

Reviewing the Security Council

Dr Matthew Happold, Law School, University of Hull, UK
M.Happold@hull.ac.uk



Introduction:

My research argues that the practice of States shows that there are limits to the Security Council's powers, and that States frame those limits in legal terms. It will be argued that it is the proponents of an unbound Council who are engaging in ideological thinking.

However, agreement that the SC's powers are not unlimited means little if there is not agreement as to what the limits are and (ii) there is no body that can (or will) give an authoritative decision as to where they are drawn. These are the real issues in dispute.

Debate has centred in the wrong places. Lawyers' *déformation professionnelle* has led to an emphasis on what international and national courts have done. Governments' views of the legality of particular resolutions, expressed in political fora, are arguably more significant, in particular when consequences are threatened.

Review by the International Court of Justice:

- As the principal judicial organ of the United Nations (Art. 92, UN Charter), the ICJ's pronouncements, even if not formally binding, are highly authoritative.
- The Court also applies international law (Art 38(1) ICJ Statute). However, the Court's powers may be limited by its basis of jurisdiction: see, e.g., the *Genocide Convention (Bosnia/FRY) Case*.
- It remains unclear whether the ICJ has the power to judicially review SC decisions. On the one hand, the Belgian proposal at San Francisco to confer upon the Court such a power was rejected, whilst in its *Namibia Advisory Opinion* the Court disclaimed the power's existence. On the other, both the *Namibia* and the *Certain Expenses Advisory Opinions* saw the Court examining the legality of acts of other UN organs.
- Whatever the legal position, the ICJ has in practice been careful to avoid exercising a power of incidental review.

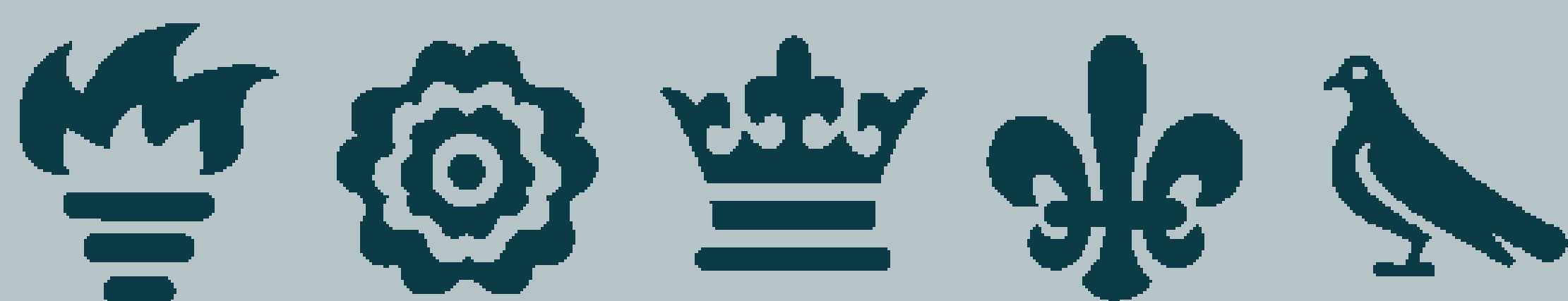
Review by other courts (national and international):

- Other courts apply their own law, whether national law or that mandated by their constituent treaty. International law and the Charter may be applied but are unlikely to take precedence.. National implementing legislation, rather than the relevant SC resolution, will be the subject of the court's scrutiny. See, e.g. *Diggs v Schultz* (1972) 11 ILM 1252 and *Kadi v Council & Commission* [2008] ECJ C-415/05.
- Some national courts may also be unwilling to review SC resolutions for separation of powers reasons: see, e.g. *CND v Prime Minister* [2002] EWHC 2777 (Admin).
- Some international courts may consider that as they are not members of the United Nations they are not bound by the UN Charter.

States' "right of last resort" to review (and refuse to comply with) SC resolutions:

Art. 25 of the Charter can be interpreted at least three different ways, so it is difficult to find definite textual support for a right to interpret and review the legality of SC resolutions. Nevertheless, in the absence of any judicial body able to undertake the task, there are only two options: that the power rests with the Security Council or with the UN member States. Leaving the issue to the Council would mean – practically if not legally – that it is unbound. By default, it might be thought, States must have a right of last resort to review SC resolutions.

This situation is still problematic. It would seem to require States to act in good faith (which cannot always be presumed). In addition, If different States take different views on the legality of a particular resolution, then either some are right and some are wrong (but which?); all are right (which would mean that the contested resolution is simultaneously valid and invalid); or all are wrong. This has led States to act collectively, in particular by adopting resolutions in international organisations.



THE UNIVERSITY OF HULL

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States' Right of Last Resort: An Example:

Approaches to the ambit of the Security Council's powers are often framed as being divided between theoretical analyses based on abstract interpretations of the Charter divorced from reality and those based on the practice of the Organisation and of States. However, there is relevant practice in support of my argument.

The *Lockerbie* and *Genocide Convention (Bosnia/ Serbia)* Cases: Two Perspectives

1. The relationship between the Security Council and the ICJ (whether the ICJ can judicially review decisions of the Council)
2. States' and international organisations' views as to the legality of the relevant SC resolutions (whether States consider they have a "power of last resort" to determine the legality of Council decisions)

The *Lockerbie* Cases (Libya/US and Libya/UK)

In its order of 14 April 1992, the ICJ refused to indicate provisional measures, holding that, by virtue of the operation of Articles 25 and 103 of the UN Charter, the obligations set out in SC res. 748 (1992) trumped those under the Montreal Convention, at least *prima facie*. In its judgment on jurisdiction and admissibility of 27 February 1998, the Court, however, reserved final determination of the issue for the merits stage. Both cases were subsequently discontinued.

The *Genocide Convention (Bosnia/FRY)* Case

In its orders of 8 April and 13 September 1993 on Bosnia's requests for provisional measures, the ICJ avoided ruling on Bosnia's claim that SC res. 713 (1991) (which imposed an arms embargo on the whole of the former Yugoslavia) impaired its inherent right of self-defence and its obligation to protect its people from genocide on the basis that the measures sought were beyond the scope of the Genocide Convention and were addressed to States and other entities not party to the proceedings.

SC sanctions against Libya

At its 34th session in June 1998, the Assembly of Heads of State and Government of the Organisation of African Unity (composed, at the time, of 53 member States) decided, from September 1998, no longer to comply with the sanctions regimes established by SC res 748 (1992) and 883 (1993), on the ground that the resolutions "violate[d] Article 27 paragraph 3, Article 33 and Article 36, paragraph 3 of the United Nations Charter".

The SC arms embargo on the former Yugoslavia

At the 7th Islamic Summit in December 1994, the Heads of State and Government of the (then 48) member States of the Conference of the Organization of the Islamic Conference demanded that the Government of Bosnia-Herzegovina "be provided with all necessary means for self defense to exercise ... its inherent right recognized by Article 51 of the UN Charter", claiming that SC res. 713 (1991), paragraph 6 (the arms embargo) did not "legally" apply to Bosnia-Herzegovina and proclaiming its commitment to "act accordingly". (This was the interpretation argued by Bosnia in the *Genocide Convention* Case, which was premised on the view that to interpret the embargo as applicable to Bosnia would render the resolution *ultra vires*.)

Some Conclusions:

In each case, Security Council decisions were challenged both within and without of the United Nations, in judicial and diplomatic fora. Moreover, the Security Council itself was only indirectly addressed. Instead, an appeal was made - with some success - to a wider community of States.

Throughout, however, challenges were made in legal terms based on what the UN Charter was said to require. Whether such arguments were made in good faith is, perhaps, irrelevant. They served successfully to delegitimize the Council's actions.

