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Orakhelashvili, Alexander

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UN Security Council Resolutions before UK Courts

Alexander Orakhelashvili

Abstract

Over the past decade, the effective performance by the UN Security Council of its primary responsibility in the area of peace and security has increasingly become contingent on the implementation of its decisions within the national legal systems of the UN Member States. An examination of this issue in the context of the British legal system could offer a useful case-study of the ways to enhance the effectiveness of the UN collective security mechanism, to enforce the limits on the legitimacy of that mechanism, and also to highlight the practical difficulties that may accompany the attempts to apply Security Council resolutions domestically. This contribution exposes all these issues, focusing on the practice of the UK courts over the past decade. It examines the mediation of the effect of Security Council resolutions into English law through the 1946 United Nations Act, the royal prerogative and other common law techniques. After that, the contribution moves on to examine the English courts' handling of the normative conflict between a Security Council resolution and other sources of international law.

Keywords

UN Security Council – Treaty Interpretation – Normative Conflict – Statutory Transformation of Treaties – Royal Prerogative – Act of State – Statutory Interpretation – Common Law

I. Introduction

For the UN Security Council to properly perform its primary responsibility in the area of the maintenance of international peace and security, its resolutions need to be implemented by its Member States' organs at the national level. An examination of the effect of UN resolutions in the English legal system is merited by virtue of the repeated engagement by English courts of the effect of these resolutions. Our analysis will mostly focus on Security Council resolutions, even though some UN General Assembly resolutions have been increasingly used as aids to interpret the meaning of the UN Charter or of other international treaties. This was done, for instance in the UK Supreme Court decision in *Al-Sirri*, with a view to ascertaining the meaning and scope of the provisions of the 1951 UN Convention on the Status of Refugees, in the light of the purposes and principles of the UN Charter that were thought to be detailed in the relevant General Assembly resolutions.[1] But overall, the attention paid to Security Council resolutions by English courts has been far greater than references to resolutions adopted by any other organ of the United Nations.

The status of UN resolutions in the English legal system draws on two, essentially constitutional, questions. The first question relates to the relevance of international law in English courts. National and international legal systems are essentially separate from and

[1] On *Al-Sirri*, see below Section IV.

autonomous in relation to each other. Each of them autonomously determines the range of its own sources of law that produce rights and obligations for individuals as well as public authorities. Each national legal system is unique in terms of the ways in which it permits the international legal norms in general and Security Council resolutions in particular to take effect and influence the outcome of litigation at the domestic level. Therefore, it could never be automatic that a rule of international law, including one that is derived from the institutional decision produced within the UN framework, is applicable at the domestic level.

The second issue relates to the ability of a national court to deal with the issues of mutual interaction, and normative conflict, between various rules and sources of international law. The resolution of normative conflicts between the sources of international law may, in litigation before English courts, be potentially affected by the – actual or projected – position that one of the pertinent sources of international law could be found to be properly applicable in English law and the other may not be found to be so applicable. The outcome thus obtained at the domestic level may or may not reflect the ways in which the normative conflict in question ought to be resolved in the light of international law.

The importance of both these above issues is increased by the fact that, a decision adopted by the national judge within the UK jurisdiction could engage the UK in an internationally wrongful act which would be produced, depending on the case, either by an incorrect interpretation of a Security Council resolution, or by an incorrect resolution of its normative conflict with any other source of international law. It is an established position in international law that decisions made by national courts could amount to an internationally wrongful act.[2]

This contribution will examine the pertinent issues in the following order. Section II will deal with the legal regime that applies to the interpretation of Security Council resolutions. Section III will focus on the ways in, and extent to, which various sources of English law permit Security Council resolutions to apply at the domestic level. Section IV will examine and critique the English courts' handling of the relationship of various Security Council resolutions with other rules and sources of international law. Section V will offer the overall evaluation and conclusions.

II. The Legal Regime Applicable to the Interpretation of Security Council Resolutions

The correct interpretation of a resolution is therefore crucial to understand its meaning and purport, and whether a resolution has some impact on private rights under or on entitlements of public authorities under English domestic law.

Security Council resolutions are adopted in consequence of an agreement between States-members of the Security Council and bind all Member States of the UN (under Art. 25 UN Charter). Analytically speaking, Security Council resolutions therefore possess all the characteristics required for a source of international law. However, resolutions are not independent sources of international law, as such cognisable under Art. 38 ICJ Statute, but they constitute secondary legal instruments through which the Security Council exercises its authority delegated to it under the UN Charter, which is an international treaty. Even if a Security Council

[2] See Art. 4 of the UN ILC's 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) GAOR 56th Session Supp 10, 43.

resolution could bind States not represented in the Security Council and even those States who vote against the resolution, this still would take place on the basis of those States' consent to an international treaty from which the resolutions derive their binding force. This conventional and consensual element in resolution is thus obvious at various levels and has to be considered when the ways in which resolutions should be interpreted are discussed. It is also important that, while the Charter provides for the general basis for the validity of resolutions, every single resolution that has binding force could emerge only as a product of the negotiation and agreement between the States whose consent is required by the Charter for the adoption of these resolutions (Art. 27 UN Charter). Consensual agreement and binding force are, thus, inseparably connected. In that respect, and regardless of some differences in form and structure, Security Council resolutions are normatively indistinguishable from ordinary treaties.

On occasions, the special nature of Security Council resolutions is alluded to. The International Court of Justice has suggested in the *Kosovo UDI Advisory Opinion* that:

> While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also requires that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty.[3]

But the Court never specified what those 'other factors' are and why the 'different process' of drafting could be crucial for identifying the content of the consensually agreed document. In this regard, the counterpoint contained in the decision by the Special Tribunal for Lebanon (STL) is rather pertinent. As the Tribunal suggested:

> Subject to the caveat suggested by the Kosovo Advisory Opinion, under international law seeming inconsistencies in a text must be resolved by reference to the general principle of construction enshrined in Article 31 (1) of the Vienna Convention (and the corresponding customary rule of international law): rules must 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.4

The STL's expression 'subject to the caveat suggested by the *Kosovo Advisory Opinion*,' is very much to the point, as it exposes the lack of the determinate scope in the caveat that the ICJ has formulated. Therefore, until and unless those 'special factors' are positively identified, which has so far not been done, the VCLT-based textual approach should be used to interpret the resolutions. By analogy if not by direct designation, VCLT applies to resolutions that are in essence inter-State agreements, albeit negotiated and approved through the designated institutional framework and procedure. Also, there is no other set of interpretative rules than those embodied in the Vienna Convention.

The claim that resolutions are 'different' has never been substantiated in the manner that could call into question the applicability to them of any of the basic methods of interpretation

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[3] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) (22 July 2010) ICJ Doc 2010 General List No 141, para. 94.

[4] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging Special Tribunal for Lebanon (Appeals Chamber) (16 February 2011) STL-11-01/I/AC/R176bis, para. 28.

under Art. 31 Vienna Convention. The structural differences between treaties and Security Council resolutions are, at times, no greater than differences in the structure, and the process of will formation leading to the conclusion of, international treaties of various kinds. Some treaties are directly negotiated between its States-parties, others are adopted within international conferences or UN organs and then other States accede to those treaties without having had a say regarding its original content. The 1919 Versailles Treaty was not properly freely negotiated between all the States-parties to it, yet it obviously fell to be interpreted according to the same rules as any other international treaty, notably on the regular basis by the Permanent Court of International Justice.[5]

III. Security Council Resolutions and the Sources of English Law

1. General Aspects

On what basis could Security Council resolutions apply within the English legal system? As a starting-point, English judges could apply the rules of international law on the conditions that the English legal system allows for their domestic effect. In relation to customary international law, the doctrine of incorporation operates in the UK, making international law in its entirety part of the law of the land, namely of common law.[6] As far as international treaties are concerned, the English legal system does not ordinarily allow their direct effect without them being transformed into English law through the act of parliament.

Some would term the above approach as an implication of 'dualism.' However, it is important to understand that 'dualism' is merely about the origin of the rules within each international and English legal systems, rather than constituting a pre-conceived platform as to how the effect of international rules within the domestic legal order should be judged. 'Dualism' does not always imply a strict separation between national and international law. On the other hand, the perception most widespread in the British context as to the relevance of 'dualism' relates to the premise that the English legal system operates as a matter of national policy and legal choices, primarily through the democratic representation of the population via parliament, and therefore the rights and obligations of public authorities or individuals should not – at any rate not more than a particular source of English law would permit – be affected through the importation of the effect of extraneous rules of public international law which enjoys no comparable democratic legitimacy. This approach is presumably meant to relieve the domestic courts and judges from assessing issues of high political and constitutional importance which are better dealt with by the elected branches of the government. In this context, the position of the British parliament is special in terms of it enjoying legislative supremacy in relation to common law, which privilege the Executive does not enjoy. The relation between courts and the parliament is therefore not the same as that between courts and the Executive. Even if, as is frequently thought, acts of parliament could not be judicially reviewed, policy decisions made by the Executive are fully susceptible of being judicially reviewed in courts. Therefore, even if the 1946 UN Act as such is

[5] For an overview, see A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008), Chap. 10.

[6] *R v. Gul* [2013] UKSC 64.

not reviewable in courts, the Executive's use of the authority conferred to it by this Act is fully reviewable according to ordinary principles of administrative law.

2. The Scope of the 1946 United Nations Act

a. General Scope and Content

The 1946 Act is titled as 'An Act to Enable Effect to Be Given to Certain Provisions of the Charter of the United Nations,' and thus as one that is not meant to domesticate the effect of the UN Charter in its entirety. Section 1 prescribes, on very specific terms, that:

> If, under Article forty-one of the Charter of the United Nations signed at San Francisco on the twenty-sixth day of June, nineteen hundred and forty-five, (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order.

This Section thus provides for giving the domestic legal effect to certain Security Council resolutions whose range is delimited by the statute. Domestic measures introduced through the Order in Council have to be limited to those meant to implement the Security Council's measures under Art. 41. The 1946 Act thus establishes the normative link between the action of the Executive branch of the British government and decisions adopted by an international organisation. The establishment of such link could, in principle, be seen as deviation from the ordinarily applicable pattern in English law that any effect an international treaty could take in English law should depend on the decision of the parliament, not the Executive.[7] Presumably, in the exercise of its legislative supremacy, the UK parliament is constitutionally entitled to adopt decisions of such kind, thereby redistributing, in relation to this particular subject-matter, the law-making authority. Nevertheless, there is an apparent conflict with the traditionally established position that it is only the parliament who could legislate adversely to the rights of the subject.

The issues arising in relation to the operation of Security Council resolutions in the English legal system, through the 1946 Act, are three: judicial review, statutory interpretation in its relation to common law, and the doctrine of 'constitutional statutes.' It is proposed to examine each of those in turn.

b. Judicial Review

The Executive's use of the statutory authority conferred to it under the 1946 Act could be challenged in courts, in the judicial review process. In the first place, the judicial review proceedings in English law relate to the statutory basis of the measures of the Executive's measures and also to the standard against which they could be reviewed. However, in the context

[7] To which effect, see *The Parlement Belge* England, Probate Divorce and Admiralty Division [1879] 4 PD 129.

of applying Security Council resolutions domestically, the context of judicial review has to include the interpretation of Security Council resolutions, to ascertain their content and thus clarify whether the Executive has properly used the authority conferred to it under the 1946 Act. In *Jabar*, the English judiciary disagreed with the UK Government's interpretation of certain resolutions that introduced targeted sanctions against individuals suspected in the involvement of terrorism, and on that basis reviewed the domestic legal instruments adopted by the Executive.

Judicial review proceedings could also focus on examining the international *vires* of the pertinent Security Council resolutions. Under the existing legal position, for a Security Council resolution to have any domestic legal effect whatsoever, it has to be a validly adopted and operating Security Council resolution. This is the issue the 1946 Act does not, nor is supposed to, expressly resolve. But the legislature must be presumed to have legislated in accordance with international law and thus having fully accommodated the UN Charter-based requirements for the validity of the Security Council resolutions (Art. 1, 2, 24, and 25 UN Charter). On that basis, parliament must be deemed to have intended, through the adoption of the 1946 Act, to allow English courts assessing the *vires* of the Council. For, otherwise, the parliament would be presumed to have intended to allow for the domestic legal effect of *ultra vires* resolutions of the Security Council as well. In *Al-Jedda*, the House of Lords initially declined examining *vires* yet in *Jabar* the Supreme Court was in principle prepared to dis-apply a Security Council resolution if in conflict with a peremptory norm of international law (*jus cogens*).[8]

c. Statutory Interpretation

In general, English statutes should be interpreted so as not to contradict individual rights under common law, should such construction of a statute be possible. Unless the statute unmistakably points to the opposite, it cannot be seen as taking away common law claims and rights of an individual.[9] There is no reason, let alone any authority, that this ordinary pattern of relationship between the statute and common law should not govern the interpretation of the 1946 Act.

This position is even more obvious in relation to constitutional rights under English law.[10] Such rights count as relevant factors in the process of statutory interpretation, in which process courts will be even stricter by requiring the indication of a more obvious and express intention by the legislator to adversely affect those rights.

d. The Doctrine of 'Constitutional Statutes'

In the case of *Thoburn*, Laws LJ has elaborated upon the notion of 'constitutional statutes' that presumably constitute a category exempted from the implied repeal doctrine that applies to situations where a previous act of parliament is in conflict with the latter one.[11] The 'constitutional statutes' doctrine could thus protect certain statutes from being impliedly repealed by a subsequent act of parliament.

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[8] *HM Treasury* v *Mohammed Jabar Ahmed and others* [2010] UKSC 2 (27 January 2010), para. 151.

[9] National Assistance Board v Wilkinson [1952] 2 QB 648 at 658–659, 662.

[10] Regina v Lord Chancellor ex parte Witham [1998] QB 575 at 581, 585–586.

[11] *Thoburn v. Sunderland City Council* [2003] QB 151 at 179–184.

There has been no direct or express articulation of the position in the UK jurisprudence that the 1946 UN Act may rank as one of those constitutional statutes; much as dealing with this issue would have been more than pertinent in the *Al-Jedda* case before the House of Lords where a resolution was claimed to have domestic effect on the basis of the 1946 Act and the rights of the individual were protected under the 1998 Human Rights Act. It is true that the 1946 Act was enacted earlier than the 1998 Act. But the point made in *Thoburn* matters here even more, for if the 1998 Act can stand the effect of later statutes through the implied repeal doctrine, it is even more plausible that it should not be easily trumped by Security Council resolutions, even if domesticated through an earlier act of parliament. A latter piece of legislation should be seen as a more authentic expression of the will of parliament.

3. Unincorporated Resolutions

a. Judicial and Constitutional Options

What should English courts do in relation to resolutions other than those covered by the 1946 Act? In *Serdar Mohammed*, it was stated by the court that 'the obligations imposed on the UK by the UN Charter and UNSCR 1546 were obligations under international law. Neither the Charter nor the Resolution have been incorporated into English law.'[12] While this blanket statement is only partly accurate, it does illustrate the nature of the issues, effectively as constitutional dilemmas, an English court would be confronting in this context.

Beyond the scope of the 1946 Act and of resolutions it covers, English courts have hardly ever properly or coherently explained on what basis the decisions of the Security Council, other than those adopted under Art. 41 UN Charter, should be given the domestic legal effect. Moreover, in this non- Art. 41 area, the constitutional factors of democratic legitimacy and parliamentary representation, in the absence of a domestic legitimation through the statute, become relevant factors again. The legal justification for the government to invade individual rights becomes less obvious. Under such legal framework, the direct effect and applicability of Security Council resolutions in English law beyond the scope of the 1946 Act's wording is not straightforwardly admissible. The Security Council resolutions whose domestic legal effect is derived from a British statute (the 1946 UN Act), cannot be placed on the same footing with resolutions that are not covered by the terms of the statute.

The dilemma for English courts here, as to the interpretation and effect of a statute, would not be very different from that surrounding the 1972 European Communities Act as it was addressed by the House of Lords in *Factortame*.[13] While the 1972 Act makes European legal provisions directly applicable in the UK, it does not expressly or completely resolve the situations where there may be an incompatibility between an EU and English legal rules, and ~~in doctrinal writings~~ the handling of this Act in *Factortame* ~~has been~~could be regarded either as a legislative choice enforced in courts or as a position created through the courts' own judicial contribution to law-making.

The principal question, in relation to the UN resolutions, would be whether the international treaty – the UN Charter – could be given a wider domestic effect than is allowed through the

[12] *Serdar Mohammed v. Ministry of Defence and Others* [2014] EWHC 1369 (QB) (2 May 2014), para. 210.

[13] *R v. Secretary of State for Transport ex p. Factortame Ltd* (No. 2) [1990] 1 AC 603.

express statutory words of the 1946 Act. The evidentiary hurdle would be even higher than in relation to the 1946 Act, given that the 1946 Act mentions Art. 41 UN Charter expressly and makes no reference to other provisions of the UN Charter. The statutory interpretation dilemma as to whether the statute could override common law by less than an express provision would be more obvious. A development similar to *Factortame*, enabling Security Council resolutions to produce greater effect at the domestic level than the ordinary wording of the 1946 Act suggests, would similarly, and inevitably, be an entirely judicial development of the law.

b. Security Council Resolutions Pleaded as a Defence

The partial scope of the 1946 UN Act and the fact that it does not cover all Security Council resolutions, via its own text or owing to a potential development similar to *Factortame*, leads to the necessity of the assessment of the various patterns of distribution of the law-making authority under the British constitution, both in terms of the sources of English law and of the distinction between justiciable and non-justiciable issues. Given that some Security Council resolutions have no domestic effect via the 1946 Act, they could find their expression in English law only depending on what the British constitution allows to various branches of the government in terms of claiming rights and obligations under the pertinent Security Council resolution.

In a private law litigation involving, for instance, tort law claims, the UK government may be inclined to rely on the domestic effect of a Security Council resolution to counter the claims advanced by individuals against it. This is what the House of Lords has in essence allowed the government to do in its *Al-Jedda* judgment adopted in 2007.

The reasoning here could possibly be that while the Human Rights Act (HRA) 1998 incorporates the ECHR into English law and makes its provisions domestically applicable, it could still be premised on the conditions of applicability to which ECHR is subjected on international plane. Thus, if under international law the scope and effect of ECHR were to be qualified by some provisions of the UN Charter and secondary instruments adopted and binding under the Charter (presumably as the national court would understand this issue), then HRA should be presumed to have incorporated ECHR into English law on that very same condition. But this approach would nevertheless project the international treaty – the UN Charter – as having more effect domestically than the parliament has accorded to it via the 1946 Act, and would, on that basis, amount to an attempt to bypass the 'dualism' pattern by the backdoor, in the sense that an unincorporated resolution would domestically preclude litigation without the legislative enactment adopted by the democratically elected parliament. That an incompatibility between the two international treaties may be resolved under international law in a particular manner is one thing; that such outcome of normative conflict should be deemed to have been incorporated into the UK law is quite another thing.

On a purely 'dualist' vision, a defence or substantive entitlement should not be available to a government or any other legal entity, unless that defence has been allowed in relation to pertinent cases by the parliament, or through the pre-established common law principles. Otherwise, allowing the use of a defence could be seen as an instance of judicial incorporation of the relevant elements of international law, and would not be really distinguishable from the direct effect of the pertinent rules and standards of international law in the English legal system.

c. Justiciability

The notion of justiciability under English public law initially relies on the distinction between non-justiciable issues that fall within the policy discretion of the Executive on the basis of some particular rule of English public law (under the statute or as a matter of the royal prerogative), and justiciable issues that raise the issue of the Executive's compliance with the limits imposed on its action by the relevant rules of English law and, *a fortiori*, of public international law under the doctrine of incorporation.

Analysing the domestic use of Security Council resolutions could point to the converging relevance of the pertinent issues, which are the domestic legal relevance of unincorporated treaties (or unincorporated parts of statutorily incorporated treaties), and the public law issues of justiciability. At times these issues may run into each other, because courts may have to examine whether dealing with an unincorporated treaty is affected by considerations of non-justiciability.

It is not impossible that a Security Council resolution could be informing the content of the act of State doctrine, presumably as part of the Royal prerogative. In *Serdar Mohammed* (CA) some endorsement of that approach was given, in the context of the pertinent Security Council resolution having not been incorporated into English law. The Court enquired into whether it was

> necessary [...] to consider whether the United Kingdom was under an obligation to detain or intern 'for imperative reasons of security' arising from the Security Council resolutions. The existence of such an obligation would, at the very least, be support for the view that the court is here concerned with policy in the conduct of foreign relations. Moreover, this would, in our view, be a highly relevant consideration, notwithstanding that the relevant obligations in international law have not been given effect in domestic law within the United Kingdom.[14]

On this view, and to some extent, the domestic effect of a Security Council resolution not covered by the terms of the 1946 Act could possibly be sustained in English law, if it can be established that the matter covered by resolutions is one of policy importance in relation to which the Executive branch of the government enjoys royal prerogative, without contravening the rights that otherwise arise and operate under the common law. Just as the royal prerogative is bound and restricted by the law, so is the domestic effect of those Security Council resolutions which, being outside the scope of the 1946 Act, are being domestically implemented by virtue of that very prerogative.

To compare, a treaty not displacing the otherwise valid private law rights could not be challenged in courts. To illustrate, in the *Rustomjee* case,[15] the debt owed by a foreign government to a British national, and recovered from them through the agreement with the British government, could not be recovered by the relevant individual in the private law litigation. As a matter of international law, it was a debt owed to, or owned by, the British government and, on that matter, the relevant individual had no rights cognisable under national or international law the way that would be opposable to the government. The position under international law was thus mediated into domestic law. If the government acts in compliance

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[14] *Serdar Mohammed and Others v. Secretary of State for Defence* [2015] EWCA Civ 843 (30 July 2015), para. 368.

[15] *Rustomjee v* The *Queen* (1876–7) 2 QBD 69.

with international law, its action is thereby exempted from the legal challenge under domestic law.

The *Rustomjee* equation presumably refers to the Crown making a policy choice within the prerogative area constitutionally reserved to it – the area on which the sources of English law make no determinate legal regulation to the effect of restraining the choice available to the Executive. If the Executive acts in relation to the subject in which individuals thus have no determinate rights, in relation to the government's conduct, under common law in the first place, then it cannot in principle be said to have violated any legal requirement and should thus be able to claim that the relevant issue is one of policy and is thus non-justiciable.

From here, it is yet another, qualitatively distinct, step of reasoning that, by having used its prerogative through the conclusion of the treaty, the Crown could exercise its rights under that treaty so as to deprive individuals their rights under any other source of law. This latter outcome would amount to the use of the Executive's prerogative precisely to the effect of circumvention of the position that international treaties do not produce rights and obligations domestically without parliamentary intervention based on democratic legitimacy, and nor does the Executive's authority enjoy the priority in relation to common law the way Parliament's authority does. It is, therefore, constitutionally significant to maintain the understanding of a clear separation between these two ways in which international treaties may produce domestic effect, and consequently between the constitutional roles of the parliament and the Executive. The moral of this story is that 'dualism' cuts both ways.

English courts have further elaborated on the scope and dimension of the royal prerogative in relation to international treaties. The leading case of *GCHQ* has referred to the process of the making of the treaties as part of the non-justiciable realm of the royal prerogative.[16] The *act of conclusion* of the treaty relating to matters unregulated by common law and, therefore, the effect of a treaty thus concluded could be seen as a policy issue that is not justiciable before English courts.

Later on, the case of *CND* has suggested that the positions taken by the UK government in the process of the negotiation of Security Council resolutions, and the pre-resolution deliberations and policy decisions may be non-justiciable.[17] However, the actual ascertainment of the content of the resolution could not be non-justiciable. For, the British government does repeatedly rely on the effect of those resolutions in various domestic legal proceedings as something that would enable them performing a particular course of action.

d. Relationship between the Act of State and Royal Prerogative

If used through the route of the Royal Prerogative, the whole essence of the act of State doctrine would depend on whether the relevant matter properly belongs to the Royal Prerogative, and the complies with common law. The merit of the act of State doctrine as a free-standing issue is less certain. An early authority of *Buron v Denman* which curiously finds frequent citation in English courts in our times, dealt not with the Executive's action but with their endorsement of the action taken by the private person.[18] In any case, admitting the relevance of the British act of State as a

[16] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

[17] *CND v. Prime Minister of the UK and Others* [2002] EWHC 2777 (Admin).

[18] *Buron v. Denman* [1848] 2 Exch. 167.

discrete doctrine not derived from, and limited by the scope of, the royal prerogative would, if generalised, impose serious handicaps on the ability of the English courts to properly adjudicate in the various areas of common law. For, such reliance on the doctrine of the act of State would enable the Executive to effect stopping any undesirable litigation without demonstrating that the matter involving in the relevant case is, under the common law, linked to the constitutional exercise of the royal prerogative.

Be the above as it may, whichever route is resorted to by English courts – whether that of the act of State, non-justiciability or prerogative – and in whichever kind of English legal proceedings (civil or administrative), dealing with the Security Council resolutions involves asking the same set of questions. The legal force of a Security Council resolution derives from no other basis than an international treaty. The court has to query into the grounds on which the relevant act commands the required character of the act of State. That is impossible to be properly done without first examining the Security Council's vires and correctly interpreting its resolutions. For, if the Security Council has not covered the relevant 'act' through its decisions, its resolutions could do precious little to justify the use of the act of State doctrine through whichever modality.

A nuanced approach was given by the House of Lords in *Attorney-General v Nissan*,[19] where distinction was made between the overall mandate of peace-keeping forces and their particular action. The connection between the two did not have to be inherent or indispensable.

Arden LJ in *Al-Jedda II* suggested that in *Nissan*,

> [i]t was no part of the peace-keeping function of the troops to take property without paying for it. In the present case, internment was part of the role which the British contingent of the MNF were specifically required to carry out. The acceptance and carrying out of those obligations was an exercise of sovereign power. It is inevitable that a detainee would suffer the loss of his liberty while he was detained.[20]

This difference between the contexts of two cases would hold true only if the Security Council Resolution 1546 had been genuinely applicable to the case of Al-Jedda's detention, and thus had made the detention the function of the British military presence in Iraq. This effect the Resolution 1546 did not produce, if the ordinary meaning of its terms is considered, and also as subsequently the Grand Chamber of the Strasbourg Court also confirmed.

Arden J reinforced her application of the act of State doctrine through the following policy statement:

> My conclusion that act of State is a defence here does not go wider than this. It applies, in my judgment, because of the overriding force of UNSCR 1546. If courts hold States liable in damages when they comply with resolutions of the UN designed to secure international peace and security, the likelihood is that States will be less ready to assist the UN achieve its role in this regard, and this would be detrimental to the long-term interests of the States.[21]

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[19] *Attorney General v. Nissan (Appeal and Cross Appeal Judgment)* ILDC 1741- [1970] AC 179.

[20] *Al Jedda v. Secretary of State for Defence* Court of Appeal (Civil Division) (8 July 2010) [2010] EWCA Civ 758, para. 110.

[21] *Al-Jedda* (2010), para. 108.

It is precisely this use of policy reasoning as part of the domestic legal process which accompanies, probably even leads to, the overstretched interpretation of Resolution 1546, reading into it, on above-stated policy grounds, the very specific entitlement on conditions that the Security Council has not provided for.

All the above suggests that, beyond the area properly covered by Art. 41 UNC, and in its turn covered by the 1946 UN Act, using Security Council resolutions to reinforce the act of State doctrine may be yet another circumvention of the position that international agreements have no direct effect in the UK legal system. The problem would be corroborated in cases when the interpretation of the resolution's text does not reflect the judicially projected outcome. The problem all this generates relates not just to the UK's observance of its international obligations, but also to the coherent application of basic doctrines of English law in English courts.

4. The Doctrine of Precedent and the Effect of Strasbourg Court decisions in English Law

The doctrine of precedent is one of the key doctrines of English law, allowing courts to produce law while adjudicating particular cases, with the effect that the law thus produced will bind courts in subsequent instances of adjudication. While the doctrine of precedent is premised on the unique constitutional position courts enjoy in the English legal system (in contrast, for instance, to civil law jurisdictions), it does not have the full-fledged operability in relation to international legal matters when they come before the English courts. This is due to the fact that English courts do not author the rules of international law the way they author the creation of English common law rules.

This consideration has been brought to our attention by Brierly, to the effect that

> A rigid adherence to the English doctrine of precedents, applied to a branch of law which English Courts have as a rule little opportunity of developing with continuity as they have in the common law, is undesirable from any but a narrowly insular point of view, and, it is respectfully submitted, unnecessary, for international law is a customary law and it is developed by agencies which include, but are not limited to, the English Courts.[22]

Lord Denning in *Trendtex* adopted a similar approach, in the sense that a development in international law could find a direct recognition in English courts, even without a direct precedent under English law being needed to reach such outcome.[23]

One pertinent issue, in relation to the matter examined here, is that the House of Lords *Al-Jedda* decision, adopted in 2007, was subsequently overturned by the European Court of Human Rights.[24] Subsequent cases of English courts had to deal with the situation that, the two courts had adopted different ways of interpreting Security Council resolutions. The background of this controversy presumably is that the Strasbourg court decisions would merely need to be taken into account by English courts under Section 2 HRA 1998, while the House of Lords precedent binds the other English courts directly.

In *Serdar Mohammed*, the UK government submitted that the judge was 'bound by the decision of the House of Lords in the *Al-Jedda* case to hold that in relation to the detention of

[22] J.L. Brierly, 'International Law in England' (1935) 51 LQR 24 at 34.

[23] *Trendtex Trading v. Bank of Nigeria* [1977] 1 QB 529, 552–553.

[24] *Al-Jedda v. UK* (GC) 27021/08 (7 July 2011).

SM in this case Art. 5 is displaced or qualified by UNSCR 1890.'[25] Leggatt J accepted the government's 'submission that I am bound by the decision of the House of Lords in the Al-Jedda case, even where it conflicts with the decision of the European Court.'[26] Here Leggatt J allows for the precedential force of the House of Lords decision even as – as had by then become clear in the Strasbourg judgment – the House of Lords misconstrues the scope of the Art. 103 UN Charter. Thus, the unincorporated provisions of Security Council resolutions, essentially not part of English law on the 'orthodox' view, end up shaping the scope of the purely domestic doctrine of precedent.

In a subsequent case Leggatt J reiterated that 'this court, and indeed the Court of Appeal, is bound by the decision of the House of Lords in the *Al-Jedda* case, notwithstanding that the decision conflicts with the subsequent decision of the European Court. In this litigation it is common ground between the parties that this is so.'[27] In another subsequent case it was observed that 'the Strasbourg court in *Al-Jedda v United Kingdom* concluded that Security Council Resolution 1546 authorised the United Kingdom to intern where necessary but did not impose a binding obligation to do so. However, we are bound to follow the decision of the House of Lords on this point.'[28]

This leads to a rather rough and overstretched application of the doctrine of precedent, not only premised on the acknowledgment that international legal standards may thereby be contravened, but also involving a contradiction from the approach that Lord Denning has earlier adopted in relation to the doctrine of precedent in matters relating to international law.

IV. English Courts and the Normative Conflict between Security Council Resolutions and Other Treaties

1. General Aspects

Once we have ascertained the ways in which sources of English law enable Security Council resolutions to be implemented domestically, we need now to move on to analysing how English courts identify the actual content of those resolutions and their interaction with other sources of international law.

To ascertain how a Security Council resolution interacts with any other source of international law, there is an issue of how exactly the allocation of rights and obligations takes place through Security Council resolutions and what exactly the Security Council has entitled or obliged the UK government to do or prohibited it from doing. As resolutions are law-making acts, the distinction always needs to be drawn between them creating a general framework for a particular action and allocating specific rights and obligations to particular entities. For, it would hardly be acceptable to the Security Council's membership that any statement of a general purpose or objective, or establishment of a general legal framework would entail far-reaching rights or obligations for various entities, without those rights being expressly articulated by them in their

[25] *Serdar Mohammed v. MOD*, High Court [2014] EWHC 1369 (QB), 2 May 2014, para. 208.

[26] *Serdar Mohammed v. MOD* (HC), para. 209.

[27] *Abd Ali Hameed Ali Al-Waheed* [2014] EWHC 2714 (QB) (31 July 2014), para. 16.

[28] *Serdar Mohammed* (CA), para. 328.

consensually and collectively agreed text. The Council's membership can have no such certainty, unless they can transparently rely on their decisions being interpreted in accordance with their ordinary and plain meaning. The collective and consensual nature of the Security Council's decisions is strictly tied to the need of their textual interpretation.

A particular problem arises in situations where a Security Council resolution provides a general context within which a particular type of governmental activities is undertaken but falls short of covering the performance of particular acts and conduct by the relevant governments. To illustrate, the Security Council resolutions pleaded in *Al-Jedda* (2007) and *Al-Jedda* (2010) did not authorise or oblige UK authorities to detain the individuals on the conditions that courts have endorsed.

The models of interaction between Security Council resolutions and other sources of international law as articulated in English case-law

a. Security Council Resolutions Reinforcing the Interpretation of International Treaties

The *Al-Sirri* case before the Supreme Court addressed the effect of the authorisation of the presence of and operations of the International Security Assistance Force (ISAF) in Afghanistan, under a Security Council resolution in refugee law, in terms of the scope of acts directed against principles and purposes of the UN under Art. 1 F (c) 1951 Convention on the Status of Refugees, so that the refugee status could be withheld from an individual who was claiming it.

The Supreme Court specified that ISAF was authorised by UN Security Council resolutions to help maintaining security in and around Kabul. The Supreme Court alluded to the fact that

> [t]ime and again, the resolutions of the Security Council recorded that the role and responsibility of ISAF was to assist in the maintaining of international peace and security. This is one of the most important purposes set out in article 1 of the United Nations Charter (see para. 10 above). In these circumstances, it might be thought to be obvious at first sight that such acts are contrary to the purposes and principles of the United Nations.[29]

Furthermore, '[t]he fundamental aims and objectives of ISAF accord with the first purpose stated in article 1 of the United Nations Charter. By attacking ISAF, the appellant was seeking to frustrate that purpose.'[30] The Supreme Court's approach to the interpretation of ISAF-related resolutions is textual, namely by alluding to the Council's express statements as to the link between UN purposes in Afghanistan and the presence and operation of ISAF in the territory of that country. But, generally speaking, the impact of the pertinent resolutions of the Security Council in this case is not to modify the existing legal position under the pertinent international treaty, but to provide an interpretative factor to it.

[29] *Al-Sirri v. Secretary of State for the Home Department and DD (Afghanistan) v. Secretary of State for the Home Department* [2012] UKSC 54, para. 63.

[30] *Al-Sirri*, para. 68.

b. The Strict Interpretation of Security Council Resolutions in the Context of Treaty Regimes

The litigation in *Al-Jedda* (2012) before the Court of Appeal was related to the decision of the Secretary of State for the Home Department to deprive Al-Jedda of his British nationality, by an order under Section 40 (2) of the 1981 British Nationality Act. This Section authorises the Secretary of State to make such decision if 'deprivation [of nationality] is conducive to the public good,' provided that, as sub-Section 4 further specifies, 'the order would [not] make a person stateless.'[31]

At the time when he first came to the United Kingdom, Al-Jedda had the Iraqi nationality. The effect of him obtaining the British nationality in 2000 was that, under the law of Iraq, as it was in force at the time, he lost his Iraqi nationality. The principal issue before the Court of Appeal was whether, as a consequence of the Home Secretary's order, the Iraqi nationality was restored to Al-Jedda, under any applicable Iraqi legislation, whether one in force before the 2003 invasion or transitional legislation adopted by the Iraqi Governing Council afterwards.[32] If the Court would be satisfied that Al-Jedda's Iraqi citizenship was automatically restored under Iraqi law, a further international law question would have to be examined as to whether that legal position under Iraqi law was compatible with international law and, therefore, whether it could be invoked before English courts.

The key provisions of Iraqi law were Section 11 (c) of the 2004 Transitional Administration Law, adopted on 8 March 2004 by the Governing Council of Iraq during the period of occupation by coalition forces, and by Iraqi Law No. 26 of 2006 ('2006 Nationality Law') which came into force on 7 March 2006 following the end of the occupation, the expiry of the transitional period and the approval of a new Iraqi Constitution.[33] According to Section 11 (c) of the 2004 Law, 'Each Iraqi shall have the right to carry more than one citizenship. Any Iraqi whose citizenship was withdrawn because he acquired another citizenship shall be deemed an Iraqi.' Section 10 (1) of the 2006 Law specified that '[a]n Iraqi who acquires a foreign nationality shall retain his Iraqi nationality, unless he declares in writing his renunciation of Iraqi nationality.'

The way of ascertaining the meaning and reach of the Iraqi legislation has posed a major challenge to English courts. The approach of the Special Immigration Appeals Commission (SIAC) was to construe Art. 10.1 pursuant to English rules of statutory construction, especially the one that requires avoiding anomalous results. The implication of the use of this rule was that Art. 10.1 led to the reversing of the historical injustices committed by the Saddam Hussain regime by depriving many Iraqis of their nationality, for instance through the 1980 Revolutionary Command Council decree.[34] The effect of Section 10 (1) was thus construed as being retrospective, covering the nationality deprivation cases before the 2006 Law was enacted. Al-Jedda thus was deemed to have re-acquired his Iraqi nationality, with the effect that the Home Secretary's decision did not make him stateless.

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[31] *Hilal Al-Jedda v. Secretary of State for the Home Department Court of Appeal* (Civil Division) [2012] EWCA Civ 358.

[32] *Al-Jedda* (2012), paras 5, 9.

[33] *Al-Jedda* (2012), para. 9.

[34] *Al-Jedda* (2012), para. 39.

It was on that basis that the Court of Appeal engaged the SIAC's failure to rely on the 'international law question.' The matter, quite simply, was whether Iraqi domestic legislation (including for our purposes that enacted under the post-invasion provisional governance framework), could be opposable before English courts in the shape and with the effect that does not reflect the limitations which public international law ordinarily expects national legislators (or their *ad hoc* equivalents) to observe.

The starting-point of the underlying international legal position was that the occupying power is not empowered to introduce fundamental changes in the law previously applicable to the occupied territory. Express reference was thus made to Art. 43 Hague Regulations (1907) and Art. 64 Geneva Convention IV (1949). Richards LJ has found this sufficient to conclude that restoring citizenship automatically to 1.5 million people constituted such fundamental change.[35]

The Court has observed that

> the Secretary of State places reliance on a series of UN Security Council resolutions, most of them made under Chapter VII of the Charter of the United Nations and creating binding obligations under international law. A general theme of the resolutions was to reaffirm the sovereignty of Iraq and to encourage efforts by the people of Iraq to form a representative government. The various steps in that process were covered in the individual resolutions.[36]

The Court of Appeal addressed the impact of Security Council resolutions, namely whether, as the Government had insisted, Resolution 1546 (2004), authorised provisional institutions in Iraq to override the letter of the IV Geneva Convention and undertake fundamental changes in the law relating to the Iraqi nationality. Resolution 1546 did not, however, refer to legal aspects of Iraqi nationality. The mere fact that, under Resolution 1546, the Governing Council was described as embodiment of Iraq's transitional sovereignty did not pre-determine the exact reach of this organ's powers. 'The normal limits of international law' under the law of occupation were thus not disposed of.[37] The only way in which the relevant Security Council resolutions could have disposed of the requirements under humanitarian law treaties is to have stated the relevant intention expressly; and then, as follows from *Al-Jedda GC*, to oblige the relevant States to act in defiance of those treaty-based requirements.[38] This was not done, and the legal position under humanitarian treaties remained preserved.

Thus, the Court was unwilling to endorse the argument that the conferral of some broad responsibilities to the Governing Council or to CPA entailed authorising them to act in disregard of international humanitarian law as embodied in Geneva Convention IV.

Overall, *Al-Jedda* (2012) is a good example of how a national court could make a proper distinction between the text of the resolution as the source of particular legal rules, and the overall framework or aims of the resolution. The Court of Appeal decision here endorses the essentially textual approach to Security Council resolutions: that which the Council has not said, it has not decided, undertaken, obliged or authorised. Furthermore, the Court of Appeal's

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[35] *Al-Jedda* (2012), paras 47–54, 98.

[36] *Hilal Al-Jedda v. Secretary of State for the Home Department*, Court of Appeal (Civil Division) [2012] EWCA Civ 358, para. 56.

[37] *Al-Jedda* (2012), paras 65–67.

[38] Which, had the Security Council acted accordingly, could have led to raising concerns as to the Council's observance of its *vires*, pursuant to the spirit of the very same *Al-Jedda GC* judgment.

approach effectively was that the Court presumed the Security Council to be acting within the overall framework of the law of occupation, and therefore not to be intending anything contravening the underlying sources of humanitarian law.

c. Cases of Normative Conflict

In 2007, the House of Lords has ruled that the Security Council Resolution 1546 (2004) authorised the government of the UK to detain individuals in Iraq, even though the text of the resolution contained no such authorisation. It then ruled that such authorisation by the Council was just as good as its imposition of the requisite obligation on the UK, so that the UK government could invoke Art. 103 UN Charter to justify its non-compliance with Art. 5 ECHR when detaining Mr Al-Jedda in Basra. The European Court of Human Rights has overruled this decision four years later and found that the UK government had acted contrary to Art. 5 ECHR.

A rather peculiar, and somewhat more moderate, approach to the interpretation of Security Council resolutions was pursued in the subsequent case of *Serdar Mohammed*, dealing with detention issues arising in the context of the operations in Afghanistan. The Court held that:

> The UNSCRs therefore provide a legal basis for the presence and activities of UK armed forces operating as part of ISAF in Afghanistan. Specifically, the UK government relies on the authorisation conferred on the Member States Participating in ISAF to 'take all necessary measures to fulfil its mandate' as providing a legal basis for detaining people where to do so is considered necessary to assist the Afghan government to improve the security situation in Afghanistan.[39]

The Court continued, per Leggatt J, that

> [a]lthough I consider that a power to detain is implied, there is nothing in the language of UNSCR 1890 which demonstrates – let alone in clear and unambiguous terms – an intention to require or authorise detention contrary to international human rights law.[40]

The concern this raises is why does the power to detain need to be implied – in any way being a step too far, premised on inferences from generalised provisions – when the routes in relation to detention and internment, available to States under human rights law, stand open to them anyway. And if so, then the reliance on a Security Council resolution would not genuinely increase the margin of freedom of the relevant governments.

Leggatt J bases the above finding on the Strasbourg court decision in *Al-Jedda v UK* which he considers to have been decided on the basis of presumption that a resolution should not be read as having been intended to violate international human rights norms. However this is not compatible with the Strasbourg Court's principal point in *Al-Jedda v UK* that the lack of such effect of Resolution 1546 was in the first place due to the absence of the requisite provision in its text, owing to the lack of the authorisation of the detention in the first place, and then because

[39] Serdar Mohammed v MOD (HC), para. 190.

[40] *Serdar Mohammed v. MOD* (HC), para. 221. The similar approach was displayed by the Court of Appeal in the same case, to the effect that "On its language, it authorised the use of lethal force to enable ISAF to fulfil its mission or mandate. It is difficult to see why therefore it did not authorise detention as long as was necessary in all the circumstances to enable ISAF to fulfil its mission." But then, the Court of Appeal emphasised that "The question of whether the authority under the UNSCR was limited or qualified by a system of human rights law is a separate question." *Serdar Mohammed v MOD*, Court of Appeal [2015] EWCA Civ 843, 30 July 2015, para 148

Art. 103 requires the existence of an obligation under the Charter to override other international treaty obligations.[41] It is rather curious that the approach adopted in relation to the interpretation of resolutions in the House of Lords *Al-Jedda* decision has been maintained in an English court by reference to the Strasbourg decision which had overruled the House of Lords on the relevant points.

Continuing in the *Serdar Mohammed* spirit, in *Iraqi Civilians*, Leggatt J suggested that '[p]ursuant to UNSCR 1483 and UNSCR 1511, the defendant was under a duty (in the sense of an 'obligation' within the meaning of Art. 103 UN Charter) to detain individuals where considered necessary for imperative reasons for security.'[42] This was presumably the case owing to the effect of the IV Geneva Convention.[43] However, the judge stated that '[a]lthough paragraph 5 mentions, in particular, the Geneva Conventions and Hague Regulations, it does not purport to give obligations under those instruments primacy over any other international law obligations.'[44] On this view, the Security Council's intention was seen to be to leave the applicable international law, in particular human rights treaty obligations, the way it was before the enactment of its pertinent resolution.

Thus, the *Iraqi Civilians* case attributes to Security Council resolutions not an independent effect in relation to the detention of individuals, but one on the basis of their association with the effect that, in the opinion of the court, international humanitarian law treaties independently generate in relation to British authorities. The logic here is that Security Council is merely deemed to be applying those treaties, instead of generating a fresh and independent right or obligation of States as to the detention of individuals. This way States who implement a Security Council resolution could undertake the relevant action in relation to targeted individuals, but subject to limits imposed by human rights and humanitarian law on the legality of that action. By taking this position, the *Iraqi Civilians* court eschews attributing to the Security Council resolution the potential to override, on its own, the applicable international humanitarian law treaties. This is different from the *Al-Jedda I* (2007) model under which the Security Council's will could trump the applicable requirements under the human rights law.

On the *Iraqi Civilians* model, Art. 103 UN Charter would not be activated, because the obligation to detain would not be an obligation under the UN Charter, as Art. 103 requires it to be. Leggatt J does not purport generating such effect in any case, instead preserving the impact of Art. 5 ECHR intact. In order to activate the effect of Art. 103, a Security Council resolution needs to be a valid resolution in the first place, which above all means its compatibility with the letter and purposes of the UN Charter. The Strasbourg Court's decision in *Al-Jedda v UK* indicates that the purposes of the Charter, as part of the law that determine the Council's *vires*, prominently include human rights protection.

The above analysis reveals that there are three possible models projected by English and European courts as to the judicial treatment of the relationship between Security Council resolutions and other international treaties:

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[41] *Al-Jedda* (GC), paras 100–101.

[42] *Iraqi Civilians v. MOD* [2015] EWHC 116 (QB), para. 32.

[43] However, the *Iraqi Civilians* court does not properly address the use of permissive language in Art. 42 and 78 (4) Geneva Convention ('may') when detention and internment issues are dealt with.

[44] *Iraqi Civilians*, paras 25–26, 28.

The 2007 *Al-Jedda* decision of the House of Lords suggests that the Security Council has generated a fresh right, *a fortiori* obligation to detain individuals, and this projected obligation trumps Art. 5 ECHR via Art. 103 UNC.

The 2011 *Al-Jedda* decision of the European Court of Human Rights suggests that the relevant Security Council resolution did not generate an obligation to detain and thus fell short of triggering a normative conflict with ECHR, then to be resolved on the basis of Art. 103 UNC.

The *Iraqi Civilians* court approach is that the obligation to detain arises not discretely under a Security Council resolution, but under humanitarian treaties that need to be applied consistently with the ECHR.

These three models are not mutually reconcilable. Under the first model there may in principle be an indefinite detention. Under the second model no detention at all is legitimised. Under the third model there may be some detentions, provided that they comply with Art. 5 ECHR.

The Strasburg Court in *Al-Jedda v UK* protects the ECHR rights of an individual from the encroachments through or on the basis of Security Council resolutions. English courts after the Strasbourg Judgment try to adopt a medium solution, to some extent increasing the leeway of national authorities in dealing with the content of, or conflict between, the relevant international legal instruments. While the overall outcome would be similar to that reached by the Strasbourg Court, the handling of interpretation of resolutions and of normative conflict issues is far less adequate.

V. Concluding Observations

As this contribution has demonstrated, the English legal system is among the most prominent ones in terms of enabling the UN Security Council resolutions to be interpreted and implemented at the national level, including in relation to other sources of international law. However, the treatment of these matters in English courts is not always free of problems, both in terms of the interpretation of Security Council resolutions and of the proper use of basic doctrines and categories of English law. However, whether or not the outcomes reached in particular cases are invariably correct, English courts seem to understand, intuitively at least, the dimension of normative hierarchy and normative conflict attendant to the domestic implementation of Security Council resolutions when they operate in context with other sources of international law.

According to the international legal requirements, a Security Council resolution must be carefully interpreted to see whether it includes a consensual agreement that authorises or requires a particular conduct. Then in terms of national law, it has to be a resolution of the kind that a particular source of English law allows to have domestic legal effect. In terms of the relationship between a Security Council resolution and the rest of international law, a resolution has to be one properly covered by the terms of Art. 103 UN Charter so that it could prevail over other international obligations. If Art. 103 does not provide for the primacy of the pertinent resolution over another relevant rule of international law, then a national court would not be justified in implementing that resolution domestically as if it was otherwise.

Therefore, it makes every sense to suppose that, anytime English courts give domestic legal effect to a UN Security Council resolution beyond the scope expressly allowed under the 1946 Act, their approach is premised on the constitutional distribution of law-making authority that is not fully compatible with the 'dualist' perception and with the special role of parliament.