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Unilateral Interpretation of Security Council Resolutions: UK Practice

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Abstract

Unilateral interpretation of UN Security Council resolutions takes place where, due to political considerations of the day, one or more States attempt construing the resolution in question as falling short of, or exceeding, the agreement between the Council's Member States that the resolution on its face suggests. Whether unilateral interpretation indeed takes place depends on what the content of the resolution actually is, which question in its turn depends on the use of transparent methods of interpretation applicable to resolutions. After examining the applicability of the 1969 Vienna Convention in this process, the article turns to four instances of unilateral interpretation from the UK practice, and to reactions to the attempts of unilateral interpretation. These four instances demonstrate that the consistent use of interpretation methods, coupled with the reaction by other States to that effect, can help maintaining the adherence to the resolution's meaning. Where the national or international courts are available as forums to challenge unilateral interpretation, they can further enhance the maintenance of proper meaning of these instruments.

A. The Regime of Interpretation of Security Council Resolutions and the Essence of Unilateral Interpretation

In order for the United Nations Security Council to properly implement its primary responsibility to maintain and restore international peace and security, it has to be able to properly communicate to its membership what steps and measures should be taken in the relevant situation to maintain or restore peace and security under Chapters VI and VII of the United Nations Charter. The Council communicates, through its resolutions, its collective intention as to those steps and measures. Clarifying the content and scope of those resolutions through the use of a single and hierarchically arranged set of interpretation rules is necessary if it is going to be ensured that the steps and actions taken on the ground correspond to those articulated in the Council’s collective decision. The hierarchical arrangement of interpretation rules is meant to precisely identify the parameters of the Council’s collective intention, should States have a disagreement as to what precisely the Council has demanded, mandated, authorized or proscribed.

The only written and authoritative set of interpretation rules in the international legal system is provided for under Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. No alternative set of the rules of interpretation formulated by academics, legal advisers or diplomats can have the same authority of law as this codified set of rules. Security Council Resolutions are agreements between Member States of the Council; even though they are adopted as institutional decisions, they are beforehand negotiated and agreed by Member States. Even if they can bind States that have voted against them or are not even members of the Council, they still remain agreements as between States that constitute the majority in the Council specified in Article 27 of the UN Charter. Resolutions should therefore be interpreted as agreements pursuant to Articles 31 and 32 of the Vienna Convention. Although Articles 31 and 32 are not formally designated to apply to Security Council resolutions, their paramount rationale still is to help identifying the meaning of the agreed written word so that then States can place reliance upon them, which need is no less pressing in the case of resolutions that it is in the case of treaties.

Questions regarding the above conclusion will necessarily arise as the International Court of Justice has suggested in the Kosovo Advisory Opinion, in somewhat obscure terms, 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."[1]

The Court did not specify what those "other factors" are, and how the drafting process of resolutions is "very different" from that of treaties. In reality, however, both these drafting processes relate to arriving at the agreement between States (whether within an institutional framework or outside it), enshrining that agreement in the written text and enabling the

[1] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion, [Kosovo-Opinion] available at http://www.icj-cij.org/docket/files/141/15987.pdf (last visited 5. August 2010) *[Kosovo-Opinion]*, 34, para. 94.

relevant States to place reliance on it whenever their rights and obligations are at stake. It can also be said that the drafting process of a BIT is different, or "very different", from that of the ICCPR; but they are both agreements regardless, and subjected to the same regime of interpretation. In general, it is not uncommon in the Court's jurisprudence to pay a lip-service to the "special" nature of certain "non-treaty" acts, but ultimately interpret them in compliance with the Vienna Convention regime.[2]

The interpretation of resolutions pursuant to Articles 31 and 32 shall thus demonstrate the objectively intelligible content of the resolution in question and of the agreement between States it embodies. Only the factors expressive of that agreement have to be considered, above all the text of the resolution in the light of its object and purpose as could be inferred from the resolution's overall aims and structure. Adopting Articles 31 and 32 of the Vienna Convention as guidance, even if not as a direct authority, requires that the primary importance shall be attached to the ordinary meaning of the text of the relevant resolution in the light of its object and purpose. In the *Kosovo* Advisory Opinion, the International Court applied this method of interpretation to Security Council resolution 1244 (1999)[3]. Through the use of the object and purpose method, the Court concluded that the regime of interim administration of Kosovo was fundamentally interim, but retained its continuous validity until it would be abolished the way it was originally established.

In the final analysis, interpretation of resolutions is always about identifying and evidencing the Council's collective will to the exclusion of unilateral projection – whether by a single State or a group of States – of the parameters and scope of the Council's agreed position. Such use of interpretation methods confirms the limited role of interpretation – it is meant to identify what Member States of the Security Council have agreed upon, as opposed to projecting what would have been reasonable or suitable for them to agree.

2 In *Fisheries Jurisdiction* (Spain/Canada) the International Court has 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, by reliance on the textual meaning of the Canadian declaration as the crucial factor of the ascertainment of its meaning, *Fisheries Jurisdiction (Spain v. Canada*), Jurisdiction of the Court, Judgment, I. C.J. Reports 1998, 432, especially 457-465, paras 61 to 80.

3 SC Res. 1244, 10 June 1999

The issue of unilateral interpretation relates not to methods of interpretation, that is *how* interpretation should be performed, but *who* should interpret the relevant resolution. Individual States, whether or not they have been part of the drafting process, are obviously not prevented from expressing their views as to the content of the relevant resolution. The standing accorded to individual States reflects the principle that United Nations organs are not the ultimate auto-interpreters of their decisions; individual States must have the faculty to react when a UN organ adopting a decision thereby exceeds its delegated powers; or if a State or an organ implementing that decision construes it to the same effect, or the way that differs from the decision that has been actually adopted, for instance by disrupting the required sequence of interpretation methods that are aimed at clarifying what the Council precisely intended and agreed upon. On the other hand, unilateral interpretation by States becomes a problem when attempting to construe the relevant resolution as approving the outcomes different from those emerging when normal methods of interpretation are used, and the State which advances an interpretation other than those defensible under the normal methods of interpretation can be said to be engaging in unilateral interpretation. Factors that motivate unilateral interpretation prominently include attempts to stay, nominally at least, within the range of the United Nations law. The outcome sought through unilateral interpretation is to project the legal position that either exceeds, or is narrower than, that envisaged under the Council's collective decision.

B. Iraq: Invasion in 2003

The UK argument in favor of the use of force against Iraq in March 2003 centered around the following points: Security Council Resolution 687 (1991)[4] suspended but did not terminate the authority to use force under Security Council Resolution 678 (1990)[5] to liberate Kuwait from Iraq; a material breach of the resolution 687 would revive that authority under resolution 678; resolution 1441 (2002)[6] determined that Iraq was in material breach of resolution 687; the authority to use force thus revived.[7] The

4 SC Res. 687, 3 April 1991.
5 SC Res. 678, 29 November 1990.
6 SC Res. 1441, 8 November 2002.
7 *The Use of Force against Iraq*, The Attorney-General's Opinion, 52 *International & Comparative Law Quarterly* (2003) 3, 811 at 811-812;Attorney General's Advice on

unilateral interpretation thus concerned, as we shall see, all those three resolutions.

Under paragraph 2 in resolution 678, and in response to Iraq's invasion of Kuwait in August 1990, the Security Council authorized member States cooperating with Kuwait "to use all necessary means to uphold and implement resolution 660 (1990)[8] and all subsequent relevant resolutions and to restore international peace and security in the area." It is arguable that the open-ended language in resolution 678, namely the words "to restore international peace and security in the area" could, on their face at least, be interpreted as authorizing the use of force up to the point of removing the Iraqi regime and occupying Iraq for some time, if that would be necessary to restore the peace in the area. However, the problem in this case can be disposed by the contextual reading of resolution 678 which saw the "breach of the peace" in Iraq's invasion of Kuwait – no other event – and thus authorized the Chapter VII force to deal with, and "restore peace and security in the area" after that "breach of the peace". Once this "breach of the peace" would be reversed, peace and security in the area would be restored. There was thus no authority granted beyond the liberation of Kuwait, because no objective of "restoring peace and security in the area" additional to the liberation of Kuwait has ever been formulated by the Council. Projecting the authority to use force against Iraq beyond the limits of the liberation of Kuwait will pose an insoluble question as to precisely how far such broader authorization would go, what instances it would or would not encompass. Reading in such broader authorization would thus fall short of providing any workable guidance on this matter.

The second step of interpretative exercise related to inferring the authority to use force against Iraq from resolution 687 (1991), which argument was based on a false premise that the authorization of the use of force under resolution 678 went beyond the liberation of Kuwait. The FCO Paper on *Legal Basis for the Use of Force* suggested that

> "SCR 687 did not repeal the authorization to use force in paragraph 2 of SCR 678 … The authorization was suspended for so long as Iraq complied with the conditions of the ceasefire. But the authorization

the Iraq War Iraq Resolution 1441, 54 *International & Comparative Law Quarterly* (2005) 3, 767, 769

8 SC Res. 660, 2 August 1990.

> could be revived if the Council determined that Iraq was acting in material breach of the requirements of SCR 687."[9]

That argument then led to a consequent assertion that the determination, under resolution 1441, of Iraq's "material breach" has revived – the non-existent as we saw – authority to use force under resolution 678.

It has to be specified that resolution 687 is clear in acknowledging that the authorization of the use of force under resolution 678 had lapsed as soon as Kuwait got liberated. Despite the semantics, what happened in 1991 as between the Coalition States and Iraq was not really a cease-fire but termination of hostilities, and the end to war. Resolution 686 (1991)[10] spoke in its preamble and paragraph 8 of "the rapid establishment of a definitive end to the hostilities" as an aim. Even if resolution 687 spoke of a cease-fire, this has to be seen as a stage towards "a definitive end to the hostilities" as envisaged earlier, not as a temporary break in hostilities, if the Council's entire position is to be construed consistently. Both preamble and paragraph 6 of resolution 687 manifest the Council's intention to bring "military presence in Iraq to an end as soon as possible consistent with paragraph 8 of resolution 686."

Moreover, quite apart from resolutions 678 and 687, resolution 1441 showed no trace of automatic authorization of force, as has been confirmed in British and American statements.[11] Under paragraphs 1 and 4 the Council stated the essence of the problem, namely that Iraq's failure to cooperate with UN inspectors and the IAEA amounted to a material breach of resolution 687(1991); under paragraphs 11 and 12 the Council expressed its intention to obtain the information regarding Iraq's further non-compliance and non-cooperation, and "consider" the need to ensure Iraq's compliance.

9 *Iraq: Legal Basis for the Use of Force*, 52 *International & Comparative Law Quarterly* (2003) 3, 813; Attorney-General's advice, 54 *International & Comparative Law Quarterly* (2005) 3, 767, 769, para. 7

10 SC Res. 686, 2 March 1991.

11 The British and American statements did not at that stage claim that this resolution contained an express or implied authorization to that effect. In fact, the US Representative in the Council conceded that resolution 1441 contained no hidden triggers and no automaticity regarding the use of force. Security Council 4644th Meeting, SC Press Release SC/7564; Security Council, 4644th meeting, 8 November 2002, S/PV.4644, 3; Letter dated 20 March 2003 from Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2003/351, 21 March 2003.

The legal effect of these paragraphs is straightforward in pointing to the standing of the Council as the sole entity that has to ascertain the facts of Iraq's non-compliance and to consider and decide the steps that should address this problem. As such, paragraphs 1, 4, 11 and 12 entail no other effect, and there has thus been no authorization to use force under that resolution.

C. Iraq: The Post-Invasion Governance Regime and Security Measures

From May 2003 until the end of June 2004, the British and American forces had been the forces of occupation in Iraq. On 28 June 2004 the occupation ended and the interim constitution of Iraq came into effect. Sovereignty was thus transferred to the Iraqi Interim Government. This required establishing the new legal basis for the presence of British and American forces. Thus, the UN Security Council resolution 1546 (2004)[12] proclaimed the end of the occupation regime, established the US-led Multinational force (MNF), and transferred the governmental authority to the Iraqi Government. The resolution also authorized the MNF to use force and intern individuals for maintaining security and stability in Iraq. The powers claimed by British forces in Iraq under that resolution ultimately have risen to the litigation in the *Al-Jedda* case before English courts – Divisional Court, Court of Appeal and House of Lords.

Mr Al-Jedda was detained on 10 October 2004 in Baghdad on the ground that his internment was necessary for imperative security reasons, on the allegation of recruiting terrorists outside Iraq. He was flown from Baghdad to a British detention facility in Basra. No charges have been brought against him and no trial has been held. His detention has been periodically reviewed and prolonged by senior officers in the British army. In June 2005, he began proceedings before English courts to obtain the pronouncement on the legality of his detention. Al-Jedda challenged his detention alleging the violation of the freedom from arbitrary detention under Article 5 of the European Convention on Human Rights, which applies in English legal system through the 1998 Human Rights Act, and of Article 78 of the 1949 IV Geneva Convention, which deals with the right of the occupying power to detain individuals, and the conditions on which such right can be exercised. Following the decisions of the lower courts, the

[12] SC Res. 1546, 8 June 2004.

House of Lords dismissed the appeal of Al-Jedda on the basis of the authorization to intern individuals in Iraq as stipulated in the UN Security Council resolution 1546(2004).[13]

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."[14] 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.[15] 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 allegedly have the automatic effect of rendering the detention unlawful.[16]

The Court of Appeal's approach is somewhat less straightforward, but it subscribes to the same outcome in relation to the interpretation of Security Council resolutions and their impact on the 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

[13] *R (on the application of Al-Jedda) (FC) (Appellant)* v *Secretary of State for Defence (Respondent)*, Judgment of 12 December 2007, Appellate Committee, House of Lords [2007] UKHL 58, [Al-Jedda (House of Lords)], para. 44.

[14] *Regina (Al-Jedda) v the Secretary of State for Defence*, Judgment of 12 August 2005, Queens Bench Divisional Court, Case No: CO/3673/2005, paras 87, 92.

[15] Article 78 of the IV Geneva Convention requires, in its relevant parts, that "[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power." Geneva Convention relative to the Protection of Civilian Persons in Time of War, 21 October 1950, 75 U.N.T.S., 287, Article 78.

[16] *R (Al-Jedda) v the Secretary of State for Defence*, Judgment of 12 August 2005, Divisional Court, [2005] EWHC 1809 [*Al-Jedda* (Divisional Court)], paras 126, 144.

> 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."[17]

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 and under Article 5 of the European Convention on Human Rights.[18]

Similar to the outcome in *Al-Jedda I*, in *Al-Jedda II* Arden LJ considered it to be clear from *Al-Jedda I* that the UK had obligations pursuant to Security Council resolutions which overrode UK's other obligations, including those under the IV Geneva Convention.[19] Detention for security reasons was the task MNF was *required* under resolution 1546, which obligation allegedly derived from Article 103 UN Charter.[20] This differs from the House of Lords understanding of resolution 1546 as merely authorizing security detention, for which reason the House of Lords vigorously asserted in *Al-Jedda I* that authorizations under a Security Council resolution produce, via Article 103, effects similar to obligations.

17 *R (Al-Jedda) v the Secretary of State of Defence*, Judgment of 29 March 2006, Court of Appeal, [2006] EWCA Civ 327, para. 63.

18 *Id.*, para. 80.

19 *Hilal Abdul Razzaq Ali Al Jedda v the Secretary of State for Defence*, Judgment of 8 July 2010, Court of Appeal (Civil Division), [2010] EWCA Civ 758, para. 84 [*Al-Jedda II*]; this case concerned Al-Jedda's claims for damages for unlawful imprisonment in Iraq, raised by amendment of his original claims in *Al-Jedda I* regarding the *habeas corpus*.

20 *Al-Jedda II*, *supra* note 12, paras 105 & 108 (further using the wording "entitled and bound"); Arden LJ pointed later on, however, that the actions by British forces had a legal basis in overarching provisions of Article 103 and the IV Geneva Convention, at para. 105. On a general plane, however, Article 103 produces no obligations on its own; it merely requires according the primacy to obligations that the Council has validly created through its resolutions.

It is noteworthy that the Divisional Court and Court of Appeal in *Al-Jedda I* did not address the issue of proper interpretation of resolutions; nor did, on the whole, the House of Lords which essentially upheld the decisions of the two lower courts in this case. Only Baroness Hale of Richmond has emphasized that the House of Lords devoted little attention to the precise scope of the authorization under Resolution 1546, as "there must still be room for argument about what precisely is covered by the resolution and whether it applies on the facts of this case."[21]

In terms of specific action and measures under resolution 1546, the Security Council had

> "*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 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 imply, the power of the Multinational Force to intern or detain individuals in violation of the applicable human rights and humanitarian law.

The letter of the US Secretary of State, by reference to which the Resolution 1546 is adopted and the part of which it forms, emphasizes 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

[21] *Al-Jedda* (House of Lords), supra note 6, para. 129.

> this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security."[22]
>
> 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."[23]

The exchange of letters thus 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. Therefore, on its face the 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.[24] 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 for. It has also to be emphasized that the reference to the text of resolution 1546 renders moot any exercise in a "human-rights-friendly" or "harmonious" interpretation of this resolution, because there is simply no need to go that far. The Divisional Court, for instance, has rejected the argument of "harmonious" interpretation,[25] but it also disregarded the textual requirements of the resolution, the same problem to be replicated later in the two judgments of the higher courts. In practice it matters not whether a resolution should be construed in a "harmonious" way with human rights norms; it matters instead whether the text of a resolution shows any authorization to depart from human rights norms – which resolution 1546 does not – there thus being no need for its "harmonious" construction; or if, hypothetically, a resolution were to divulge such authorization to depart from human rights, then the problems would arise with the validity of that provision in the light of the Council's paramount

22 Al-Jedda (House of Lords), supra note 6, para.14.

23 *Id*.

24 The UK is bound by international human rights law, particularly the ECHR, while conducting its operations in Iraq, as was affirmed in another House of Lords judgment, *Al-Skeini and Others v Secretary of State for Defence*, Judgment of 13 June 2007, House of Lords, [2007] UKHL 26, para. 132 (*per* Lord Brown). para. 90 (*per* Baroness Hale), para. 97 (*per* Lord Carswell).

25 *Al-Jedda* (Divisional Court), supra note 9, paras 90-108.

duty to keep within human rights restrictions both as a matter of the principles of the UN Charter and of general international law.

The House of Lords' approach effectively approved a unilateral interpretation of resolution 1546 contrary to that resolution's terms. The outcome thus contemplated is problematic as it projects the Security Council's decision to authorize a practically indefinite detention of individuals contrary both to human rights law and humanitarian law. Placing *Al-Jedda*-type detentions within the Security Council's powers is essentially confirming a rather scary outcome that the Security Council is also authorized to approve indefinite detentions of the kind practiced by the US Government in the Guantanamo Bay.

D. Targeted Sanctions against Terrorism Suspects

Targeted sanctions imposed by the Security Council against the individuals suspected of their involvement with terrorism are aimed not against States as such, but against individuals. Resolution 1267 (1999)[26] initiated this policy of targeted sanctions, manifested in the travel ban and the freezing of funds. Resolution 1373(2001) has introduced a number of general measures to deal with these problems. In the preamble of resolution 1822(2008) the Council articulates the necessity of targeted sanctions against terrorist suspects the way that terrorism can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all States "to impede, impair, isolate, and incapacitate the terrorist threat." By resolution 1735 (2006)[27], adopted "with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them", the Council decided that all States freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, and ensure that such funds, financial assets or economic resources are not made available to them (paragraph 1(a)).

The interpretation placed on these resolutions by the UK came before English courts. The High Court in England addressed the implementation in the English legal system of paragraph 1(c) of Security Council resolution 1373 (2001)[28] which obliges States to "freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to

[26] SC Res. 1267, 15 October 1999.
[27] SC Res. 1735, 22 December 2006.
[28] SC Res. 1773, 24 August 2007.

commit, terrorist acts or participate in or facilitate the commission of terrorist acts." In view of that, the 2006 Terrorism Order conferred to the Treasury the power to act upon the resolution requirements where they have "reasonable grounds for suspecting that the person *is or may be*" committing the relevant crimes. The High Court rightly pointed out that the threshold set in the Order was very low and could not constitute a necessary means of implementing the resolution. The resolution did not extend to those who were suspected of possible involvement in terrorism, even if the resolution was not actually limited to those who were actually proved to be performing those acts.[29] The High Court also specified that the objective of asset-freezing under resolution 1373 was to ensure that funds were not made available for terrorist purposes; "thus any criminal liability which could fall on those who make any assets available to a designated person should depend on whether it was or ought to have been known to the supplier that the asset in question could result in funds being available for terrorist purposes." That at the very least was an appropriate limitation on criminal liability. The Order did not reflect the resolution's requirements and was thus not a necessary measure to implement the resolution or obligations imposed by the Sanctions Committee.[30]

The Court of Appeal in the same case acknowledged that the reasonable suspicion standard is not warranted under the text of resolution 1373, and insists that the resolution is silent on the standard of proof to be satisfied on the question whether a particular person commits the relevant terrorist act. The State could thus properly conclude that it was expedient to provide for the reasonable suspicion test. However, the use of words "may be" had to be disapproved because the language of resolution 1373 did not authorize inserting these words in the 2006 Order.[31] The reasoning, as well as evidence – or the lack of it – to substantiate this last point in the appeal judgment is essentially the same as the one relating to the use of the reasonable suspicion standard. If the use of words "may be" was not

29 *A, K, M, Q & G* v *HM Treasury*, Judgment of 24 April 2008, High Court of Justice, Queen's Bench Division, Administrative Court, [2008] EWCH 869 (Admin), paras 39-40. The reasonable suspicion approach is also disapproved under Security Council Resolution 1822 (2008) which focuses on "acts of activities indicating" that an individual or entity is associated with Al-Qaida, Usama Bin Laden or the Taliban (paragraph 2).

30 *Id*., para. 46.

31 *A, K, M, Q & G* v *HM Treasury*, Judgment of 30 October 2008, Court of Appeal (Civil Division), [2008] EWCA Civ 1187, paras 39, 42.

warranted by the resolution, nor was that of the reasonable suspicion standard.

The difference in approaches of the two courts may not be that great if the Court of Appeal's rejection of the words "may be" is considered. Any sensible meaning the reasonable suspicion approach could properly have refers, in essence, to whatever the State suspects "may be" the case. Suspicion is a mental process focused on likelihood, potential or possibility, and is thus definitionally different from certainty that falls within the realm of demonstration, knowledge and proof. One could never suspect that something *is* the case but only that something *may be* the case, and one's assertion to be suspecting that something is the case in effect only means that one suspects that something may be the case. From the perspective of an external observer, the expression of a suspicion not substantiated by evidence points, in any case whatsoever, to the likelihood that suspected facts could be true, whether or not the person expressing suspicion insists to be suspecting that this actually is the case. The use, in the 2006 Order, of the words "suspecting that the person is" thus amounts to an oxymoron. The Court of Appeal's rejection of the words "may be" effectively amounts to its rejection of the reasonable suspicion test as a whole, because in practice it will be very difficult to approve this test without also approving its likelihood element.[32] This litigation demonstrates that the choice of words in the 2006 Order has been unfortunate.[33]

The courts' approach to interpreting resolution 1373 is a separate question. While the High Court rightly opposes the adoption of standard of reasonable suspicion, it also acknowledges that the obvious proof standard is not required in Security Council resolutions either. Thus, if the High Court's approach opposing the reasonable suspicion standard is right, it is left profoundly unambiguous what is the standard that actually applies the assets freezing requirement under paragraph 1(c) of resolution 1373 which again, on the High Court's interpretation, supports neither of the two evidentiary standards. Therefore, under the High Court's approach, the British Government effectively auto-interpreted paragraph 1(c) by

[32] Unless, of course, courts were to defer to the self-judging assertion by the Executive that the latter's mere belief and suspicion point to certainty as opposed to likelihood and possibility, without being in any position to verify it.

[33] Even more so in the 2006 Al Qaida Order, Article 4(1) of which enables the taking of the relevant measures if the HM Treasury has "reasonable grounds for suspecting" that the relevant person "is or may be" Usama Bin Laden or a person designated by the Sanctions Committee.

arrogating to itself a greater power over individuals than that paragraph allocated to it.

On its face, paragraph 1(c) is sufficiently clear by referring to individuals who "commit", "attempt to commit" or "facilitate the commission" of terrorist acts, as opposed to those who are suspected or presumed to be doing any of that. The text of the resolution does not mandate any presumptive approach in this regard. It is moreover doubtful whether the Council could validly subscribe to the reasonable suspicion standard. Even as targeted sanctions fall within its powers under Article 41, it is still incompetent to stipulate the reasonable suspicion standard in relation to what effectively amounts to criminal liability and consequently offend against fundamental human rights that possess peremptory status. The Court of Appeal's decision avoids construing paragraph 1(c), implemented through the 2006 Order, as actually entailing that result, in particular through by disapproving the words "may be" which in practice will preclude the application of paragraph 1(c) as if it approved the use of reasonable suspicion standard. But as a matter of principle, the Court of Appeal does not reject the reasonable suspicion standard as such and this approach, it can be concluded, materialized only due to the lack in the appeal judgment of any consistent attempt to properly interpret paragraph 1(c) in accordance with methods that govern interpretation of Security Council resolutions.

The Supreme Court Judgment in this case demonstrates the ways of interpreting Security Council resolutions to prevent a unilateral modification of their meaning by States. Lord Hope held that the words of the Order must be tested against the words used in the resolution. While the Order was meant to enforce the resolution, "but it does not permit interference with the basic rights of the individual any more that is necessary and unavoidable to give effect to the SCR and is consistent with the principle of legality." There was "nothing to indicate that the Security Council has decided that freezing orders should be imposed on a basis of mere suspicion." Resolution 1373 is not phrased in terms of reasonable suspicion. It instead lays "specific factual tests" for association with Al-Qaida and Taliban. By introducing that test to give effect to resolution 1373, the Treasury had acted *ultra vires* of that resolution as given effect in England through the 1946 UN Act.[34]

[34] *HM Treasury* v *Mohammed Jabar Ahmed and others*, Judgment of 27 January 2010, United Kingdom Supreme Court, [2010] UKSC 2, paras 47, 58-61, 139, 142 (*per* Lord Hope), also referring to Guidelines of the 1267 Committee, section 6(d), which specified the required type of evidence that justified listing and was qualitatively

This expansive interpretation also has an impact on the proportionality of actions claimed to be taken pursuant to resolutions 1373. As Lord Hope specified,

> "The Resolution nowhere requires, expressly or by implication, the freezing of the assets of those who are merely suspected of the criminal offences in question. Such a requirement would radically change the effect of the measures. Even if the test were that of reasonable suspicion, the result would almost inevitably be that some who were subjected to freezing orders were not guilty of the offences of which they were reasonably suspected. The consequences of a freezing order, not merely on the enjoyment of property, but upon the enjoyment of private and family life are dire. If imposed on reasonable suspicion they can last indefinitely, without the question of whether or not the suspicion is well-founded ever being subject to judicial determination."[35]

Similarly, Lord Mance observed in this context that "A measure [under the 2006 Order] cannot be regarded as effectively applying that core prohibition [under resolution 1373], if it substitutes another, essentially different prohibition freezing the assets of a different and much wider group of persons on an indefinite basis."[36]

All this demonstrates that the principles of interpretation of Security Council resolutions have been applied by the Supreme Court, above all the principle of ordinary meaning. This has enabled the Court to identify the meaning and reach of measures prescribed in resolution 1373, distinguish them from those projected under the unilateral interpretation made by the Executive, establish that this unilateral interpretation entails consequences disproportionate in relation to the objectives set by the Security Council, and enforce the legal consequences of all that within the English legal system.

different from mere suspicion, *id*., para. 140; *id*., paras 199-200 (*per* Lord Brown), paras 225-226 (*per* Lord Mance).

35 *Id*., para. 137.

36 *Id*., para. 230.

E. Resolution 1244 (1999) and the Provisional Governance of Kosovo

As is well-known, the Security Council intervened with the situation in Kosovo after the NATO-led war against FRY in 1999, and established its transitional administration regime in Kosovo through resolution 1244(1999). This resolution established the UN Mission in Kosovo (UNMIK) to administer the territory on an interim basis, and as a background it also recognized that FRY's territorial integrity was not going to be disrupted. Independence for Kosovo was not envisaged.

On 17 February 2008, the Kosovo assembly issued a Unilateral Declaration of Independence (UDI), after which Kosovo received recognition from several dozens of States. Whether this process is compatible with resolution 1244 depends on the proper interpretation of this instrument. Both before and after the UDI, including the pleadings before the International Court regarding this issue, interpretation States placed on resolution 1244 were not uniform. States supporting the Kosovo independence argued that resolution 1244 did not preclude the UDI, while States opposed to independence argue that it did prohibit any unilateral and non-consensual solution of the Kosovo issue, such as UDI.

When the matter came before the International Court, these competing claims had to be assessed in terms of the regime governing the interpretation of Security Council resolutions. Principal questions were, quite simply, whether resolution 1244 is time-limited, whether it allows a unilateral exit from its interim arrangements capped by UNMIK, and whether the Kosovo UDI is thus compatible with this resolution. A number of States, including the UK, argued that resolution 1244 did allow for an ultimate UDI even in the absence of a consensual solution.

The background of this problem illuminates that right up to the events in the eve of the Kosovo UDI, there was a virtual agreement in the international society that unilateral exit from 1244 arrangements would be impermissible. States that subsequently recognized Kosovo have confirmed the impermissibility of a UDI both by voting for resolution 1244 and by supporting the Contact Group statements on Kosovo.[37] Even in the Ahtisaari

[37] See statements reproduced in the Declaration by Vice-President Tomka in the *Kosovo* case, *Kosovo-Opinion*, *supra* note 1, Declaration of Judge Tomka, 7, para. 27, available at http://www.icj-cij.org/docket/files/141/15989.pdf (last visited 20 December 2010).

plan, the "supervised independence" for Kosovo was proposed to be effected through the revision of 1244 arrangements. There was thus a clear agreement on this point.[38]

A subsequent revision of position by pro-UDI States took place around the period when the UDI was proclaimed, from 2007 onwards, and this got reflected in the pleadings submitted to the International Court when it was discussing the legality of that UDI. The UK position before the Court was, by reference to the UN Secretary-General's view, that "The situation established under Resolution 1244(1999) was, however, unsustainable in the long term," among others because UNMIK was expensive to maintain.[39] Furthermore, "[t]he purpose of setting up local provisional institutions was to transfer authority from the international civil presence over time, until all authority was vested in local institutions, whose character at that point would – unless otherwise agreed – no longer be provisional."[40] But this left the question open as to whether resolution 1244 justifies such transfer of authorities without the Council's collective decision, and thus a unilateral exit from 1244 arrangements. And here it has to be faced that, as a matter of interpretation of resolution 1244, even if UNMIK and KFOR are regarded as *interim* arrangements – which has to be the case unless the Council were to decide to permanently detach Kosovo from Serbia – their mandate is not *time-limited*. The interim nature of 1244 arrangements means that they will be terminated at some point in the future when the Council comes to an agreement on this point, to the exclusion of any option of unilateral exit. This position – the absence of a fixed time-limit on the validity of 1244 arrangements – was regarded as vital back in 1999 when resolution 1244 was adopted, in order not to enable non-NATO States to block the extension of the KFOR and UNMIK mandates. It is rather inconsistent to argue that the option of unilateral exit is available now, much as there has been no agreement to amend resolution 1244.

38 *Letter Dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council*, S/2007/168, 26 March 2007.

39 UK Written Submission, 17 April 2009, 111, para. 6.28, available at http://www.icj-cij.org/docket/files/141/15638.pdf (last visited 20 December 2010.

40 *Id*., 111, para. 6.29, also referring to the periodic review requirements, para. 6.30, which however do nothing to reverse the requirement that the actual continuation of 1244 arrangements depends on the collective decision of the Security Council. Even if UNMIK faced difficulties in administering the entire territory of Kosovo (see para. 6.47), it still does not follow that its mandate or any other aspect of 1244 arrangements could be modified unilaterally, that is without the Council's collective decision.

The International Court's own position has been that 1244 arrangements, including the UNMIK supervision of the Kosovo authorities, continues on the terms it has been originally arranged back in 1999.[41] The Court regarded neither material difficulties nor position of pro-UDI States as factors that could adversely impact that position. Much as the Court chose to address the problem on narrow grounds, it nevertheless precluded the validity of such unilateral interpretation of resolution 1244, thus reaffirming that the interim 1244 arrangements continue in force regardless of interpretations unilaterally placed upon that resolution.

F. Conclusion

Resorting to unilateral interpretation is principally motivated by political considerations of the day. It is noteworthy that while, in relation to the invasion of Iraq, resolution 678 was considered to produce the authorizing effect far beyond its proper temporal scope of authorization, in relation to Kosovo the provisional regime of governance under resolution 1244 was argued to have before the decision of the Council to abolish it. In this latter case too, the unilateral interpretation had challenged not just a specific aspect of resolution 1244, but the entire rationale and essence of interim 1244 arrangements.

In procedural terms, options of responding to unilateral interpretation may be limited, and various systemic models can emerge depending on the availability of the fora where unilateral interpretations could be challenged. The Iraq invasion in 2003 was performed pursuant to the unilateral interpretation of resolutions 678, 687 and 1441. There was no court to exercise jurisdiction and verify the interpretation placed upon these resolutions. In relation to the detention of Al-Jedda, the House of Lords did not address the interpretation of Security Council resolutions, but have plainly confirmed the outcome that the Executive inferred on that basis of their unilateral interpretation of resolution 1546. In relation to targeted sanctions against suspected terrorists the UK judiciary was, to the contrary, quite strict in censuring the Executive's exercise in unilateral interpretation of resolution 1373. Finally, the unilateral interpretation of resolution 1244 on Kosovo was disapproved by the International Court in its Advisory Opinion in relation to the Kosovo UDI.

41 Kosovo-Opinion, *supra* note 1, 33-34, paras 91-93.