The Security Council

The Authority of the Security Council over Non-Members

The Security Council occupies a unique position within international affairs. One of the unique facets of the post-1945 legal order is that the use of force by States is prohibited on the international plane except in cases of consent, self-defence and, most notably, Security Council authorisation. Indeed, it is often stated that the Security Council is the only actor which can use force in international law. Although that assessment is, almost certainly, accurate, it should nevertheless be seen as surprising. After all, the Security Council is an organ of the United Nations. It was created under the UN Charter, and its authority is based on conventional law, synallagmatic obligations between the State parties. Nevertheless, the prohibition on the use of force (also a product of the Charter) has become a general obligation under customary law (and may have acquired jus cogens status). In parallel, the Security Council appears to have interpreted its role as to maintain peace and security in the international community as a whole, and not simply within the community of Charter members. In order to accomplish that task, it has exercised, sought to exercise or shown willingness to exercise authority under both Chapters VI and VII of the Charter over States non-members and over non-State and sub-State actors.

The resolutions of the Council selected below demonstrate either an attempt by the Council to exercise authority or demonstrate its belief that it is competent to exercise authority over a non-Party (in some cases, such as Israel and Jordan in Resolution 101 (1953), a State non-member and in other cases, such as ISIL in Resolution 2170 (2014), a non-State actor). The Security Council's wide interpretation of its mandate has been accepted both by the ICTY, in the Dusco Tadić decision, and by the ICJ, in its Kosovo advisory opinion. Its power to bind non-Members has not been universally accepted, however. Before Switzerland joined the organisation in 2002, its position was that as a non-member it could not be bound by the Security Council's decisions.

For obvious reasons the position of the Security Council within the international legal order is of great importance, and never more so than now, when international peace and security faces a number of growing threats from non-State actors such as international criminal organisations and non-State-aligned militias such as ISIL.

- Charter of the United Nations.
- UNSC Res 32/1947 (26th August 1947) – Netherlands/Indonesia).
- UNSC Res 82 (1950) – North Korea/South Korea.
- UNSC Res 101 (1953) – Israel/Jordan.
- UNSC Res 221 (1966) – Southern Rhodesia.
- UNSC Res 743 (1992) – Yugoslavia.
- UNSC Res 733 (1992) – Somalia.
- UNSC Res 2170 (2014) – Islamic State (ISIL).
- Statement by the President of the Security Council, 24 February 2010. UN Doc S/PRST/2010/4.
- Prosecutor v Dusco Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (1996) 35 ILM 35) .
- Note Verbale dated 22 August 1990 from the Chargé d'affaires a.i. of the Permanent Observer Mission of Switzerland to the United Nations addressed to the Secretary-General, UN Doc S/21585.

- Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, (2010) ICJ Reports 403 [115-119].

Judicial Review of Security Council Decisions

'The Security Council is not a body that merely enforces agreed law. It is a law unto itself. If it considers any situation as a threat to the peace, it may decide what measures shall be taken. No principles of law are laid down to guide it; it can decide in accordance with what it thinks is expedient.' (Dulles, John Foster, War or Peace (Macmillan 1950) 194-195.)

The Security Council is one of the most powerful actors in modern international law. The Charter of the United Nations grants the Council a wide discretion to declare a situation to be a 'threat to international peace and security', and to respond to that situation. It has the authority to mandate the use of force against a State, to permit the (otherwise illegal) use of force by a State, and to require action by a State. It remains unclear, however, to what extent the Council's powers are limited and, if its power are limited, to what extent those limits can be enforced. The documents selected are some of the most significant judicial and academic contributions to that debate.

The major judicial statements on the subject at the international level have been made in separate and dissenting opinions. The ICJ has had the opportunity to consider the question but has not, as yet, considered it necessary to make any pronouncement. Judges Bedjaoui and Weeramantry and Judge ad hoc Lauterpacht have given indications that, in their opinion, the Court is capable of reviewing the acts of the Security Council, and those wishing to explore this question in greater detail should consult Bedjaoui's extrajudicial work, The New World Order and the Security Council. At the regional level, however, the European Court of Justice has, indirectly, reviewed the actions of the Security Council in its decisions in Kadi. Kadi challenged the legality of European Council Regulation 881/2002, which implemented UNSC Res 1267(1999): the question for the ECJ was not the legality of the Security Council Resolution directly, therefore, but the legality of the implementing measures adopted by the European Council. The Court of First Instance found that implementing measures of Security Council Resolutions can be reviewed, but only for conformity with jus cogens (which it found did not apply to the instant case). The Grand Chamber, however, took a more expansive view, finding that compliance with human rights norms should also be established.

- Charter of the United Nations, 1945, Chapter VI-VII.
- Akande, Dapo, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46(2) *International and Comparative Law Quarterly* 309.
- Bedjaoui, Mohammed, *The New World Order and the Security Council: Testing the Legality of its Acts* (Martinus Nijhoff Publishers 1994), Chapter 1.
- *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America; Libyan Arab Jamahiriya v. United Kingdom of Great Britain and Northern Ireland)*, Order of 14 April 1992 on the Request for the Indication of Provisional Measures, Dissenting Opinion of Judge Bedjaoui, (1992) ICJ Rep 143, esp. [25-27].

- *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America; Libyan Arab Jamahiriya v. United Kingdom of Great Britain and Northern Ireland)*, Order of 14 April 1992 on the Request for the Indication of Provisional Measures, Dissenting Opinion of Judge Weeramantry, (1992) ICJ Rep 160, 170-171.
- *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order of 13 September 1993 on Further Requests for the Indication of Provisional Measures, Separate Opinion of Judge ad hoc Lauterpacht, (1993) ICJ Rep 407, [98-104].

Kadi and Al Barakaat v Council and Commission:

- *Yassin Adbullah Kadi v Council of the European Union and Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland intervening*, Case T-315/01, Judgement of the Court of First Instance, [2005] ECR II-3649.
- *Yassin Abdullah Kadi v Council of the Euorpean Union and Commission of the European Communities*, Case C-402/05 P, Opinion of Advocate General Poiares Maduro, 16 January 2008.
- *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Kingdom of Spain, French Republic, Kingdom of the Netherlands and United Kingdom of Great Britain and Northern Ireland intervening*, joined cases C-402/05 P and C-415/05 P, Judgement of the Grand Chamber 18 July 2013, [2014] 1 C.M.L.R 24.
- Finlay, Lorraine, 'Between a Rock and a Hard Place: The Kadi Decision and Judicial Review of Security Council Resolutions, (2009-2010) 18 Tulane Journal of International and Comparative Law 477.