Hutchinson, *supra* note 211, at 268.

[213] *See* Milanović, *supra* note 3, at 138.

[214] *See, e.g.*, Milanović, *supra* note 55, at 97–102 (advocating based on domestic public law jurisprudence for the precise set of presumptions the court adopted). Sir Nigel Rodley argued similarly in his separate opinion in *Sayadi v. Belgium*, a complaint to the UN's Human Rights Committee. Human Rights Comm., Commc'n No. 1472/2006, 94th sess, Oct. 13–31, 2008, at 36–38, U.N. Doc. CCPR/C/94/D/1472/2006 (2008), *available at* http://www1.umn.edu/humanrts/undocs/1472-2006.pdf.

countability.[215] Hence, "[i]f the Council now truly wishes to release states from their human rights obligations, it will have to do so through clear and unambiguous language . . . and its members will have to take political responsibility for their actions."[216]

With the *Al-Jedda* ruling, the court has responded to human rights advocates' disparagement of the lack of Security Council accountability in the human rights context.[217] Advocates have continually expressed frustration at the relative ease with which the fifteen states of the Security Council— "an organ which, no matter how important its mission, is not accountable to anyone"—may whisk away "the constitutional instrument of European public order."[218] For example, although the language of Resolution 1546 was admittedly more specific, resolutions routinely use language such as "all necessary measures" and "all necessary means."[219] As human rights advocates have noted, "[i]t is one thing to say that the phrase 'all necessary means' has in practice developed as the appropriate diplomatic euphemism for the use of military force, but it cannot be plausibly read as an absolution from all human rights constraints that do not qualify as *jus cogens*."[220] Furthermore, it has always been fundamentally disconcerting "that in order to avoid liability for human rights abuses by their forces, member states might rely on the UN, a body designed to preserve peace, law and human rights."[221]

From the perspective of human rights advocates, then, the *Al-Jedda* presumption is laudable in that it will help provide a long-awaited check on the Security Council's ability to override human rights protections.[222] This is because ECHR states parties engaging in missions authorized by

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[215] Milanović, *supra* note 3, at 138.

[216] *Id.*

[217] *See, e.g.*, Frédéric Mégret & Florian Hoffman, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 Hum. Rts. Q. 314, 316–18 (2003); August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 Am. J. Int'l. L. 851, 851–53 (2001).

[218] Milanović, *supra* note 55, at 86, 126.

[219] Behrami v. France, App. No. 71412/01, para. 41 (Eur. Ct. H.R. May 2, 2007) (admissibility decision), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830; Milanović, *supra* note 55, at 97. The language at issue in *Behrami*, for example, authorized "Member States and relevant international organizations to establish the international security presence in Kosovo . . . with all necessary means to fulfill [their] responsibilities." *Behrami*, App. No. 71412/01, para. 41.

[220] Milanović, *supra* note 55, at 97.

[221] Hutchinson, *supra* note 211, at 268.

[222] *See* Milanović, *supra* note 3, at 138.

the Security Council will desire predictability.[223] Until *Al-Jedda*, ECHR states parties could feel confident that they would not be expected to adhere to the ECHR's guarantees when acting pursuant to Security Council authorization.[224] Given the holding of *Al-Jedda*, such states will be uncomfortable engaging in military operations abroad under ambiguous authorizations, fearing that they, like the United Kingdom, may be called to task by the ECtHR for behavior implicitly within the scope of their authorization.[225] Being so concerned, such states may exert political pressure on Security Council members to be explicit in the language of their resolutions in order to prevent involved ECHR states parties from being held accountable for non-ECHR-compliant behavior.[226] If the Security Council were to refuse to be so explicit, the result may be "a chilling effect on the willingness of states to participate in international military operations, and on what they are prepared to allow their armed forces to do when they do participate."[227]

Admittedly, the use of explicit and unambiguous language is a rarity in the Security Council's history.[228] Furthermore, as Judge Poalelungi observed in his partially dissenting opinion in *Al-Jedda*, even if the Security Council had the will to use such explicit language, it might be "unrealistic to expect the Security Council to spell out in advance, in detail, every measure which a military force might be required to use to contribute to peace and security under its mandate."[229]

Nevertheless, given the reproach the Security Council's broad discretion has drawn in recent years, it makes sense that if the Security Council intends to authorize states to derogate from applicable human rights instruments, it must do so in a way that, at the very least, makes explicit the Council's intent and exposes its members to the political consequences of that decision.[230] Thus, "[i]f the Council truly intends

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[223] *Cf.* Wood, *supra* note 49, at 143 (discussing how a court's ruling on the applicability of human rights treaties may impact states' decisions to participate in Security Council-authorized actions).

[224] *See* Rep. of the Int'l Law Comm'n, *supra* note 62, ¶¶ 328–340.

[225] *See* Wood, *supra* note 49, at 143; *cf.* Milanović, *supra* note 3, at 138 (recognizing that the *Al-Jedda* decision will result in ripple effects as states decide between Security Council-authorized actions and other human rights obligations).

[226] *See* Milanović, *supra* note 3, at 138; Wood, *supra* note 49, at 143.

[227] Wood, *supra* note 49, at 143.

[228] *See* Milanović, *supra* note 3, at 138; Milanović, *supra* note 55, at 97.

[229] *See* Al-Jedda v. United Kingdom, App. No. 27021/08, 53 Eur. H.R. Rep. 789, 850–51 (2011) (Poalelungi, J., partially dissenting).

[230] *Cf.* Milanović, *supra* note 3, at 138 (suggesting that the Security Council use more precise language and take on the political repercussions where it seeks to alleviate states from their human rights treaty obligations).

to derogate from human rights, that intent *must* be manifested in the language of the resolution, and the reasons for doing so should be explained openly, not left to backroom dealings between diplomats."[231] By such explicit action, the Security Council "may [even] come out stronger through gaining more legitimacy from accountability. After all, the standards and values enforced by [regional courts] are also those pursued by the international legal order."[232] In these ways, the *Al-Jedda* presumptions may "prove to be a key tool for securing human rights compliance with respect to [Security Council] decisions."[233]

B. *Further Fragmentation of the International System Is Undesirable*

The implications of the ECtHR asserting itself as part of a separate legal order would be extreme from both an academic and a practical perspective.[234] As Katja Ziegler pointed out in her discussion of *Kadi v. Council*, by "asserting the 'constitutional dimension' of the [European Community], the ECJ inevitably add[ed] another layer and, possibly, centrifugal force into the legal landscape at the international level, hence contributing to the fragmentation of international law."[235] Similarly, asserting the ECHR as a self-contained regime would further fragment the international system, exacerbating the negative effects of that phenomenon on the coherence and authority of international law.[236] Those negative effects include further proliferation of conflicting norms, diverging institutional practices, and the erosion of a coherent perspective on international law.[237]

Concern with these negative effects stems not only from the immediate consequences of an ECtHR holding, but also from the "centrifugal force" such a holding would lend to the fragmentation phenomenon across the international system.[238] The judgment of such an influential regional court is "likely to be given significant attention by courts in other countries and jurisdictions, and even by political actors within these and other jurisdictions, which are facing similar questions"

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[231] Milanović, *supra* note 55, at 102.

[232] *See* Ziegler, *supra* note 211, at 304.

[233] Milanović, *supra* note 3, at 138.

[234] *See* Ziegler, *supra* note 211, at 297; de Búrca, *supra* note 111, at 7.

[235] Ziegler, *supra* note 211, at 297. By centrifugal force, Ziegler is referring to the fact that when influential regional courts such as the ECJ or the ECtHR rule on important issues, their holdings have potential influence beyond their respective legal orders. *See id.*

[236] *See* Hafner, *supra* note 102, at 856; Ziegler, *supra* note 211, at 297; *supra* text accompanying notes 125–128.

[237] Rep. of the Int'l Law Comm'n, *supra* note 62, ¶¶ 8, 15.

[238] *See* Ziegler, *supra* note 211, at 297.

regarding Security Council authority.[239] A fragmentationist approach by the ECtHR would potentially encourage other states and regional or specialist systems "to assert the primacy of their autochthonous values over the common goals of the international community."[240] Other states and systems would be particularly receptive to such implicit support were this message to be sent by the ECtHR, the judicial human rights branch of the geographically inclusive and "juridically influential" Council of Europe.[241]

The ECtHR is an important actor in the international arena during a period when the openness of constitutional systems to the international legal order will impact not only the studies of academics, but also the lives of individuals.[242] It is not desirable for the ECtHR to encourage insular attitudes in other legal systems.[243] As Gráinne de Búrca has remarked:

> The degree of openness of domestic legal systems to international law is a significant factor in shaping the context in which the foreign policy decisions of those systems are made. And the degree of openness and engagement on the part of international organizations with international and transnational law and institutions is an important factor in shaping both the legal environment in which norms are generated by that organization and the substance of the norms generated.[244]

Apprehension toward an assertion of the ECtHR as part of a separate legal order then, is the same as that expressed by de Búrca and other scholars regarding *Kadi*.[245] Namely, that a persuasive fragmentationist holding will embolden other courts "to assert their local understandings of human rights and their particular constitutional priorities over international norms and over Chapter VII resolutions of the Security Council."[246]

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[239] de Búrca, *Three Replies*, *supra* note 211, at 857.

[240] *See* de Búrca, *supra* note 111, at 7.

[241] *Cf. id.* at 7, 11 (describing the special reputation and character of the ECtHR within the international legal system).

[242] *See* de Búrca, *Three Replies*, *supra* note 211, at 858.

[243] *See* de Búrca, *supra* note 111, at 7.

[244] de Búrca, *Three Replies*, *supra* note 211, at 858.

[245] *See, e.g.*, de Búrca, *supra* note 111, at 42.

[246] *See id.*

C. *An Undesirable Dilemma for ECHR States Parties*

The assertion of the ECHR as a self-contained regime would undoubtedly give rise to conflicting obligations for states parties between the ECHR and UN Charter Article 103.[247] Although the ECJ's ruling in *Kadi* has been met with limited success in promoting Security Council accountability,[248] these results might equally stem from the standard set by *Al-Jedda*.[249] Also, the risks associated with putting ECHR states parties in such a predicament make the separate-regime option undesirable for practical reasons.[250] Pitting ECHR and UN obligations against each other would be potentially detrimental to both organizations.[251]

For the UN, such fragmentation could undermine collective security by shaking ECHR states parties' willingness to participate in armed conflicts under Security Council authorization where derogation from the ECHR seems impossible.[252] This is especially likely given that an-

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[247] *See* Ziegler, *supra* note 211, at 304.

[248] *See* de Búrca, *supra* note 111, at 40. As de Búrca explains, Security Council Resolution 1822 responded in small ways to *Kadi*, for example, "by deciding that at least some parts of the 'statements of case' which member states now provide to the Sanctions Committee when seeking the listing of an individual should be made public and placed on a Security Council website, or made available for qualified release on request by states." *Id.* at 40 n.208. The Resolution also requires the Sanctions Committee to make these cursory past statements of case available and "to keep listings under review to make sure they are still warranted." *Id.* Finally, member states who have been notified that one of their citizens or an individual within their borders has been added to the list are required to notify the individuals of their listing or delisting, as well as of the publicly announced reasons for these decisions. *Id.* "Nevertheless, in its 2008 Report, the Analytic Support and Sanctions Monitoring Team of the Sanctions Committee . . . seemed unwilling to contemplate the establishment of any kind of review panel that would be competent to review the Security Council's decisions or processes . . . ." *Id.*

[249] *See supra* text accompanying notes 206–212.

[250] *See* Ziegler, *supra* note 211, at 304.

[251] *See id.*

[252] *See id.* As Lord Bingham explained in the House of Lords' opinion, the power of derogation

> may only be exercised in time of war or other public emergency threatening the life of the nation seeking to derogate, and only then to the extent strictly required by the exigencies of the situation and provided that the measures taken are not inconsistent with the state's other obligations under international law. It is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw. . . . It has not been the practice of states to derogate in such situations . . . .

R (on the application of Al-Jedda) v. Sec'y of State for Def., [2007] UKHL 58, [38], [2008] 1 A.C. 332 (appeal taken from Eng.); *see also* U.N. Charter art. 15. This practice of states is also justified from a practical standpoint, "particularly in an extraterritorial context, since their use by a State would be interpreted as a concession that the [ECHR] . . . in principle

other recent ECtHR decision—*Al-Skeini v. United Kingdom*[253]—has simultaneously expanded the class of persons over whom states parties could exercise jurisdiction extraterritorially.[254] In other words, the pool of potential plaintiffs to whom states parties could be held accountable for human rights violations has suddenly swelled.[255] States parties will necessarily be wary of engaging in behavior authorized by the Security Council that is incongruent with the ECHR.[256]

For the ECHR, it is uncertain whether its obligations would prevail in the estimations of its states parties.[257] Most likely, using fragmentation as a drastic tool by which the ECtHR might hope to pressure states parties to radically reform the Security Council's accountability would have the opposite effect: ECHR states parties would increasingly seek formal derogations when confronted with a conflicting resolution within the Security Council's sanctions regime.[258] The result would likely be incommensurate with the ECHR's aspirations as state parties attempt to stretch the category of circumstances that fit the requirements for derogations to include their resolution-authorized behavior, resulting in a new wave of litigation on the issue appealable to the ECtHR.[259]

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applies extraterritorially to a given situation, and would thus open the State's actions up to judicial scrutiny . . . ." Milanović, *supra* note 75, at 467.

[253] Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. 589 (2011). *Al-Skeini* dealt with the scope of the ECHR's Article 1 jurisdiction provision, which reads, "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." ECHR, *supra* note 3, art. 1; *Al-Skeini*, 53 Eur. H.R. Rep. at 647. The ECtHR ruled that the protections of the ECHR could extend to persons outside the territorial jurisdiction of the states parties. *Al-Skeini*, 53 Eur. H.R. Rep. at 647–52. The ECHR could apply to the behavior of states parties' agents extraterritorially who "through the consent, invitation or acquiescence of the Government of that territory . . . exercise[] all or some of the public functions normally to be exercised by that [consenting] Government." *Id.* at 647.

[254] *Cf.* Milanović, *supra* note 75, at 467 (discussing how the use of derogations in reference to actions under Security Council authorization abroad is particularly unappealing to states because it would draw with it the extraterritorial applicability of the ECHR); Ziegler, *supra* note 211, at 304 (noting that putting states in such a "Catch-22" could dissuade them from engaging in Security Council-authorized actions).

[255] *See* Milanović, *supra* note 3, at 131–33.

[256] *Cf.* Wood, *supra* note 49, at 143 (discussing how a court's ruling on the applicability of human rights treaties may impact states' decisions to participate in Security Council-authorized actions).

[257] *See* Ziegler, *supra* note 211, at 304.

[258] *But see* Hutchinson, *supra* note 211, at 268.

[259] *Cf.* Ziegler, *supra* note 211, at 304 (discussing how conflict between human rights instruments and other obligations results in uncertainty and litigation); Hutchinson, *supra* note 211, at 268 (noting that, were Article 103 to absolve states parties of all ECHR respon-

Conclusion

It is difficult to predict whether the ECtHR will assert itself as part of a separate legal order. Undoubtedly, the ECJ's *Kadi v. Council* decision looms large in the minds of the ECtHR judges tasked with upholding the "constitutional instrument of European public order." The answer likely depends on how effective a human rights check on the Security Council the presumptions from *Al-Jedda v. United Kingdom* actually turn out to be and, consequently, how serious a threat the ECtHR views the Security Council to be to human rights protection going forward. This Note proposes, however, that the judges should value the importance of international legal cohesion and be reluctant in the end to challenge the Security Council and risk compromising the universality of the treaty's protections by encouraging states parties to seek formal derogations.

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sibilities, states would not feel the need to take advantage of the formal derogation procedures of the ECHR).