The Acts of the Security Council: Meaning and Standards of Review

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I. The General Framework of the Security Council's Interference with International Law

The meaning and effect of the UN Security Council decisions can be approached from different perspectives. They can be examined from the perspective of interaction between law and power, "hegemonic international law",[1] or other related doctrines. But to understand the legal merits of this question, it must be approached from the perspective of understanding the ambit and effect of the relevant norms. This means, more specifically, the understanding of the scope of delegated powers of the Security Council, and the ways of discovering the content of the Council decisions through the application of interpretative methods.

The whole problem certainly has a political aspect. However, the interpretation of a treaty or other instrument is an inherently legal, not political, question. As the ICJ affirmed in the case concerning the Conditions of Admission of a State to Membership in the United Nations, the political elements involved in a case cannot deprive it of its legal significance when the purely legal issue of interpretation is involved.[2]

The criteria governing the clarification of meaning and standards of review of Security Council resolutions are important due to the expansion of the activities of the Security Council, especially its interference with the variety of norms and principles of international law, which in its turn constitutes the interference with expectations that international legal actors have in relation to these norms and principles. The need for

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1 See J. Alvarez, *International Organizations as Law-Makers*, 2005, 211-217.

2 ICJ Reports 1947-48, 57 et seq.

legal certainty requires specifying both the standards of interpretation of Council resolutions, as well as the standards of their review.

The Security Council's interaction with international law can take place in two dimensions. The first dimension is represented by the number of Council resolutions in which the Council confirms its support for the validity and enforcement of the relevant international norms and instruments. There are numerous resolutions in which the Council subscribes to the principle of non-interference in internal affairs of states, respect of human rights and humanitarian law, the prohibition of the use of force, or the right to self-determination. The Council's practice can also be seen as developing certain aspects of international law,[3] and even contributing to the formation of customary norms by providing the elements of state practice or legal conviction that are essential in the process of custom-generation.[4]

The second dimension is represented by resolutions by which the Council either purports to impact, qualify or modify the existing legal position under international law, or is seen to do so, either in diplomatic or academic discourse. It is in this second field that the relevance of interpretation methods and standards of review is most pertinent and pressing.

The Security Council's interference with the established international legal positions involves the dimension of its awareness of the situation and relates to the need of informed decision-making, and also raises the issue of the limits of the Council's powers. The need of the Council's informed decision-making[5] is particularly demonstrated by its involvement with the matter of Kosovo. This matter has been on the Council's agenda since 1998 when S/RES/1160 (1998) of 31 March 1998 has been adopted condemning the activities of the Federal Forces of Yugoslavia against the Kosovo population, as well as the terrorist attacks by the "Kosovo Liberation Army." After the NATO troops undertook the bombardment of Yugoslavia without the approval of the Security Council, as would have been required by Arts 2 (4), 42 and 53 of the UN Charter, the Council adopted S/RES/1244 (1999) of 10 June

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3 R. Higgins, *The Development of International Law by the Political Organs of the United Nations*, 1963.

4 On the International Court's treatment of the elements of customary law see North Sea Continental Shelf case, ICJ Reports 1969, 3 et seq. (4).

5 F. Kirgis, "Security Council Governance of Postconflict Societies: A Plea for Good Faith and Informed Decision Making, *AJIL* 95 (2001), 579 et seq.

1999 which relates to cease-fire as well as international military and civilian presence in Kosovo.

In 2007 the issue of the final status of Kosovo was brought before the Council, on the basis of the plan submitted by the UN Rapporteur Ahtisaari.[6] At this stage, with the Kosovo situation having been on the Council's agenda for nine years, the Council came to accept in April 2007 that it had no sufficient information on Kosovo and dispatched the delegation to Belgrade and Pristina to enquire into the process of implementation of Resolution 1244.[7] This followed the fact that several members of the Security Council disagreed with the Ahtisaari plan, considering, inter alia, that its adoption could trigger instability in other parts of the world.

Be that as it may, this precedent serves as a reminder, that in addressing a particular situation the Security Council may not always be properly informed of the situation and its interference in such situations can potentially worsen matters, being thus counter-productive to the Council's intentions.

Another issue is that of the limits of the Security Council powers. It has to be asked whether this organ can act as if it were the organ of world governance, and thus override international law and state sovereignty wherever it sees fit. The debate on the scope of the Council's powers has been ongoing since the United Nations was first established. There is a school of thought which sees the Security Council as unlimited in its powers. As Reisman argues, the UN collective security mechanism was intended to operate according to the will and discretion of the permanent members of the Security Council.[8] According to this school of thought, the powers of the Security Council being based on political as much as legal factors, this organ can effectively legislate on the matter it addresses, despite any otherwise applicable international legal position.

This approach, however, fails to respond to the nature and origins of the Security Council powers. The ICJ gave a clear solution to this issue by stating that the political character of the organ of an international organisation does not release it from the observance of legal provisions

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6 Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Doc. S/2007/168 of 26 March 2007.

7 Report of the Security Council mission on the Kosovo issue, Doc. S/2007/256 of 4 May 2006.

8 M. Reisman, "Peacemaking", *Yale L. J.* 18 (1993), 415 et seq. (418).

which constitute limitations on its powers or criteria for its judgment.[9] As Judge Jennings further observed in the Lockerbie case,

> "all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law."[10]

Therefore, the key to understanding the powers of the Security Council lies in understanding their delegated nature. When the power of the Council in relation to international law is considered, it must be borne in mind that the task of the Security Council to maintain peace and security derived not from any abstract value, or some sort of *Grundnorm* regarding peace and security, but from the specific and individual legal norms that define the parameters of this process. Peace and security can and shall be maintained only in so far as the relevant legal norms provide for this. Therefore, the Security Council can undertake respective measures only within the limits that are imposed by the law that applies to its decisions, or as the ICJ emphasised, provide criteria of its judgment or constitute limitations on its activities. The entire process of maintenance of peace and security is a legal process and the depiction of dichotomy of peace versus law in this process is conceptually unsound.

The previous attitude towards United Nations activities that the Security Council was exempted from the operation of law coincided with the perception that then it was not envisaged that the United Nations would go too far in purporting to impact applicable international law. To illustrate, in its Advisory Opinion on the International Status of South West Africa, the ICJ addressed the question of observance of the League of Nations mandate in South West Africa.[11] The Court's conclusion was that the change of the status of the South West African territory was permissible only with the assent of the United Nations General Assembly. Thus, the principal point was the Court's opposition to the unilateral solution of this problem.

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9 See Conditions of Admission of a State to Membership in the United Nations, ICJ Reports 1947-48, 57 et seq. (64).

10 ICJ Reports 1998, 9 et seq. (110).

11 International Status of South West Africa, ICJ Reports 1950, 128 et seq.

One may, however, suppose the General Assembly could have adopted a decision in which it would state that South Africa could take the South West African territory and own it just like any other part of its territory, whatever concerns thus may arise in terms of international law, be it matters of self-determination or individual rights. Obviously such decision seemed impossible at that time and little concern was shown for the likelihood of the United Nations action that could seriously endanger the compliance with international law. The later stages of the Council's practice, especially the post-cold war era, have demonstrated that such concerns are increasingly pressing now. The expansion of the Security Council activities in this period have caused the consolidation of the jurisprudential approach that the Security Council powers are subjected to law, just as this approach was already accepted in the cold war period.

The ICJ in the Namibia Advisory Opinion clearly affirmed that the Security Council powers are bound by the standards of the Charter.[12] The ICTY later has likewise pronounced that the Security Council is,

> "subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)."[13]

The interference of the Security Council with international law means, as specified above, interference with the expectations of states that benefit from particular norms. The reactions, actual or potential, may thus vary, and the Council may end up getting itself in situations that do not require its involvement, because it may complicate the situation instead of resolving it and even violate the relevant international law. Therefore, the subsidiarity principle, recognised in several legal systems, should potentially find application within the UN system as well. This means that the Security Council shall not resort to its enforcement Chapter VII powers if the relevant situation can be dealt with without it. The possibility of a veto can always play a useful role in reminding the Council membership of the limits of appropriateness

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12 Legal Consequences for States of the Continued Presence of South Africa in Namibia, ICJ Reports 1971, 16 et seq.

13 Tadić, Decision by Appeals Chamber (1995) IT-94-1-AR72, paras 28-29.

of the Council's interference in a particular situation. Otherwise, legal guidance is provided by legal standards that bind the Council.

II. The Impact of Article 103 of the UN Charter

Of direct importance in addressing the powers of the Security Council in relation to international law is Article 103 of the Charter which stipulates that,

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

The first and most obvious limit on the relevance of Article 103 is that the relevant Council resolution must be compatible with the Charter in the first place, before Article 103 could provide for its primacy. Article 103 cannot make a resolution which is contrary to the Charter to prevail over other rules of international law. As Wilfried Jenks observed, "Article 103 cannot be invoked as giving the United Nations an overriding authority which would be inconsistent with the provisions of the Charter itself." [14]

The classical vision of Article 103 has for decades been that its relevance consists in excusing Member States for their non-compliance with trade and economic agreements with states which are subjected to the mandatory sanctions imposed by the Security Council.[15] There are however doctrinal views, for instance that of Alvarez, according to which Article 103 makes the Council decisions prevail over both treaties and custom.[16] But according to the clear wording of Article 103, the

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[14] W. Jenks, "The Conflict of Law-Making Treaties", *BYIL* 30 (1951), 439 et seq.

[15] L. Goodrich/ E. Hambro/ A. Simmons, *The Charter of the United Nations*, 1969, 615-616.

[16] Alvarez argues this, referring in this regard to the ICJ's pronouncement in the Nicaragua case, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), ICJ Reports 1986, 14 et seq., on the interrelated character of treaty and customary law, and seems to suggest on that basis that if the Security Council resolution prevails over the treaty obligations on human rights, it also prevails over their customary counterparts; J. Alvarez, "The Security Council's War on Terrorism: Problems and Policy Options", in: E. De Wet/ A. Nollkaemper (eds), *Review of the Secu-*

Charter is to prevail over international agreements, not over general international law.

Whatever the merits of the above argument, Article 103 could never override the operation of norms that have peremptory status.[17] As Judge Lauterpacht's Separate Opinion in the Bosnia case points out, even if the Charter prevails over other international agreements,

> "the relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*."[18]

Likewise, the ILA Reports on Accountability of International Organisations state that although Article 103 establishes the primacy of the Charter obligations, the Member States cannot be required to breach peremptory norms of international law.[19]

In judicial practice this approach has been reaffirmed. The EU Court of First Instance in Yusuf and Kadi faced the submission that the legality of the institutional measures adopted pursuant to Security Council resolutions was guaranteed under Article 103 which makes the resolutions prevail over any conflicting norm of international law.[20] The Court, having decided the case on the basis of *jus cogens*, did not treat

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rity Council by Member States, 2003, 119 et seq. (133). But Alvarez' argument is defective as it neglects the clear distinction between treaty and custom as expounded by the Court in Nicaragua when it expressly emphasised that when treaty and customary norms overlap in their content, they still maintain a separate existence, ICJ Reports 1986, 14 et seq. (94-95). Given that, it is more plausible that if the Council measure were to prevail over treaty obligations, it is unlikely to affect their customary counterparts.

17 See under section IV. 2.

18 Separate Opinion, ICJ Reports 1993, 407 et seq. (440).

19 M. Shaw/ K. Wellens, *Third ILA Report on Accountability of International Organisations*, 2003, 13; M. Shaw/ K. Wellens, *Final Report on Accountability of International Organisations*, 2004, 19.

20 Ahmed Ali Yusuf and Al Barakaat International Foundation, Case T-306/01, 21 September 2005, paras 200-225; Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, Case T-315/01, 21 September 2005, paras 136-156. The same court reaffirmed this approach in Chafiq Ayadi v Council of the European Union, Case T-253/02, 12 July 2006; Faraj Hassan v Council of the European Union and Commission of the European Communities, Case T-49/04, 12 July 2006.

Article 103 as upsetting the outcome. As the relevant rights were part of *jus cogens*, Article 103 could not help the relevant Council resolutions to prevail over the relevant rights. Similarly, the judgment of the English Court of Appeal in Al-Jedda confirmed that in the field of *jus cogens* Article 103 had no prevailing force.[21] The issue – and the most contestable one – in this case was whether the relevant rights were part of *jus cogens*.

But even within the proper ambit of Article 103, it would only justify the primacy over other relevant norms if the relevant resolution itself intends to displace or qualify the otherwise applicable law. Whether this is the case ultimately depends on the clarification of the meaning of the resolution through the use of the methods of interpretation.

III. The Interpretation of Security Council Resolutions

1. The Rules of Treaty Interpretation and their Applicability to Security Council Resolutions

To clarify whether the relevant Security Council resolution impacts on international law, its intention to do so must be demonstrated. The assumption in jurisprudence, notably by international criminal tribunals, is that the Security Council shall not be taken as acting in disregard of international law, unless its clear intention to that is demonstrated in the expressly stated textual provisions.[22] Therefore, the ultimate source of finding the Council's intention on these issues is the text of the resolutions it adopts, just as with the interpretation of treaties.

The only authoritative provisions on interpretation are included in the 1969 Vienna Convention on the Law of Treaties. The Vienna Convention has consolidated, pursuant to the developments in jurisprudence, the distinction between the General Rule of Interpretation embodied in article 31[23] and the supplementary methods of interpretation

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[21] R (Al-Jedda) v the Secretary of State of Defence, Court of Appeal, [2006] EWCA Civ 327, 29 March 2006, *per* Brooke LJ, paras 63 & 75.

[22] See to this effect, Tadić, see note 13, para. 296; Prosecutor v Akayesu, ICTR, Case No. ICTR-96-4-T, 2 September 1998, para. 466.

[23] According to article 31,
"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

embodied under article 32.[24] As Sir Ian Sinclair writes, the distinction between the general rules of interpretation and the supplementary means of interpretation is intended "to ensure that supplementary means do not constitute an alternative, autonomous method for interpretation, divorced from the general rule."[25]

Even within the framework of the General Rule, the interpretative methods are further classified into those which guide the interpretative process (plain meaning, context, object and purpose), and those which "shall be taken into account" together with the context of the treaty (subsequent practice, general rules of international law). This must be understood as a further allocation of priorities. In addition, the Vienna Convention regime no longer allows considering the intention of states as an independent and free-standing factor. Intention must, instead, be ascertained from individual interpretative factors included in the Convention, such as the text, object and purpose or other factors.

The primacy of the text leads to the relevance of the principle of effectiveness. Fitzmaurice defines this principle by stating that,

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2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

24 According to article 32,
"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to Article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

25 I. Sinclair, *The Vienna Convention on the Law of Treaties*, 1984, 116.

"treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text."[26]

During the ILC codification work, Special Rapporteur Waldock proposed formulating the effectiveness rule as giving effect to the plain meaning and the object and purpose of the treaty. This followed from the recognition of the textual primacy in jurisprudence. The Commission accepted this approach, and reinforced it by placing the relevance of the object and purpose of the treaty just after the treaty's plain meaning.[27] At the final stage of codification, the Commission affirmed that the rule of effectiveness is reflected in the rule that a treaty shall be interpreted in accordance with its plain meaning and its object and purpose. The Commission further stated that "when a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[28] Given that the Commission adopted this approach even for the cases where the meaning of the text admits two different interpretations, it should not be difficult to understand how cogent the principle of effectiveness becomes when the meaning of the treaty text is clear and straightforward.

The relevance of the Vienna Convention is universally accepted as the general guide of treaty interpretation, extending to fields from trade and investment to human rights, from bilateral transactions to multilateral "law-making treaties." In the Libya-Chad Boundary Dispute, the ICJ affirmed that article 31 of the Vienna Convention reflects the rules of customary international law on treaty interpretation,[29] and reiterated this conclusion in LaGrand and Kasikili/ Sedudu.[30] Similarly, in Ligitan/ Sipadan, the Court noted that Indonesia was not a party to the 1969 Vienna Convention, and reaffirmed that article 31 thereof, with its

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26 G. Fitzmaurice, *The Law and Procedure of the International Court*, 1986, 345.

27 ILCYB 1964, 60-61, 199, 201.

28 ILCYB 1966, 219.

29 Libya-Chad Boundary Dispute, ICJ Reports 1994, 6 et seq. (21).

30 LaGrand, ICJ Reports 2001, 466 et seq. (501, para. 99); Kasikili/Sedudu Island, ICJ Reports 1999, 1045 et seq. (1059, para. 18).

priority for textual and teleological interpretation, was part of customary international law.[31]

The similar approach prevails in arbitral practice. According to article 102 (2) of the NAFTA Agreement, it shall be interpreted "in accordance with the applicable rules of international law." As the NAFTA Arbitral Tribunal pointed out in Pope & Talbot, "NAFTA is a treaty, and the principal international law rules on the interpretation of treaties are found in the Vienna Convention on the Law of Treaties."[32] The Tribunal reaffirmed that arts 31 and 32 of the Vienna Convention reflect the generally accepted rules of customary international law.[33] The relevance of the interpretation methods under the Vienna Convention was also affirmed in Metalclad[34] and Waste Management.[35] The Arbitral Tribunals in Thunderbird and SD Myers also maintained that it should construe the terms of Chapter 11 NAFTA in accordance with its plain meaning, context and object and purpose as required by the Vienna Convention.[36]

The same holds true for human rights treaties. In Golder, the European Court of Human Rights examined how the European Convention should be interpreted. The Court stated that it should be guided by the Vienna Convention, because "its Articles 31 to 33 enunciate in essence generally accepted principles of international law."[37] Therefore, even as the interpretation of treaties is undertaken in diverse treaty frameworks regulating different subject-matters, it is the same regime of the Vienna Convention that applies – the regime that refers to multiple interpretative factors that can explain diverse outcomes depending on the character of treaty relations.

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31 Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/ Malaysia), ICJ Reports 2002, 625 et seq. (645, para. 37).

32 Pope & Talbot Inc and the Government of Canada (Interim Award, NAFTA Chapter 11 Arbitration), 26 June 2000, para. 65.

33 Pope & Talbot (Interim Award), see note 32, para. 66.

34 Metalclad Corporation and the United Mexican States (Award), 30 August 2000, para. 70.

35 Waste Management Inc and United Mexican States (Award), 2 June 2000, para. 9; see also S.D. Myers and Government of Canada (Partial Award, NAFTA Arbitration under the UNCITRAL Rules), 13 November 2000, paras 199-200.

36 International Thunderbird Gaming Corporation and the United Mexican States (Award), 26 January 2006, para. 91; SD Myers, see note 35, para. 202.

37 Golder v UK, 4451/70, Judgment of 21 February 1975, paras 29-30.

Even more significantly for our analysis, the WTO Appellate Body in US-Gambling addressed the interpretation of GATS specific commitments and their legal nature. This legal nature influences the applicability of interpretation rules,

> "In the context of the GATT 1994, the Appellate Body has observed that, although each Member's Schedule represents the tariff commitments that bind *one* Member, Schedules also represent a common agreement among *all* Members. Accordingly, the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the Vienna Convention."[38]

The interpretative task consisted therefore in "the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members." The Appellate Body considered that,

> "the meaning of the United States' GATS Schedule must be determined according to the rules codified in Article 31 and, to the extent appropriate, Article 32 of the Vienna Convention."[39]

The Appellate Body thus used the relevant Vienna Convention provisions throughout its interpretative exercise,[40] which confirms that the rules applying to treaties and acts possessing a allegedly unilateral nature, are, in principle, similar.

This confirms the thesis that there is simply no alternative and authoritative set of interpretation rules. In the Fisheries Jurisdiction case (Spain/ Canada) the ICJ stated that the Optional Clause declarations of the acceptance of the court's jurisdiction are *sui generis* instruments. However, the actual process of interpretation in this case was conducted in the same way as the faithful application of the 1969 Vienna Convention would require. The Court relied on the textual meaning of

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[38] United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, AB-2005-1, Report of the Appellate Body, Doc. WT/DS285, AB/R, 7 April 2005, para. 159 (emphasis in original).

[39] Ibid., para. 160 (emphasis in original).

[40] Ibid., paras 161-213.

the Canadian declaration as the crucial factor in the ascertainment of its meaning.[41]

If this approach is applicable to Security Council resolutions, the implication is that the text and plain meaning of the relevant resolution must be taken as the basis for determining what has been agreed upon. Security Council resolutions are, to an important extent, agreements between states being members of the Council. It follows that the text of the relevant resolution has primacy over what is being said during the deliberations, or after the adoption of the resolution. After all, it is the text that embodies the agreement and joint attitude of the Council's membership – all other statements express the view of individual Member States only. If the view of the Member State expressed individually at whichever stage differs from the view it voted for in the resolution, then the view expressed in the resolution prevails in relation to all relevant states.

Obviously, there are situations where there are no direct contradictions between what the text of a Security Council resolution says and how the Member State interprets it. These are cases where the relevant members may claim that the relevant resolution provides for *more* or *less* than what it actually says, among others because the resolution does not say anything about that *more* or *less*, and it does not expressly contradict the assumption that that *more* or *less* is permissible and allowed.

However, if there is to be an impact on the state of applicable international law, or if the legal change is to be initiated, it is critically necessary to know what the precise intention of the Council is. In the law of treaties, the respect for the written word as the dominant interpretative principle is the pre-requisite for legal stability and predictability. If these factors are to be present in the decision-making of the Security Council and not be replaced by mutual distrust and legal chaos, the textual approach must be adhered to in interpreting the resolutions of the Council. It must, again, be borne in mind that the Vienna Convention rules on interpretation are the only set of rules on this subject. There is no other set of rules applicable to interpretation of other instruments,

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41 Fisheries Jurisdiction (Spain v Canada), ICJ Reports 1998, 432 et seq., see especially paras 61 to 80 of this judgment. For more details see A. Orakhelashvili, "Interpretation of Jurisdictional Instruments in International Dispute Settlement", in: *The Law and Practice of International Courts and Tribunals*, Vol. 6 (1), 2007, 159 et seq.; id., "The Concept of International Judicial Jurisdiction: A Reappraisal", in: *The Law and Practice of International Courts and Tribunals*, Vol. 3, Fall issue, 2003, 501 et seq.

such as unilateral acts, or decisions of international organisations. No set of rules of interpretation formulated by academics, legal advisers or diplomats can have the same authority as the codified set of authoritative rules.

Consequently, the outcome is that whether or not the Vienna Convention formally applies to Security Council resolutions, or whether such application takes place by analogy, the textual principle is still the dominant principle in interpreting these resolutions. Although there are attempts to discredit textualism in a variety of contexts,[42] it remains the principal method of interpretation.

Presumably the resolutions of the Security Council are not identical, though they are similar, to treaties. But it is not enough to say that Security Council resolutions are different to treaties; it is also necessary to emphasise in which way they are different, and what factors cause such difference. On their face, and in terms of the process of their adoption, resolutions, just as treaties, express the agreement between states being members of the Security Council and embody their intention expressed to the attention of all.

Therefore, as far as the process of identification of the original content of a Security Council resolution is concerned, the difference between treaties and Security Council resolutions is not the most crucial question. The identification of the meaning following from the clearly written text can be done with Security Council resolutions in the same way as with treaties.

Consequently, even as the Vienna Convention does not formally apply to Security Council resolutions, its principles of interpretation embody more than those pertinent in the case of the agreements covered by the scope of the Vienna Convention. In particular, given the essence of Security Council resolutions as agreements expressed in the written word on which reliance can be placed, the distinction drawn between the general rule of interpretation and secondary methods of interpretation becomes particularly important. As with the treaties, the general rule of interpretation putting emphasis on the ordinary meaning of the written word is the inevitable precondition for ensuring legal certainty in the process of adoption and implementation of Security Council resolutions.

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42 See T. Franck, *Recourse to Force*, 2001, and the review on it, *ICLQ* 52 (2003), 827-829.

The relevance of the Vienna Convention principles of interpretation in the case of Security Council resolutions is also explained by the fact that the states being members of the Security Council would not be willing to have held as having consented to something not overlapping with, or going beyond, the written text to which they have given their agreement. The tendency of inferring from the Council resolutions more than they say at face value can operate as a destabilising factor that will hamper the process of achieving the consensus among the members. This can be seen from the fact that, in the aftermath of the repeated tendency to construe from Security Council resolutions more than they mean, the Council resolutions include the safeguard clauses, i.e. additional paragraphs which state that for the adoption of additional Chapter VII measures additional decisions will be required. This has been the case with S/RES/1696 (2006) of 31 July 2006 and S/RES/1737 (2006) of 27 December 2006 adopted in relation to the claims that Iran is enriching nuclear fuel with a view to producing nuclear weapons.

The real difference of Security Council resolutions to treaties relates to its institutional background. Resolutions are adopted within the legal framework that puts constraints on their permissible content and hence their permissible meaning. If these constraints are not respected, the issue of validity of the relevant resolution could arise.[43] These limits on the Security Council powers can in certain cases justify the possible resort to preparatory work and context of resolutions. In some cases the text of the resolution could be unclear to such extent that the choice between its different meanings can be determinative of whether the relevant resolution will deviate from the otherwise applicable international law. To illustrate, S/RES/1483 (2003) of 22 May 2003, adopted in the aftermath of the invasion of Iraq in 2003, and addressing, among other things, the issue of disposal of Iraqi oil, refers to "a properly constituted, internationally recognised, representative government of Iraq."

There is no generally accepted definition of what "a properly constituted, internationally recognised, representative government" means. It is not literally the same as an elected government. Thus, theoretically it is possible that the literal reading could result in Resolution 1483 being used to affirm and mandate the exploring and exploiting of the natural resources of Iraq without the consent of the government representative of the Iraqi people – that is without the respective expression of will by the people of Iraq.

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43 See for details Orakhelashvili, "Peremptory Norms", see above * note, Chapter 14; see further under section V.

Consequently, if the principle of self-determination and its corollary – the permanent sovereignty over natural resources – are considered, the textual reading is no longer satisfactory. The principle of self-determination is part of the Charter purposes and principles and the Council resolutions could not possibly be taken as overriding it.

Therefore, the context and preparatory work can be looked at to see what "a properly constituted, internationally recognised, representative government" means. This demonstrates that S/RES/1483 does not actually authorise any deal regarding natural resources without the consent of the Iraqi people, because the preparatory work contains plenty of references both to self-determination and the permanent sovereignty over the natural resources.[44]

It must be emphasised that the relevance of preparatory work in this case is dictated not because preparatory work or the attitudes of individual Member States have any inherent relevance, or because they are more important than the text. These factors are relevant for one simple reason: because one of the possible constructions of the textual meaning of the relevant paragraph may lead to a meaning which the Security Council is not allowed to attach to its decisions. Therefore, this process of recourse to factors other than the text of the resolution does not question the validity of Vienna Convention principles, nor their relevance for Security Council resolutions by analogy. What this process does is to emphasise the essence of the Council resolution as the secondary legal instrument – which is not the same as the treaty, that can, subject to public order constraints, have any meaning that parties adduce to it. Apart from these considerations, the text of the relevant resolution must be taken as the basis for ascertaining the Security Council's intention.

In interpreting Security Council resolutions, presumptions directing the interpreter in certain ways have no direct value and authority in in-

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[44] This point was the most acute in deliberations, and the need to safeguard the permanent sovereignty of Iraq over its natural resources has been explicitly emphasised by representatives of the United Kingdom, Spain, Mexico, the Russian Federation, Guinea, Chile, Angola, and Pakistan, Doc. S/PV.4761, 5-15. The Representatives emphasised that Iraqi people are the owners of their oil resources, and some of them even linked this issue with the right of peoples to self-determination (Guinea, the Russian Federation, Spain), Doc. S/PV.4761, at 6-9. The representative of Mexico was more specific in saying that the resolution 1483 "does not authorise the establishment of long-term commitments that would alienate the sovereignty of the Iraqi people over its petroleum resources." Doc. S/PV.4761, 7.

ternational law. Resolutions arguably combine in themselves the elements of an agreement between states and the elements of "statutory" or regulatory administrative acts. But, as the international norms on interpretation are not related to the requisite standards of national legal systems, these considerations cannot be predominant.

There are, as Frowein elaborates, various ways in which this issue can be approached. While Frowein rejects the relevance of restrictive interpretation in the case of treaties, he considers that in the case of resolutions that include coercive measures against states which is the most severe encroachment upon the sovereignty, the interpretation favourable to the sovereignty is fully justified.[45] But it seems that there could not be legitimate justification for construing restrictively what the Security Council has expressly enacted in the exercise of its mandate to maintain international peace and security under the Charter. Restrictive interpretation of resolutions may in some circumstances obstruct the operation of the collective security mechanism.

As Wood suggests, the judicial authority on the interpretation of Security Council resolutions in the Namibia Advisory Opinion refers to the ascertainment of a binding character of a resolution as opposed to ascertainment of its content.[46] At the same time, the ascertainment of whether the resolution is intended to be binding clarifies the meaning of the resolution, and is thus interpretation, in the same way as any other interpretative exercise. The Namibia case criteria of reference to the resolution's language (plain meaning), context and preparatory work[47] are quite similar to the principles adopted for interpretation of other categories of acts.

The ICTY dealt with the interpretation of Security Council resolutions in respect of its statute as part of S/RES/827 (1993) of 25 May 1993. The Appeals Chamber stated in Tadić that the statute shall be construed literally and logically.[48] For a better understanding of the scope and meaning of the provisions, the Appeals Chamber considered their object and purpose, which in that case was identified as the need

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45 J.A. Frowein, "Unilateral Interpretation of Security Council Resolutions – A Threat to Collective Security?", in: V. Götz/ P. Selmer/ R. Wolfrum (eds), *Liber Amicorum Günther Jaenicke – Zum 85. Geburtstag*, 1999, 97 et seq. (112).

46 M.C. Wood, "The Interpretation of Security Council Resolutions", in: J.A. Frowein/ R. Wolfrum (eds), *MaxPlanck UNYB 2* (1998), 73 et seq. (75).

47 ICJ Reports 1971, 16 et seq. (53).

48 Tadić, see note 13, paras 83, 87.

to enable the Tribunal to prosecute war crimes both in international and internal conflicts,[49] and this outcome was reaffirmed in Seselj.[50] The preparatory work as represented by the Secretary-General's report on the establishment of the Tribunal was also used in Tadić.[51] Judge Abi-Saab in Tadić also upheld the Tribunal's approach, and observed that the provisions of the statute must be interpreted in a way which preserves their autonomous field of application, that is in accordance with the *effet utile* principle.[52] Therefore, it seems that the above-expressed concerns can be accommodated by the use of the standard principle of interpretation of plain and ordinary meaning of terms, which means that nothing that is expressed can be disregarded and nothing that is not expressed can be implied, unless directly following from an express provision.

2. Interpretation Methods as Applied to Resolutions Related to Specific Fields of International Law

a. *Jus ad bellum* – The Claims of Implicit or Subsequent Validation by the Security Council of the Unilateral Use of Force

The need of the interpretation of Security Council resolutions in accordance with their text becomes clear given the attempts to interpret the relevant resolution as impacting the legal position under *jus ad bellum*, in particular to imply the authorisation or approval of the use of force where nothing similar has been expressed in the resolution. Most notably, this took place in relation to the NATO air campaign against the Federal Republic of Yugoslavia and the war against Iraq in 2003.

The NATO air campaign which had not been authorised by the Security Council nor otherwise justified under the UN Charter, has ended with the adoption of the S/RES/1244 (1999) of 10 June 1999, whereby the Council approved the international security presence in Kosovo. This has been interpreted by some as the retrospective approval of the armed attack on Yugoslavia, although nothing in the text of the resolution confirms this and a resolution approving the war

49 Ibid., paras 71, 77.
50 Seselj, IT-03-67-AR72.1, para. 12.
51 Tadić, see note 13, para. 82.
52 Ibid. Separate Opinion, Section IV.

against the FRY would not have been supported by the required majority in the Council.

The authorisation of the use of force by the Council cannot be presumed unless the Council's explicit intention is expressed. This approach is required by the very rationale of the Charter mechanism of collective security. The authorisation of force presupposes a double determination under Arts 39 and 42 of the Charter, namely that there is a threat to, or breach of peace and that the forcible measures are required for the maintenance or restoration of peace and security. The Council cannot be presumed to have passed such a two-stage judgment unless there is a clear evidence of the opposite. All the Council did by adopting resolution 1244 was to address, in prospective terms, the post-conflict situation in Kosovo and approve the international military and civil presence.

The institutional justification of the war against Iraq has been sought in the two Security Council resolutions, S/RES/678 (1990) of 29 November 1990 and S/RES/1441 (2002) of 8 November 2002. Resolution 678 was adopted after the Iraqi invasion of Kuwait in 1990 and provided for the authorisation of the Member States cooperating with the government of Kuwait to use "all necessary means" to ensure the Iraqi withdrawal and the restoration of peace and security in the area. The ensuing campaign against Iraq ended with the liberation of Kuwait and the adoption of S/RES/687 (1991) of 3 April 1991 which laid down the parameters of the settlement in terms of compensation, border demarcation and arms inspections.

In 2003, the US invoked Resolution 678 as one of the bases that justified its invasion of Iraq. This was based on the construction of Resolution 678 as authorising repeated uses of force against Iraq, instead of being restricted in its effect to the situation related to the war in 1990-1991.[53] However, nothing in resolution 678 shows that it was intended as an indefinite, repeatedly invocable authorisation. As Lowe observes, it cannot be argued,

> "that Resolution 678 gave each one of the States in the 1991 coalition, acting either alone or jointly with some or all of the others, the right to take any action, anytime, anywhere, that it considers neces-

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[53] J. Yoo, "International Law and the War in Iraq", *AJIL* 97 (2003), 563 et seq. (569-571); R. Wedgwood, "The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense", *AJIL* 97 (2003), 576 et seq. (578-582).

sary or desirable in pursuit of the aim of restoring peace and security in the area."[54]

The reference to resolution 1441 was intended to demonstrate that the Security Council had authorised the use of force against Iraq by threatening it with "serious consequences" for the failure to cooperate with the UN inspectors to demonstrate that it did not possess weapons of mass destruction. The reference to "serious consequences" was interpreted as the reference to the authorisation of the use of force.[55] But "serious consequences" can be a much broader notion, not necessarily including the use of force. It is the collective will of the Security Council that matters and the proceedings of the adoption of resolution 1441 do not demonstrate any collective support for the authorisation of the use of force. As Corten observes, if the Security Council had wished to authorise the use of force, it could have done so expressly.[56] As Lowe further suggests,

> "It is simply unacceptable that a step as serious and important as a massive military attack upon a State should be launched on the basis of a legal argument dependent upon dubious inferences drawn from the silences in Resolution 1441 and the muffled echoes of earlier resolutions, unsupported by any contemporary authorisation to use force."[57]

In general, the arguments of implicit previous or subsequent approval of the use of force in the institutional context are the arguments of desperation, raised where no other justification of the relevant use of force can be found. These arguments also undermine the factor of reliability in international dealings, because they force states not to consent to any document, whether a treaty or a Security Council resolution, which does not expressly exclude the outcome they are unwilling to see happening. This can make reaching agreement on many issues impossible because states would be constantly afraid of having their word interpreted as consent to something to which they have never consented. It therefore seems that the strict standards of textual interpretation that

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54 V. Lowe, "The Iraq Crisis: What Now?", *ICLQ* 52 (2003), 859 et seq. (866).

55 J. Stromseth, "Law and Force After Iraq: A Transitional Moment", *AJIL* 97 (2003), 628 et seq. (630-631).

56 O. Corten, "Opération *Iraqi Freedom*: Peut-on admettre l'argument de l' authorisation implicite du Conseil de Securité?", *RBDI* 36 (2003), 205 et seq. (213).

57 Lowe, see note 54, 866.

take the written word for what it literally means and exclude what could have been said but was never said is the only option to promote the atmosphere in which states would be ready to give their agreement to certain deals, and thus promote international cooperation, without being concerned of their words being twisted afterwards.

That such concerns have become real after the discourse as to the meaning of resolutions 1244, 678 and 1441 was clear in the process of adoption of S/RES/1696 (2006) of 31 July 2006 and 1737 (2006) of 27 December 2006, demanding the termination of Iran's uranium enrichment programme. In the process of adoption, some members of the council supported the resolution that would provide for sanctions against Iran should it refuse to comply. The propensity among some members of the council to read implied authorisations of enforcement measures in resolutions which do not even mention them, led to the insistence of other members to include, *ex abundanti cautela*, the specific provisions in these resolutions stating that a separate decision would need to be taken on any enforcement measures.

b. *Jus ad bellum* – Claims on the Impact of Security Council Resolutions on the Law of Self-Defence

Until recently, in the law of self-defence, the issue of the actor who conducts an armed attack triggering the right to self-defence under Article 51 of the UN Charter had not been raised and it had always been presumed that the source of an armed attack was the state.[58] The emphasis on the possibility of armed attacks by non-state actors entitling states to exercise their right to self-defence first emerged after the September 11 events when the UN Security Council referred in its resolutions S/RES/1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001 to the right to self-defence in the context of terrorist attacks. In the case of the Construction of the Wall in the Occupied Palestinian Territory, Israel claimed that the construction of the wall is consistent with its inherent right to self-defence under Article 51 of the

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[58] Significantly enough, leading treaties on the subject have not touched upon the issue of self-defence against armed attacks ensuing from non-state actors which are not in the final analysis attributable to the state, cf. I. Brownlie, *International Law and the Use of Force*, 1963, 216 et seq.; Y. Dinstein, *War, Aggression and Self-Defence*, 2001, 165 et seq.; C. Gray, *International Law and the Use of Force*, 2004, 108 et seq.

Charter, and Security Council resolutions 1368 and 1373 which recognise that right.[59] The Court responded that,

"Article 51 of the Charter … recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence."[60]

This approach was further reaffirmed in the Congo-Uganda case, where Uganda invoked the right to self-defence to justify the actions that were proved as attributable to Uganda. As a starting-point, the court referred to the document of the High Command of Uganda regarding the operation "Safe Haven" that resulted in the use of force on the Congolese territory.[61] "Safe Haven" justified the attacks against the Congo in terms of Uganda's security interests, but failed to refer to the armed attack perpetrated by the Congo against Uganda. Therefore, the Court refused to see this as the instance where the self-defence was claimed in the first place and at the relevant stage by Uganda.[62]

In terms of the legal aspects of self-defence, the Court observed that,

"while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assem-

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59 Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136 et seq. (194, para. 138).

60 Advisory Opinion, ibid., (194, para. 139).

61 Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), available at <http://www.icj-cij.org/docket/files/116/10455.pdf>, para. 109.

62 Ibid., para. 143.

bly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC."[63]

This mirrors the court's pronouncement regarding self-defence in the Advisory Opinion in the case of the Wall in the Occupied Palestinian Territory. It seems that the reasoning in the Wall case and in Congo-Uganda is similar.

The Wall case involved the claims of self-defence against the armed attack which not only allegedly emanated from non-state actors but also took place within the territory under control of the state that claimed to be the victim. In Congo-Uganda the relevant attacks were alleged to be perpetrated from abroad. Therefore, the Congo-Uganda case rejected the claim of self-defence solely on the basis that the relevant acts were not attributable to the state. This means that the court has reaffirmed and consolidated its previous finding in the Wall case that the attack must emanate from the state in order to trigger the right to self-defence. The legal position regarding the source of attack *ratione personae* that was affirmed in the Wall case in conjunction with other factors was affirmed in Congo-Uganda on its own merits. With this judgment, the legal position on the source of an armed attack seems to be consolidated.

The Court's line of reasoning on self-defence has met some opposition from individual judges in both cases. Judge Koojmans in the Wall case and in Congo-Uganda, as well as Judge Simma in Congo-Uganda argued against the requirement that self-defence can only be exercised against state attacks. Judge Simma argued in particular that this line of reasoning must be revised because of the recent developments in state practice accompanied by *opinio juris*, such as Security Council resolutions 1368 and 1373 related to terrorist threats.[64]

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[63] Ibid., para. 146.

[64] Separate Opinion of Judge Koojmans, ibid., paras 26-31; Separate Opinion of Judge Simma, ibid., para. 11. Simma in the Oil Platforms case noted the general need for the court to reaffirm, on policy grounds and via *obiter dicta,* the "legal limits on the use of force at a moment when these limits find themselves under the greatest stress," Separate Opinion, paras 6 et seq., and in the Wall case voted for the Court's opinion. It is also noteworthy that Judges Higgins and Buergenthal who opposed in the Wall case the

The fact that the two Security Council resolutions have been adopted in relation to the terrorist attacks against the US and the use of force in Afghanistan is no evidence that they support the legal position that the source of an armed attack is not limited to states. Nothing in these resolutions states that non-state actors can be the source of armed attacks on their own. On closer look, it appears that the Council resolutions 1368 and 1373 have recognised the inherent right to self-defence in the context of anti-terrorist measures and also reaffirmed the responsibility of state and non-state actors for terrorist acts. This has been, however, an emphasis on two separate principles and the fact that they were mentioned together does not establish the conceptual or normative link between them. The reference to the inherent right to self-defence in accordance with the UN Charter and the simultaneous introduction of certain measures against individuals and groups engaged in terrorism falls short of linking these two factors in a way to make the one an implication of the other.

c. Anti-Terrorist Measures: Claimed Impact of Security Council Resolutions on Fundamental Human Rights

In Yusuf and Kadi the European Court of First Instance identified the intention of the Community institutions to give effect, by enacting the relevant community legislation such as the Common Position 2002/402, to Security Council resolutions 1267 (1999) of 15 October 1999, 1333 (2000) of 19 December 2000, and 1390 (2002) of 18 January 2002, to a number of measures related to the freezing of assets of individuals suspected of terrorist activities.[65] Therefore, in interpreting the relevant Community instruments, the Court of First Instance simultaneously interpreted the relevant resolutions of the Security Council. This is confirmed by the Court's observation that,

> "if the Court were to annul the contested regulation, as the applicant claims it should, although that regulation seems to be imposed by international law, on the ground that that act infringes his fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the

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Court's reading of Article 51 of the UN Charter and the limitations on self-defence, have not opposed this outcome in the Congo-Uganda case.

65 Kadi, see note 20, paras 154-155; Yusuf, see note 20, paras 255-256.

> Security Council concerned themselves infringe those fundamental rights."[66]

In the context of the alleged breach of the right to property, the court addressed the issue of "the extent and severity of the freezing of the applicant's funds." Therefore, it fell,

> "to be assessed whether the freezing of funds provided for by the contested regulation, as amended by Regulation No. 561/2003, and, indirectly, by the resolutions of the Security Council put into effect by those regulations, infringes the applicant's fundamental rights."

Measured by the standard of the universal *jus cogens* standard of the right to property, this was not the case. The Regulation as adopted pursuant to S/RES/1452 (2002) of 20 December 2002, did not provide for the blanket measures for freezing assets and funds, but allowed for such freezing being declared inapplicable "to the funds necessary to cover basic expenses, including payments for foodstuffs, rent, medicines and medical treatment, taxes or public utility charges." Therefore, the express clauses in the contested legislation showed that the intention behind them was not to override the right to property in a blanket manner, thereby resulting in inhuman or degrading treatment. The deprivation of property was therefore not arbitrary, which meant that the relevant measures were in accordance with the scope of the right to property as guaranteed under article 17 (1) of the 1948 Universal Declaration of Human Rights.[67] Furthermore, the freezing of the assets was a "temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof."[68] This means that the relevant Community legislation and consequently the Security Council resolutions did not in this case impact upon and override the relevant human right as part of international law. The textual interpreta-

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[66] Kadi, see note 20, para. 217; Yusuf, see note 20, para. 267.

[67] Kadi, see note 20, paras 236-237, 239-241; Yusuf, see note 20, paras 290-292; these measures would furthermore be compatible with the right to peaceful enjoyment of possessions under article 1, Protocol 1 of the 1950 European Convention on Human Rights, which allows for the governmental control of the use of property in the public interest. This is further implied in the Court's observation that "it is appropriate to stress the importance of the campaign against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations," para. 245.

[68] Kadi, see note 20, para. 248; Yusuf, see note 20, para. 299.

tion demonstrated that the Security Council has had no intention to act in conflict with international law.

In terms of the right to be heard in relation to the freezing of the assets, the Court observed that,

> "although the resolutions of the Security Council concerned and the subsequent regulations that put them into effect in the Community do not provide for any right of audience for individual persons, they set up a mechanism for the re-examination of individual cases, by providing that the persons concerned may address a request to the Sanctions Committee, through their national authorities, in order either to be removed from the list of persons affected by the sanctions or to obtain exemption from the freezing of funds."[69]

Consequently, "by adopting those Guidelines, the Security Council intended to take account, so far as possible, of the fundamental rights of the persons entered in the Sanctions Committee's list, and in particular their right to be heard."[70] The interpretation of the Council's resolutions did not reveal the intention to trump the applicable international law in this case either.

In relation to the right to access to a court, the Court emphasised that this right is generally subjected to some inherent limitations, and the implementation in the national legal order of Chapter VII decisions of the Security Council can justify such limitations. This was further reinforced by the significance of the fact that,

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69 Kadi, see note 20, para. 262; Yusuf, see note 20, para. 309.

70 Kadi, see note 20, para. 265; Yusuf, see note 20, para. 312; furthermore, as the Court stated in para. 266 of its judgement in Kadi and para. 313 in Yusuf, "The importance attached by the Security Council to observance of those rights is, moreover, clearly apparent from its resolution 1526 (2004) of 30 January 2004 which is intended, on the one hand, to improve the implementation of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000), and paragraphs 1 and 2 of Resolution 1390 (2002) and, on the other, to strengthen the mandate of the Sanctions Committee. In accordance with paragraph 18 of Resolution 1526 (2004), the Security Council '[s]trongly encourages all States to inform, to the extent possible, individuals and entities included in the Committee's list of the measures imposed on them, and of the Committee's guidelines and resolution 1452 (2002)'. Paragraph 3 of Resolution 1526 (2004) states that those measures are to be further improved in 18 months, or sooner if necessary." The similar approach was further affirmed in Chafiq Ayadi, see note 20, para. 125.

> "far from providing for measures for an unlimited period of application, the resolutions successively adopted by the Security Council have always provided a mechanism for re-examining whether it is appropriate to maintain those measures after 12 or 18 months at most have elapsed."[71]

The Council did not intend to breach international law in this field either.

The reasoning of the Court of First Instance goes hand in hand with the approach of the European Court of Human Rights in Waite and Kennedy that the access to the Court under article 6 of the European Convention can be set aside in relation to international organisations if these organisations provide the mechanism within which the relevant individuals can argue their case and obtain remedies.[72] The Court of First Instance found no intention of the Security Council to override the relevant human rights: had this been the case, the Court would exercise its power of judicial review.

d. Anti-Terrorist Measures: Security Council Resolution and Detention Contrary to Human Rights and Humanitarian Law Norms

The scope and effect of the provisions of S/RES/1546 (2004) of 8 June 2004, adopted in anticipation of the transfer of the authority of the Coalition Provisional Authority (CPA) to the Iraqi interim government, has been discussed most sharply in the decisions of English courts in the Al-Jedda case, which deals with the power of the US-led Multinational Force to detain individuals suspected of the attempts to undermine stability or commit terrorist attacks. The issue before the Divisional Court was the legality of the power to detain and intern individuals under para. 10 of resolution 1546. The Divisional Court dealt with the situation where an individual detained in Iraq has complained about the illegality of his detention because it was not accompanied by the proper procedure to review the legality of the detention, as required under article 5 (4) of the European Convention on Human Rights. This provision requires that the review must be performed by a court, while article 78 of the IV. Geneva Convention requires that the review must be performed by the competent body set up by the detaining power, and the possibility of appeal must be provided. These requirements

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[71] Kadi, see note 20, para. 289; Yusuf, see note 20, para. 344.

[72] See under section IV. 2. d.

were not observed. The detainees in this case were brought before a Divisional Internment Review Committee (DIRC), which is not a court. The Court held that,

> "Although the Commander and the panel [i.e. DIRC] do not have the qualities of independence and impartiality sufficient to meet the requirements of Article 6 ECHR, we do not think that complaint could properly be made of them in the context of Article 78."[73]

The reasoning of both courts accepts that the Security Council could override, and has overridden, the relevant rights of individuals under article 5 of the European Convention as well as article 78 of the IV. Geneva Convention.

The Divisional Court held that this power of detention and internment was conferred pursuant to article 78 of the IV. Geneva Convention, and the Resolution "provides a clear indication of the intention that the powers previously derived from Article 78 of Geneva IV were to be continued."[74] The Court's judgment did not address the question whether the detentions and internments in Iraq were accompanied by the procedure of appeal, as is required under article 78 of the IV. Geneva Convention. This provision confers power to the occupying states on the condition of providing legal venues to verify the propriety of arrests. The Court's failure to address this issue properly renders its judgment of doubtful value. The Court stated that,

> "the procedures applied to the claimant's detention do not strictly meet the requirements of Article 78, since the decision-maker was a single individual rather than an administrative board. On the other hand, the non-compliance is in our view more technical than substantial."

This "technical" non-compliance with the procedural requirements of article 78 did not have the automatic effect of rendering the detention unlawful.[75]

The Court of Appeal's approach is somewhat less straightforward, but it subscribes to the same outcome in relation to the interpretation

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73 R (Al-Jedda) v the Secretary of State for Defence, Queens Bench Divisional Court, Case No. CO/3673/2005, Judgment of 12 August 2005, paras 128-140; a similar approach is upheld by the Court of Appeal in the same case, though on slightly different grounds, see above under note 21.

74 Al-Jedda (DC), see above, paras 87, 92.

75 Ibid., paras 126, 144.

of Security Council resolutions and their impact on relevant international law. The Court of Appeal proceeded from the assumption that,

> "at the level of international law Article 103 of the UN Charter had the effect that a state's obligations under a Security Council Chapter VII resolution prevailed over any obligation it might have under any other international agreement, such as the ICCPR or the ECHR, in so far as those obligations were in conflict. If and in so far as UNSCR 1546 (2004) obliged member states participating in the MNF to intern people in Iraq for imperative reasons of security in order to fulfil the mandate of the MNF, this obligation prevailed over the 'no loss of liberty without due court process' obligations of a human rights convention or covenant."[76]

Furthermore, the Court of Appeal used the Security Council's qualification of article 78 of the IV. Geneva Convention for further inferring from the Council's action the qualification imposed on the freedom from arbitrary detention under article 9 of the International Covenant on Civil and Political Rights (ICCPR) and article 5 of the European Convention.[77]

It remains to be seen whether in S/RES/1546 (2004) of 8 June 2004 the Security Council had actually intended such outcome as was approved by the two English courts. The purposes of the resolution include, as the preamble states, along the stabilisation of Iraq and combating terrorism, "the importance of the rule of law, national reconciliation, respect for human rights including the rights of women, fundamental freedoms" and "the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law." Therefore, this resolution does not view the fight against terrorism as justification for infringing upon human rights or humanitarian norms.

In terms of specific action and measures, the Council,

> "Decide[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, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, inter alia, the

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[76] Al-Jedda (CA), para. 63, see note 21.

[77] Al-Jedda (CA), para. 80, see note 21.

United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph seven above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities."

Broad as it is, the scope of this provision does not specifically refer to, nor inherently implies, the power of the Multinational Force to intern or detain individuals in violation of the applicable human rights and humanitarian law.

The matter presumably does not end here. The letter of the US Secretary of State, by reference to which Resolution 1546 is adopted and which forms part of it, emphasises the need for the Multinational Force to be able to intern individuals,

"Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security."

However, the letter of the Secretary of State proceeds to state that,

"the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions."

Therefore, on its face Resolution 1546 does not divulge the intention to depart from the applicable international humanitarian law, whose relevance it expressly affirms, nor from human rights law because it does not contain any indication to that effect. The exchange of letters confirms that the Multinational Force has the power to intern, but at the same time they will be acting in conformity with the Geneva Conventions. Consequently, each and every act of internment must be in accordance with article 78 of the IV. Geneva Convention, and the procedures of review and appeal must be provided.

Therefore, the Court of Appeal decision to see this Resolution as justification, by reference to the primacy of Security Council decisions under Article 103 UN Charter, the deviation from the applicable international law justifying the protection of the individual, is not well-founded.

e. Measures of Counter-Proliferation: The Possible Impact of Security Council Resolutions on the Law of the Sea

The Security Council has, during the last few years, treated the matter of proliferation of weapons of mass destruction as matter that can and should be dealt within Chapter VII of the Charter. In this context, the Council has adopted resolutions dealing both with the general problem of proliferation and the conduct of individual states.

In S/RES/1540 (2004) of 28 April 2004, the Council introduced a number of measures to counter the proliferation of weapons of mass destruction. Most importantly for this analysis, in operative para. 10, the Council,

> "Further to counter that threat, *calls upon* all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials."

The Council's intention to respect the applicable international law is clearly stated and the use of resolution 1540 for undertaking measures such as the stopping and searching of vessels on the high seas is out of question. One has to agree with Joyner's conclusion that the operative para. 10 of resolution 1540 does not bestow any additional authority upon states to enforce the non-proliferation regimes and does not exempt them from obligations otherwise incumbent on them. All it does is to invite states to cooperate in efforts of counter-proliferation in a manner consistent with the existing international law.[78]

A similar reasoning can apply to operative para. 8 (f) of S/RES/1718 (2006) of 14 October 2006 on North Korea, condemning a claimed nuclear test conducted by the country imposing sanctions on it,

> "In order to ensure compliance with the requirements of this paragraph, and thereby preventing illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials, all Member States are called upon to take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including through inspection of cargo to and from the DPRK, as necessary."

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78 D. Joyner, "The Proliferation Security Initiative: Nonproliferation, Counterproliferation & International Law", *Yale L. J.* 30 (2005), 507 et seq. (540-541).

This clause is more specific than the relevant clauses of Resolution 1540 in that it directly refers to the inspection of cargoes. Nevertheless, all the Council does is to call upon states to take such measures which fall short of authorising states to undertake such measures. Therefore, the analysis of the text of Resolution 1718 does not discover the Council's intention to impact the applicable international law of the sea.

IV. Standards of Review of Security Council Resolutions

The standards against which the decisions of the Security Council can be reviewed are provided by the very same international law which binds the Council. These are, in the first place, the standards embodied in the UN Charter, and the standards under *jus cogens*, there being a significant overlap in the scope of the two.

1. The UN Charter Standards

The UN Charter standards include the prohibition of the use of force (Article 2 (4)), the right of peoples to self-determination and fundamental human rights (Arts 1 and 55). The Council has on occasions reaffirmed that it conceives its powers as limited by fundamental human rights and humanitarian law norms. For instance, in S/RES/1456 (2003) of 20 January 2003 the Council affirmed, in the context of counter-terrorist measures, that,

> "States must ensure that any measure 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, refugee, and humanitarian law."[79]

This broad statement expressing the Council's attitude in relation to the entire human rights law and humanitarian law is in accordance with seeing the Council bound by the entire human rights law, and furthermore with viewing that law as having peremptory status.[80] This furthermore constitutes the stated policy whereby the Security Council manifests its intention not to override fundamental human rights,

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79 S/RES/1456, operative para. 6.

80 See under section IV. 2.

which are, in turn, relevant to the process of interpretation of Security Council resolutions.

The relevance of the UN purposes and principles as normative standards has been emphasised by the ICJ in the Tehran Hostages case, where the Court observed that,

> "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights."[81]

The Court of Appeal in Al-Jedda notes this passage, but then proceeds to dismiss its relevance by contending that,

> "this very general comment on the lawlessness of the Iranian treatment of the US diplomatic and consular staff in 1979-80 does not afford any great assistance in the present case,"[82]

even though the two contexts were similar. If the purposes and principles of the United Nations in their human rights aspect are relevant for the legality of detention of the US diplomats in Iran, it is difficult to see how they are irrelevant for the detention of terrorist suspects in Iraq. Surely, if the UN purposes and principles can outlaw the action by the Member State, they can likewise preclude the legality of similar action undertaken under the alleged authorisation by one of the organs of the UN. The organisation is bound to act in compliance with its own purposes and principles if it expects such compliance from its members.

This follows not least from the principles enunciated in the ICJ's opinion in the Effect of Awards case. As the court pointed out, the establishment of the UN Administrative Tribunal, in order to deal with the employment claims of the UN personnel, was required by broader UN purposes to promote justice and individual rights.[83] This reasoning confirms that if an organisation aims at higher objectives of justice, it has to guarantee that the same standards are observed in the process of its own activities.

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81 ICJ Reports 1980, 3 et seq. (42).

82 Al-Jedda (CA), para. 78, see note 21.

83 ICJ Reports 1954, 47 et seq. (57).

2. *Jus Cogens*

a. The Relevance of *Jus Cogens*

The basic essence of *jus cogens* is its non-derogability. Peremptory norms bind the Security Council as the organ which is based on a treaty instrument, as treaties cannot delegate to the institutions powers contrary to *jus cogens*, since this would trigger article 53 of the 1969 Vienna Convention. This has been affirmed on several occasions by national and international tribunals, in the reports of the Vienna Conference on the Law of Treaties, and the ILA Report on the Accountability of International Organisations.[84]

Another recent recognition that international institutional acts are bound by *jus cogens* is contained in the award of the NAFTA Arbitral Tribunal in Methanex v US. The Tribunal was dealing with the propriety and legality of the interpretation by the Free Trade Commission (FTC) of NAFTA Chapter 11 provisions regarding the standard of treatment of foreign investors, and observed that,

> "as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not to give effect to parties' choices of law that are inconsistent with such principles. Yet even assuming that the USA errs in its argument for an approach to minimum standards that does not prohibit discrimination, this is not a situation in which there is a violation of a *jus cogens* rule. Critically, the FTC interpretation does not exclude non-discrimination from NAFTA Chapter 11, an initiative which would, arguably, violate a *jus cogens* and thus be void under Article 53 of the Vienna Convention on the Law of Treaties. All the FTC's interpretation of Article 1105 does, in this regard, is to confine claims based on alleged discrimination to Article 1102, which offers full play for a principle of non-discrimination."[85]

In Yusuf and Kadi, the Court of First Instance acknowledged that due to the nature of the powers of the Security Council, the *jus cogens*

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84 A/CONF. 129/16/Add. 1 (Vol. 1), article 53. See also M. Shaw/ K. Wellens, *Third ILA Report on Accountability of International Organisations*, 2003, 11, affirming that if the members transfer to an international organisation the power to impose coercive economic measures, their obligation to comply with peremptory norms is not affected.

85 Methanex Corporation and the United States of America, Final Award on Jurisdiction and Merits, 9 August 2005, Part IV, para. 24.

standard is the yardstick against which the Council's resolutions can and shall be tested. As the Court emphasised, the European institutions are bound to implement Security Council resolutions in the EC legal system, and,

> "It is in principle by the sole criterion of the standard of universal protection of the fundamental rights of the human person falling within the ambit of *jus cogens* that the applicant's claims may appropriately be examined."[86]

This line of reasoning emphasises the independent, and original, relevance of *jus cogens*, which includes human rights and humanitarian law, as an aspect of the hierarchy of norms in the international legal system. In relation to judicial review of Security Council acts, *jus cogens* can achieve the result that other concepts and categories arguably cannot. The reason why *jus cogens* binds the Security Council and justifies the judicial review relates to its hierarchical superiority over the powers of the treaty-based organ. If *jus cogens* prevails over treaties, then it also sets limits to the validity of the acts adopted by treaty-based organs. The function of international tribunals is not to uphold invalid acts and the decision of the Court of First Instance confirms just this.

Presumably, to review Security Council decisions may be inappropriate for the EC courts as the UN Charter enjoys the hierarchically higher status and, as soon as this is the case, the EC legal system must follow. The key to judicial review is the normative standard that puts constraints on the validity of the acts adopted by the Security Council and is *also* the part of the law that imperatively binds the EC as the treaty-based institution. This is the distinguishing feature of *jus cogens* which is relevant in both fields and this makes it crucially relevant.

b. Criticisms of the Use of *Jus Cogens* in Yusuf and Kadi

The reference to *jus cogens* as the basis of judicial review has been criticised in academic writings on different grounds. First and foremost, it has been submitted that these cases could be decided on more straightforward or "orthodox" grounds. Parallel to this goes the doctrinal argument that as the EC/EU is not a member of the United Nations, it is not bound by the sanctions ordered by the Security Council in the same way as the Member States are. Therefore, so the argument goes, the Court of First Instance ought to have reviewed the Security Council

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86 Kadi, see note 20, para. 235.

measures directly in terms of the primary EC law, that is the constituent treaties and fundamental rights enshrined in the European Convention on Human Rights.[87] Instead of the reference to *jus cogens*, the Community legislation could possibly have been annulled for lack of competence, and in any event, nothing in either international law or Community law prevented the Court of First Instance from assessing its compatibility with fundamental rights on the basis of the general principles of Community law.[88] It is also suggested that the use of the Community fundamental human rights standard could have carried with it the more stringent standard of judicial review of Security Council resolutions.[89]

This could well be an alternative argument to that which the Court of First Instance has articulated. However, this approach fails to consider the real nature of the relevant powers of European institutions and the inherent link between EC law and international law.[90] These criticisms of the court's reasoning also misunderstand the normative basis of the delegated powers of international organisations.

As can be seen from the Court's reasoning, the basis for the European institutions being bound by Security Council measures is the delegated nature of institutional power both with regard to the United Nations and European institutions. The latter are bound by the UN sanctions precisely because the Member States have accepted the prevailing legal force of those sanctions by virtue of Article 103 of the UN Charter and thus they cannot be considered as having delegated to European institutions the powers that would justify them acting in disregard of UN sanctions.

As the Court observed,

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87 N. Lavranos, "UN Sanctions and Judicial Review", *Nord. J. Int'l L.* 76 (2007), 1 et seq. (10-14).

88 A. Garde, "Is it really for the European Community to implement Anti-Terrorism UN Security Council Resolutions?" *CLJ* 65 (2006), 281 et seq. (284); see also R. Higgins, "A Babel of Judicial Voices? Ruminations From the Bench, *ICLQ* 55 (2006), 791 et seq. (802-803).

89 R. Brown, "Kadi v Council of the European Union and Commission of the European Communities: Executive Power and Judicial Supervision at European Level", *European Human Rights Law Review* 11 (2006), 456 et seq. (463-464).

90 On this see, among others, A. Orakhelashvili, "The Idea of European International Law", *EJIL* 17 (2006), 315 et seq. (343-347).

> "Resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations are thus binding on all the Member States of the Community which must therefore, in that capacity, take all measures necessary to ensure that those resolutions are put into effect."[91]

The Court emphasised that,

> "unlike its Member States, the Community as such is not directly bound by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter." Nevertheless, the Court observed that "the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it."[92]

This reasoning confirms that the Court views this process as an implication of the delegated nature of the powers both of the United Nations organs and the European Union bodies. The starting-point in terms of the powers of both institutions is the delegation of powers by Member States on the basis of the relevant treaties. In other words, these powers derive from state will as opposed to some institutional *Grundnorm*. The European institutions have to bear in mind that their powers are delegated to them by the same states which have also delegated more high-ranking powers to the United Nations organs, especially the Security Council, and have expressly specified this. Thus, the reason why the European institutions could refuse to comply with Security Council resolutions could never be provided from within the legal framework of the European Union. Such reason could only be found in the limits governing the use of the powers delegated to the Security Council. Unless the relevant action falls outside the powers of the Security Council, the European institutions have to follow it, in order to avoid putting the Member States in breach of their higher-ranking obligations. Any other perspective would be based on viewing the powers of the European institutions as operating in isolation from

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91 Kadi, see note 20, para. 189; Yusuf, see note 20. para. 239.

92 Kadi, see note 20, paras 192-193; Yusuf, see note 20, paras 242-243; further referring to the relevance of Article 48 para. 2 of the UN Charter, according to which the Security Council decisions "shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."

the rest of international law and deriving from a *Grundnorm* that does not exist in reality.

Thus, *jus cogens* is the most suitable tool – in the context of the delegated nature of institutional powers – for conceiving the limits on how far the European Union institutions can go in implementing UN Security Council decisions. This concept which imposes limits on what can be delegated through the treaty also provides the indispensable tool for assessing how far the delegated powers can be taken. If the Court of First Instance had not used *jus cogens*, it would be difficult to see how, as a matter of international law, it could judge the actions of the Security Council in the context of human rights. The alternative would have been to exempt the Security Council from review and leave the relevant rights unprotected.

c. The Scope of *Jus Cogens*

There are hardly any objections to international organisations in general, and the United Nations in particular, being bound by *jus cogens*, and therefore the debate regarding this issue is practically over. For instance, the real question in the Al-Jedda case was whether the relevant right was peremptory. Both the Divisional Court and the Court of Appeal seem to have accepted that the Security Council resolution cannot displace the human rights norm if it is part of *jus cogens*.[93] The most dubious element in the reasoning of the two English courts is that they did not attempt to clarify whether the relevant human right was part of *jus cogens* and found it sufficient to note that the party did not press this issue.[94] This seems to imply the outcome that had the relevant party pressed and proved the peremptory status of the relevant norm, the Court's decision would have been radically different. But in any case, such ambiguity in reasoning makes these decisions dubious and controversial.

The scope of peremptory law is therefore the issue that attracts the heaviest debate, and this involves addressing the criteria of identification of peremptory norms. In the first place, it has to be accepted that

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[93] Al-Jedda (CA), para. 63, see note 21.

[94] The Court of Appeal asserted that the reason why it was not concerned with the involvement in the case of *jus cogens* was that "in the present case Mr Starmer [the barrister representing the Appelant] did not suggest that the rights conferred by Article 9 of the ICCPR or Article 5 of the ECHR constituted *ius cogens*," Al-Jedda (CA), para. 68, see note 21.

the existence of the norm is not the same as its peremptory status. The two issues have to be separated from each other. The existence of a norm is demonstrated by reference to the evidence that demonstrates that the relevant consent or acceptance has been given to the norm. The normative status of the rule is a different question. Whether the norm is part of *jus cogens* no longer depends on consensual evidence, for the simple reason that international law requires such evidence only for the existence of the norm. For clarifying the peremptory status of the norm, its character and the values it protects have to be addressed.

The approach based on the substantive nature of norms is predominant both in practice and doctrine. Even though some may oppose this approach for its alleged uncertainty or open-endedness, it has to be accepted that no alternative approach has been developed that would both respond to the essence of peremptory law and command the necessary level of acceptance. The ILC, while drafting what became article 53 of the Vienna Convention, determined that it is the importance of the subject-matter of a rule which makes it peremptory and proposed only substantive norms as examples of *jus cogens*, such as prohibitions of aggression, genocide, slavery, as well as basic human rights and self-determination.[95] The ICTY has emphasised that norms are peremptory because of the values they protect.[96] Such substantive value must be the value which is not at the disposal of individual states.[97] Otherwise it would be unclear why the given norm is non-derogable.

The purpose of *jus cogens* is to safeguard the predominant and overriding interests and values of the international community as a whole as distinct from the interests of individual states.[98] *Jus cogens* embodies "a

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95 ILCYB 1966 (II), 248.

96 Furundzija, Judgment of 10 December 1998, Case No. IT-95-17/I-T, *ILM* 38 (1999), 349 et seq.

97 K. Zemanek, "New Trends in the Enforcement of *erga omnes* Obligations", *Max Plank UNYB* 4 (2000), 1 et seq. (8).

98 A. Verdross, "Jus Dispositivum and Jus Cogens in International Law", *AJIL* 60 (1966), 55 et seq. (58); C. Rozakis, *The Concept of* Jus Cogens *in the Law of Treaties*, 1976, 2; L. Hannikainen, *Peremptory Norms in International Law*, 1988, 2-5, 261; G. Abi-Saab, "The Concept of *Jus Cogens* in International Law", *Lagonissi Conference: Papers and Proceedings*, Vol. II, Geneva, Carnegie Endowment for International Peace, 1967, 7 et seq. (13); M. Virally, "Reflexions sur le 'jus cogens'", *A.F.D.I.* 12 (1966), 5 et seq. (21); D. Klein, "A Theory of the Application of the Customary International Law of Human Rights by Domestic Courts", *Yale J. Int'l L.* 13 (1988), 332 et seq. (351).

transcendent common good of the international community, while *jus dispositivum* is customary law that embodies a fusion of self-regarding national interests."[99] Furthermore, "there is virtually no disagreement that the purpose of international peremptory law is to protect overriding interests and values of the international community of States."[100] Most importantly, *jus cogens* protects not common interests of a random group of states but the basic values of the entire international community.[101]

It is generally acknowledged that the prohibition of the use of force forms part of *jus cogens*. The ICJ reaffirmed the peremptory status of the prohibition of the use of force in the Nicaragua case, where it pronounced on peremptory law for the first time.[102] Although there are repeated doctrinal attempts to deny this,[103] the careful reading of the Nicaragua case conveys the opposite message. The Court pointed to the ILC's qualification of the relevant norm as peremptory and then used this factor as evidence of the relevant norm's customary character. Once the Court drew consequences from the peremptory status of the norm, it subscribed to the view that the prohibition of the use of force is part of peremptory law.

The scope of human rights is doctrinally contested in human rights law as well. It has been asserted that the relevant rights the Court of First Instance referred to in Kadi and Yusuf, such as the right to property, to judicial hearing and access to a court are not proved to be *jus cogens* rights.[104]

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99 A. Brundner, "The Domestic Enforcement of International Covenants on Human Rights", *University of Toronto Law Journal* 35 (1985), 219 et seq. (249-250).

100 Hannikainen, see note 98, 4.

101 Zemanek, see note 97, 6.

102 ICJ Reports 1986, 14 et seq. (100-101). The UK House of Lords has also affirmed the peremptory status of the prohibition of the use of force following the acknowledgement of such affirmation in the Nicaragua case, see *R v Jones*, [2006] UKHL 16, 29 March 2006, para. 18 (per Lord Bingham).

103 D. Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *AJIL* 96 (2002), 833 et seq. (843); more recently id., "Normative Hierarchy in International Law", *AJIL* 100 (2006), 291 et seq. (304); id., "International Law and 'Relative Normativity'", in: M. Evans (ed.), *International Law*, 2006, 159 at 167.

104 Brown, see note 89, 467.

In general, there is a serious misconception regarding the scope of *jus cogens* in human rights law, which consists in the assumption that for being part of *jus cogens*, the relevant right must be absolute in its scope and content, thus admitting no exceptions or qualifications. This assumption contradicts the conceptual and normative basis of *jus cogens* which relates not to the scope of the relevant right or its content, but to its non-derogability; in other words, the peremptory status of the right depends not on its content but on whether it can be derogated from by agreement. In addition, the assumption that the right can be peremptory only if its content is absolute is rejected in practice. The catalogue of peremptory rights goes far beyond the catalogue of rights that are denoted as non-derogable under emergency clauses of human rights treaties, article 4 of the ICCPR, or article 15 of the European Convention on Human Rights. In clarifying whether the relevant human right is part of *jus cogens*, it is immaterial whether that right can be derogated from under the emergency clauses of the relevant treaty, or whether the content of the relevant human right allows for some qualifications or exceptions. It is rather material whether the relevant human right, as its content stands, can be derogated from at the bilateral level through the treaty without raising the issue under article 53 of the 1969 Vienna Convention on the Law of Treaties.

It has been repeatedly affirmed that potentially all fundamental human rights can be part of *jus cogens*. As Judge Tanaka put forward,

> "if we can introduce in the international field a category of law, namely *jus cogens* ... a kind of imperative law which constitutes the contrast to *jus dispositivum*, capable of being changed by way of agreement between States, surely the law of human rights may be considered to belong to the *jus cogens*."[105]

Verdross also considered that "a very important group of norms having the character of *jus cogens* are all rules of general international law created for a humanitarian purpose."[106]

This approach is conceptually coherent. Rights to personal liberty, fair trial and due process, private or family life, freedom of expression and religion, although "derogable" in emergency situations under some human rights instruments, certainly protect the community interest going beyond individual interests of states and it seems doubtful whether

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105 ICJ Reports 1966, 6 et seq. (298).

106 A. Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law", *AJIL* 60 (1966), 59 et seq.

the mere fact of their derogability under human rights treaties precludes their peremptory nature. These rights are so fundamental that it is impossible to envisage a treaty that would derogate from them and establish a regime incompatible with them.

The approach of the UN Human Rights Committee accepts this principle. According to General Comment No. 29 (2001),

> "The enumeration of non-derogable provisions in article 4 [ICCPR] is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. ... the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2 [ICCPR]. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."

The instances of recognition of the peremptory status of the right to a fair trial in particular include, apart from General Comment No. 29, the ICTY decision in the Tadić case, and the decision of the Special Court for Sierra Leone in Sam Hinga Norman.[107] Similarly, the Court of First Instance acknowledged in Kadi and Yusuf that the right to access to a court as acknowledged in article 8 of the Universal Declaration of Human Rights and article 14 of the ICCPR, being part of *jus cogens*, is not absolute in terms of its scope and content.[108]

In terms of the right to property, the Court of First Instance noted that,

> "in so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law, it

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107 In Tadić (Allegations of Contempt), 27 February 2001, it was suggested that article 14 ICCPR reflects *jus cogens*. The Special Court for Sierra Leone held that the right to have the criminal conviction against oneself reviewed by the higher tribunal as enshrined in article 14 (5) ICCPR is part of *jus cogens*, Prosecutor v Sam Hinga Norman, Case No. SCSL-2003-08-PT, para. 19.

108 Kadi, see note 20, para. 287; Yusuf, see note 20, para. 342.

is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*."[109]

The approach of the Court of First Instance also confirms that for being peremptory, the right does not have to have an absolute content, but it may as well be subjected to limitations, arguably on the basis of the margin of appreciation doctrine. In Chafiq Ayadi, the Court found no breach of the relevant *jus cogens* right, because,

"the contested regulation and the Security Council resolutions implemented by that regulation do not prevent the applicant from leading a satisfactory personal, family and social life, given the circumstances. Thus, according to the interpretation given at the hearing by the Council, which is to be approved, the use for strictly private ends of the frozen economic resources, such as a house to live in or a car, is not forbidden *per se* by those measures. That is all the more true where everyday consumer goods are concerned."[110]

Thus, the key seems to be that *jus cogens* will be violated if the Security Council measures were to invade the core of the relevant human right.

Similarly, although the Security Council decisions *prima facie* interfered with the right to the access to a court,

"the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a procedure involving both the 'petitioned government' and the 'designating government', constitute another reasonable method of affording adequate protection of the applicant's fundamental rights as recognised by *jus cogens*."[111]

These pronouncements are in line with the thesis that there is nothing in the concept of *jus cogens* requiring that norms having this status must necessarily be those that are unqualified in terms of their content or being immune from emergency derogation. Whenever the peremptory right has a qualified scope because of inclusive exceptions, emergency derogation or the margin of appreciation, it is its core that is peremptory in the sense that it cannot be derogated from through the inter-state agreement without triggering article 53 of the 1969 Vienna Convention.

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[109] Kadi, see note 20, para. 242; Yusuf, see note 20, para. 293.

[110] Chafiq Ayadi, see note 20, para. 126.

[111] Kadi, see note 20, para. 290; Yusuf, see note 20, 21 para. 345.

d. Human Rights and Humanitarian Law Treaties

It is allegedly a separate argument as to what should be the outcome when the decision of the Security Council conflicts with a provision embodied in a human rights or humanitarian law treaty as a treaty provision. It may be arguable that Article 103 UN Charter, which refers to conventional obligations of Member States, justifies the primacy of the Council resolutions over such treaties. The part of the reasoning in the Al-Jedda case is based on examining the decisions related to the application of human rights treaties and dismissing the relevance of these decisions, by suggesting that in those decisions Article 103 was not involved,[112] and by circumventing the *jus cogens* nature of the rights involved in Al-Jedda. The Court of Appeal further claimed that "There is no room here for any argument that human rights treaties fall into some special category."[113]

However, there is consistent practice of international tribunals treating humanitarian treaties as superior to other treaty clauses (and Article 103 too is a treaty clause). The European Commission on Human Rights has affirmed the general principle that states parties to the European Convention are responsible for the violation of the Convention, even if the act or omission in question is a consequence of the necessity to comply with international obligations, and especially noted that this limits the effect of obligations assumed within an international organisation.[114] Otherwise, the Commission continued, "the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character." Therefore, the transfer of powers to an international organisation is effective only to the extent fundamental human rights are adequately protected within that international organisation.[115]

In Waite & Kennedy the European Court of Human Rights further affirmed the primacy of the obligations under the European Conven-

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112 Al-Jedda (CA), paras 65-66, see note 21.

113 Ibid., para. 72.

114 M & Co v FRG, Application No. 13258/87, 9 February 1999, *Yearbook of the European Convention on Human Rights* 33 (1990), 51-52.

115 Ibid., 52; for the repeated emphasis on the peremptory character of the convention obligations in the context of the powers of international organisations, see the case Bosphorus Hava Yollari Turizm v Ireland, ECtHR, Case No. 45036/98 of 30 June 2005, para. 154.

tion over the obligations under the treaties establishing international organisations,

> "Where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."[116]

The reference to the object and purpose of the Convention is the further evidence that the primacy of human rights treaties follows from the non-bilateral character of the obligations they embody.

In the Bosphorus case, the European Court of Human Rights, addressing the issue of compliance with article 1 Protocol 1 of the European Convention in terms of the margin of appreciations doctrine, emphasised "the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations." Such considerations are arguably critical for supranational organisations like the EC, and consequently the "compliance with EC law by a Contracting Party constitutes a legitimate general interest objective within the meaning of Article 1 of Protocol No. 1." While the delegation of sovereign powers to international organisations was not prohibited under the Convention, the state party still remained responsible for the consequent violations of the convention. Otherwise, the Court emphasised reiterating the approach of M & Co, that "such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards." The state action taken pursuant to the obligations assumed within the international organisation,

> "is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a man-

[116] Waite & Kennedy v Germany, Case No. 26083/94, 18 February 1999, para. 67.

ner which can be considered at least equivalent to that for which the Convention provides."[117]

If this was not the case, the interest of international cooperation would be outweighed by the convention's public order character.[118]

In the law of the European Convention, the compatibility of the state action pursuant to the compliance with the exercise of delegated powers by an international organisation is in some cases addressed in terms of the margin of appreciation doctrine, under which certain convention rights can be limited by pursuing the public interest aims (such as arts 8 to 11; article 1 Protocol 1), as was the case in Bosphorus; this issue is also addressed in terms of the doctrine of inherent limitations if those rights are at stake which do not provide for the margin of appreciation (article 6), as was the case in Waite & Kennedy. But the need for the activities of international organisations to comply with the requirements of human rights treaties is always emphasised and maintained.

Thus, the position is, at least *prima facie*, that a treaty such as the European Convention on Human Rights (and *a fortiori* other treaties of a humanitarian character), does not tolerate the actions by international organisations that conflict with the rights provided for in these treaties. The allegedly conflicting consideration follows from Article 103 UN Charter which gives the Security Council measures primacy over other treaty provisions. But it is also material that human rights and humanitarian law treaties go beyond providing merely treaty obligations and lay down the obligations of a public order profile.

There is at least the *prima facie* case for viewing human rights and humanitarian law treaties as embodying *jus cogens*. Since the International Court's 1951 decision on the Genocide Convention, several judicial and quasi-judicial organs have unanimously affirmed, by the example of treaties such as the ICCPR, humanitarian law treaties, European and Inter-American Conventions on Human Rights, that these treaties contain objective obligations that apply uniformly to all parties and hence cannot be split in bilateral treaty relations.[119] As Fitzmaurice specifies, such treaties bind states parties without regard to reciprocity

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[117] Bosphorus, see note 115, paras 150-155.

[118] Bosphorus, see note 115, paras 155-156.

[119] ICJ Reports 1951, 15 et seq. (23); *Austria v Italy*, *Yearbook of the European Convention on Human Rights* 4 (1961), 140; *Ireland v UK*, *ILR* 58 (1980), 188 et seq. (291); *Effect of Reservations*, para. 27, *ILR* 67 (1984), 568; *Kuprsekic*, ICTY, IT-95-16-T, Judgment of 14 January 2000, para. 518; UN Human Rights Committee General Comment No. 24, 52, para. 17.

and to whether other states parties are actually complying with their terms. The code of obligations in humanitarian treaties is "absolute and admits of no derogations."[120] In his capacity as the ILC Special Rapporteur on the Law of Treaties, Fitzmaurice placed such treaties on the same footing as *jus cogens* under what has later become article 53 of the Vienna Convention.[121] Likewise, Special Rapporteur Waldock clearly emphasised that treaties like the Genocide Convention and the Geneva Conventions fall under the regime to avoid treaties conflicting with *jus cogens*.[122]

It is not feasible for treaties of a humanitarian nature to be split into bilateral legal relations conceptually and normatively similar to the non-derogability of peremptory norms of general international law in the sense of article 53 of the 1969 Vienna Convention. Therefore, the reference to Article 103 UN Charter seems irrelevant in this context and the Security Council would not be entitled to set aside the rights under human rights treaties, because they go far beyond being merely treaty obligations.

The decision of the Court of Appeal in Al-Jedda overlooks this point. Another concern Al-Jedda raises in this context is that S/RES/1546 (2004) of 8 June 2004 could potentially be seen as an approval of the agreement concluded between the US and Iraq through the exchange of letters appended to that resolution. The hypothetical question deriving from the *jus cogens* status of the essential Geneva Convention provisions arises and consists in whether it is open to the two governments to agree and withdraw the Geneva Convention guarantees from the individuals. This question is also important not least because the Al-Jedda Court of Appeal judgment, although not expressly basing its decision on article 78 of the IV. Geneva Convention, being disposed of the US-Iraqi agreement, still quotes the paragraphs of Resolution 1546 which refer to the consent of the Iraqi government as the basis of the presence and powers of the Multinational Force in Iraq. It is clear that this exchange of letters does not entail any intention to override the operation of article 78 and if it revealed such intention, the issue of validity of such agreement would arise.

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120 G. Fitzmaurice, "Judicial Innovation: Its Uses and Its Perils", *Cambridge Essays in International Law* 1965, 24 et seq. (33-34).

121 Second Report, ILCYB 1957 (II), 54.

122 ILCYB 1963 (II), 59.

V. Remedies

1. Refusal to Carry Out an Illegal Resolution

If the Security Council resolution exceeds its powers by offending the Charter or *jus cogens*, it is open to states to refuse to obey it. The refusal to carry out can be manifested by individual states or their groups. For instance, in the case of sanctions against Libya on the basis of S/RES/748 (1992) of 31 March 1992, several regional organisations such as the League of Arab States, the Organisation of the Islamic Conference and the Non-Aligned Movement deplored these sanctions.[123] The OAU declared that its membership which includes more than fifty states would no longer obey these sanctions, "owing to the fact that the said resolutions violate Article 27 paragraph 3, Article 33 and Article 36 paragraph 3 of the United Nations Charter, and the considerable human and economic losses suffered by Libya and a number of other African peoples as a result of the sanctions."[124]

The right to refuse to carry out illegal resolutions of the Security Council is reinforced by the pronouncement of the Court of First Instance in Kadi and Yusuf that,

> "International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community."[125]

Controversially enough, the Al-Jedda case states, by reference to academic writings only, that national courts cannot judge the Security Council resolutions.[126] But there is, as a matter of international law, no limitation as to which organs of the state are competent to judge the legality of the Security Council decisions and there is moreover no spe-

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[123] T. Kalala, "La décision de l'OUA de ne plus respecter les sanctions décrétées par l'ONU contre la Lybie: désobéissance civile des états Africains a l'égard de l'ONU", *RBDI* 32 (1999), 545 et seq. (549-553).

[124] The Crisis between the Great Socialist People's Libyan Arab Jamahiriya and the United States of America and the United Kingdom, AHG/DEC 127 (XXXIV), 8-10 June 1998, *African Yearbook of International Law* 6 (1998), 390-391.

[125] Kadi, see note 20, para. 230; Yusuf, see note 20, para. 281.

[126] Al-Jedda (CA), see note 21, para. 74.

cific requirement that this cannot be national courts. The thesis that national courts cannot judge the legality of Security Council resolutions is a mere premise that is justified neither by any considerations of legal principle nor by any evidence.

There is also a policy objection advanced that the refusal of states to implement Security Council resolutions can undermine the collective security mechanism under the Charter. This objection misunderstands, however, that the very foundation of the collective security system is based on the Charter of the United Nations, that is the treaty whereby states delegate the powers to the Council. Every delegated power is by definition a limited power and the argument that the Council's acts cannot be reviewed leaves open the question as to what is to happen when these acts are *ultra vires*. In the absence of a regular judicial review, the reaction by individual states remains the only regular remedy that can be used against the decisions that are made *ultra vires*. This does take place in practice and this disproves the suggestion that the refusal to comply will undermine the Charters' collective security mechanism.

2. Judicial Review

The ICJ has never ruled out the possibility of judicial review of decisions of other principal organs of the United Nations. One is expected to indicate to the dictum of the ICJ in the Namibia case, according to which "the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned". But this passage does not rule out the power of judicial review by the Court for at least two reasons. First, the court indicated that its attitude was based on the limited scope of the request for an Advisory Opinion by the General Assembly. Secondly, the Court has indeed scrutinised certain resolutions in order to respond to the objections put before it.[127] In the Certain Expenses case,[128] as well as later in the Lockerbie case[129] the Court, while dealing with the effect of decisions of UN bodies, used the language of presumption of validity of those decisions and did not suggest that such decisions enjoy absolute validity and are immune from judicial review. Such approach perhaps evidences the

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127 ICJ Reports 1971, 16 et seq. (45).

128 ICJ Reports 1962, 151 et seq. (167).

129 ICJ Reports 1992, 3 et seq. (15).

readiness of the Court to examine the findings of the Security Council in the appropriate cases where a party to those proceedings challenges their legitimacy.

The decision of the Appeals Chamber of the ICTY in the Tadić case may provide for a useful guidance. Having concluded that "neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)", the tribunal went on to examine the issue which falls directly within the ambit of the Council's powers under Article 39 UN Charter. The Tribunal examined the determination of a "threat to the peace" by the Council, questioned whether the concrete situation dealt with by the Council indeed was a "threat to the peace", and passed its own judgment on all of these issues.[130] The judgement of the tribunal is unambiguous on these issues and this makes it unclear how one could be serious in suggesting that the ICJ which is the principal judicial organ of the United Nations does not possess the powers which have been exercised by a tribunal established as a subsidiary organ of the Security Council.

The EC Court of First Instance directly linked the exercise of judicial review to *jus cogens*. In Yusuf and Kadi, the Court confronted the submission of the EU institutions that once the Security Council decision is enacted, it prevails by virtue of Article 103 UN Charter over both conventional and customary law and hence the court was obliged to implement these resolutions, and EU instruments based on them, even if they infringe the relevant human rights.[131] The Court affirmed that it "is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations."[132]

The conceptual basis of judicial review was identified by the Court by asking "whether there exist any structural limits, imposed by general international law or by the EC Treaty itself, on the judicial review which falls to the Court of First Instance to carry it out with regard to that regulation."[133] It was affirmed by the Court, that if a peremptory norm is breached by the action of the EC or the Security Council, judicial review will follow,

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130 Tadić, see note 13, paras 28-30.

131 Kadi, see note 20, paras 156, 164; Yusuf, see note 20, paras 207, 216.

132 Kadi, see note 20, para. 225; Yusuf, see note 20, para. 276.

133 Kadi, see note 20, para. 212; Yusuf, see note 20, para. 263.

> "In this action for annulment, the Court has moreover held that it has jurisdiction to review the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person."[134]

Therefore, judicial review in this case is a procedural enforcement of the substantive legal principle that *jus cogens* binds the UN Security Council and puts constraints on the validity and operation of its decisions.

VI. Conclusion: Legitimacy Means Stability

The principal point and incidence of the above analysis is that legal certainty is an inevitable requirement for the operation of the UN collective security mechanism.

The need for compliance with the legal framework governing the Security Council's competence requires a consistent approach to the issues of interpretation and standards of review, which is necessary to ensure the legitimacy of the Council's actions. The Council, however powerful and however broad its competences, works on the basis of consensual delegation, and on the assumption that the required degree of confidence and trust exist between the members as to how the resolutions will be adopted and implemented. Similarly, the delegation element implies that the membership of the United Nations expects the Council to deliver in terms of what has been delegated – that is decisions that are in accordance with the governing legal framework.

If it were to become a firmly established trend that the Council is used to breach international law, or council resolutions are seen as affecting the legal position under fundamental norms of international law and the relevant expectations of states, this would cause a whole set of problems in the long term of even medium term. First of all, states being members of the Council would realise that the consensus they achieved in the Council would be used in a different way from what was originally said and this would make the adoption of further decisions more difficult and the Council would become increasingly para-

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134 Yusuf, see note 20, para. 337; Kadi, see note 20, para. 282.

lysed. Secondly, in cases where the decisions were adopted, non-compliance, protest and disobedience would be practised both at individual state level and regional group level.

To avoid this, there are two things that must be done: methods of interpretation must be used consistently and transparently, and standards of review must be respected.