

A Willing International Federalist?

The UK's Pivotal Role within the United Nations

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I. Introduction

At the outset of his 2006 analysis of the past, present and future of the United Nations, the historian Paul Kennedy cites the poem by Alfred Lord Tennyson, 'Locksley Hall', published in 1837. A few lines from that poem are quoted here:

For I dipt into the future, far as human eye could see,
 Saw the vision of the world, and all the wonders that would be;
 ...
 Till the war-drum throb'd no longer, and the battle flags were furl'd
 In the Parliament of Man, the federation of the world.

There the common sense of most shall hold a fretful realm in awe,
 And the kindly earth shall slumber, lapt in universal law.

Kennedy concludes that the UN General Assembly comes closest to the idea of a 'Parliament of Man',¹ seating representatives of all 193 Member States, but its powers are weak in comparison to the Security Council, the 'executive' organ of the UN, which in turn seats the executives of the five permanent members (including the UK), along with those of 10 non-permanent members. Nonetheless, the composition, functions and powers of the principal political organs of the United Nations seem to fall a long way short of the 'federation of the world' dreamt of by Tennyson.

¹ P Kennedy, *The Parliament of Man: The Past, Present and Future of the United Nations* (London, HarperCollins, 2006) 208.

It is unusual to discuss the United Nations as the central component in a federalising international order but it must be remembered that ‘federalism’ is not a precise concept. Livingston wrote in 1952 of a ‘spectrum of federal societies’; stating further:

This is no less true of federalism than it is of any other form of political organisation. Federalism is a function not of constitutions but of societies. Viewed in this way, it will be seen that federalism is not an absolute but a relative term; there is no specific point at which a society ceases to be unified and becomes diversified.²

Eschewing any standard definition of ‘federalism’ at the outset, this chapter explores the use of the term, and other forms of organisation, in the context of the League of Nations and the United Nations, focusing in particular on the UK’s role in shaping those organisations and being a key member of them. The question then raised is whether harnessing the coercive powers of enforcement given to the Security Council is evidence of a federalising international order, moreover one with the potential to bypass the rule of law in the UK? As with federalism, the concept of the ‘rule of law’ is contested but for the purposes of this chapter is deployed in the broad sense identified by Waldron: that ‘respect for the law can take the edge off human political power, making it less objectionable, less dangerous, more benign and more respectful’.³ Rule of law compliance is a term used in this chapter to indicate that the balance between politics and law, particularly in the context of decision-making, leans more towards compliance with legal principles, norms and rules than policies, power, political expediency or discretion.

The chapter considers how the UK combines arguments of the supremacy of security obligations produced by decisions of the Security Council with executive expediency with the result that decisions at the level of the Security Council are implemented in a way that is not rule of law compliant. The chapter could have centred upon decisions to use force under UN auspices, when arguments that deployment of UK troops or military assets take place under a UN mandate win over Parliament and the Courts.⁴ Rather the choice has been to focus attention on non-forcible measures

² WS Livingston, ‘A Note on the Nature of Federalism’ (1952) 67 *Political Science Quarterly* 81 at 88. See also I Bernier, *International Legal Aspects of Federalism* (London, Longman, 1973) 3–6.

³ J Waldron, ‘Is the Rule of Law an Essentially Contested Concept?’ (2002) 21 *Law and Philosophy* 137 at 159.

⁴ See ND White, *Democracy Goes to War: British Military Deployments and International Law* (Oxford, Oxford University Press, 2009) 82–112.

mainly because they go further than authorisations to use force in that they impact internally within the domestic legal order.

The danger highlighted in this chapter is that, rather than the earth being covered by universal laws agreed to by all nations as envisaged by Tennyson, 188 nations are being ruled by five, at least on security matters and, moreover, ruled by an organ whose responsibility is for enforcing and keeping the peace rather upholding international law. The chapter examines the UK's engagement and interaction with the UN's political and legal order in order to discern evidence of the development of a rudimentary international federal structure. In particular, the move since 1999 towards targeted sanctions as well as more general Security Council legislation against terrorism has enabled the UK to implement laws without any real accountability. Judicial accountability has increased, however, but is either readily by-passed or is not strong enough. In contrast with its approach to the EU, where it was a reluctant international federalist until the recent referendum in June 2016 and will now withdraw from that federalising order in the next two to three years, the UK's position as a permanent member of the Security Council means that it is a willing participant in such developments, although it would not recognise the use of federal terminology in this context. While the UK is anti-federalist in the context of the EU, it is generally pro-internationalist, but not explicitly pro-federalist, in the context of the UN.

In order to understand and assess the development of a rudimentary form of federalising international legal order through the UN the chapter contrasts the UN Charter with its predecessor, where debates about possible federal structures gave way to a cooperative model. The early sections show how the UN Charter was a radical departure from the consensual approach embodied in the Covenant, which contrasts with the orthodox portrayal of the Charter as simply an improvement on the Covenant. The chapter then examines how non-forcible measures are brought within the UK legal order through the United Nations Act 1946, and how the implementation in the UK of targeted sanctions and legislative measures imposed by the Security Council have departed from the original intent of that Act. The chapter then shows how that change of use has been combined with sustained arguments by the UK government that obligations arising under the UN Charter prevail over other treaty obligations, including under human rights treaties, to introduce a draconian system of sanctions against listed individuals within the UK legal order, and how both the legal and political order has

failed to provide these individuals with adequate protection from the state. The chapter concludes by arguing that for this growing international form of federalism to be rule of law compliant requires greater critical scrutiny of executive action by both Parliament and the judiciary.

II. The UK and the League of Nations

At the end of the First World War there was a debate amongst statesmen and other leading figures about ways to secure peace in Europe, whether by a universal association of states (the League of Nations model), which would not threaten sovereignty, or by a regional federation, which might. Giovanni Agnelli, founder of the FIAT motor company, and Attilio Cabiati an Italian economist, argued:

Without hesitation we believe that, if we really want to make war in Europe a phenomenon which cannot be repeated, there is only one way to do so and we must be outspoken enough to consider it: a federation of European states under a central power which governs them. Any other milder version is but a delusion.⁵

While the experiment in European union did not start until after the Second World War, the League of Nations became a reality in 1919. The League of Nations was not conceived as a federation even by its most ardent supporters, but it did facilitate the continuation of existing federations in the form of empires. US President Wilson, credited with being the idealist behind the Covenant, held views that were tainted with a belief in the supremacy of ‘white civilization’.⁶ In this respect Wilson shared a vision of the ‘civilising’ mission of white peoples with the victorious colonial powers—Britain and France—as well as the South African statesman, Jan Smuts, who was very influential in shaping both the League of Nations’ Covenant of 1919 and the UN Charter of 1945.

Smuts argued in 1917 that a Commonwealth of Nations should emerge from the British Empire, which he described as the ‘only successful experiment in international government’, making it clear that the ‘Commonwealth’ would be a continuation of empire, albeit an ‘enlightened’ one, where non-white peoples would be under the

⁵ G Agnelli and A. Cabiati, *Federazione europea o lega delle nazioni?* (Turin, Fratelli Bocca, 1918), in (1989) 31 *The Federalist* 71.

⁶ A Tooze, *The Deluge: The Great War and the Remaking of World Order* (London, Penguin, 2015) 60, 92.

tutelage of democratic civilised nations.⁷ Smuts rejected the autocratic military imperialism of Germany in favour of a liberal form of imperialism offered by Britain, and it was that view which was preserved not only by the Covenant in 1919 but, arguably, also by the UN Charter of 1945,⁸ at least until the General Assembly adopted the Declaration on Decolonisation of 1960.⁹ As will be seen, the UN Charter contained pro-federal provisions in matters of security but, in 1945 at least, it did not attempt to dismantle empires.

One view of the First World War was that it was a fight for empire: Germany was fighting to gain an empire, while the UK and France were fighting to keep theirs. In August 1916 Wilson spoke of ‘England having the earth and of Germany wanting it’.¹⁰ The First World War was in part a battle to continue empires, a dispute over their ownership; it was not a dispute to remove that model at least until the US, in particular President Wilson, became involved. Even his vision did not contain a clear declaration of democracy and self-determination for all, but a ‘gradated view of the capacity for self-government that was typical of nineteenth-century liberalism’.¹¹ However, but ideologically his vision remained a more radical form of liberalism than the ‘imperial liberalism’ offered by the colonial powers.¹²

The surrender of Germany in 1918 was as much due to a collapse of its economy as it was to a military victory by the Allies,¹³ so it is not surprising that the first attempt at a world organisation put emphasis on economic sanctions as a means of ensuring compliance with the norms of the Covenant and that, beyond an acceptance that naval blockades would enforce sanctions, collective military action was kept as a much more vague concept in the background.¹⁴ Prime Minister Clemenceau of France argued for an international army, reflecting French concerns about future German aggression, but

⁷ M Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton, Princeton University Press, 2009) 37–45.

⁸ *ibid* at 63–65.

⁹ UN Doc A/RES/1514 (1960).

¹⁰ Tooze above n 6 at 45.

¹¹ *ibid* at 5 121. See President Woodrow Wilson’s Fourteen Points, 8 January 1918, Point 5.

¹² *ibid* at 179.

¹³ *ibid* at 39.

¹⁴ Art 16 League of Nations Covenant 1919.

these were not acceptable to the British and the Americans.¹⁵ The right to go to ‘war’, although curtailed by the terms of the Covenant at least, was ultimately remained a decision for each sovereign state.¹⁶

Nonetheless, the Covenant was arguably a purer expression of ‘peace through law’ than its successor: this was in part explained by the vestiges of Wilsonian idealism that remained in the final draft; in part by a shared belief that correct and open legal procedures would have prevented the outbreak of the Great War; in part because it more accurately reflected the limited nature of international law than its successor; and finally, in part, because it was not premised on a totally vanquished enemy. Although the Treaty of Versailles has since been seen as notorious for the reparations it imposed on Germany,¹⁷ it, and the Covenant which was part of it, were premised on respect for Germany as a nation state,¹⁸ (although Germany’s period of membership of the League only lasted from 1926–33). In contrast, the total defeat of Germany at the end of the Second World War led to its dismemberment, a condition that prevailed until the end of the Cold War. The Covenant had respect for sovereign equality at its heart, at least amongst what Wilson would have called the nation states of ‘white civilisation’, while the UN Charter was premised on Great Power supremacy and the complete defeat and rebuilding of ‘enemy’ states in the liberal democratic mould.

In summary, the League of Nations Covenant was reaction to the First World War in that it was constructed in a way to prevent such a war, but it was constructed on the basis that what was needed was better inter-governmental cooperation between European rivals rather than the creation of any international federal structure, though it did preserve federal-like empires. It did not anticipate the sort of radical belligerence of Nazi Germany, or indeed the rise of an ideologically driven Soviet Union. While the Allies agreed to an armistice with Germany in November 1918, nothing short of complete annihilation of Germany was acceptable in 1945. While the League was envisaged as a form of cooperation between sovereign equals based on the rule of international law as it then stood (with empire at its heart), the UN was envisaged as a

¹⁵ Tooze above n 6 at 264.

¹⁶ See, for example, Art 12 League of Nations Covenant 1919.

¹⁷ Tooze above n 6 at 249.

¹⁸ *ibid* at 272.

continuation of the international executive created to combat Axis aggression formed by the Allies in 1942;¹⁹ in which stress was given to threats to the peace rather than breaches of international law. In contrast to the UN, the League ‘could not be formed during the war since that would make it into an instrument of the victors’.²⁰ In contrast to the UN Charter, the first draft of the Covenant was ‘put together in a matter of a fortnight’ by the League of Nations Commission in February 1919, after the war had ended.²¹ In some ways the UN could be seen as a move away from law, when compared to the League, but on the other hand the League was seen as a failure and the Covenant too weak to provide anything like a system of collective security. That required a move towards supranationalism in the Security Council of the UN, arguably sowing within it the seeds of federalism.

III. The Covenant and the Charter

It is commonly assumed that the second experiment in universal collective security—the United Nations—remedied the defects of the League of Nations. However, in addressing the deficiencies of the League the founding states of the UN attributed powers to the Security Council that were outside (or exceptional to) the existing structures of international law. Even as the network of consensual international laws rapidly expanded post-1945, the Security Council, though largely inactive during the Cold War, was empowered to make legally binding decisions that could cut through or by-pass that network. It is worth considering the constitutive treaties of the League and the UN as a comparative exercise to demonstrate that, despite changes in nomenclature they are in some ways different versions of the same thing, but with one profound difference—the insertion of a new form of legal power that combined great power politics and supranationalism.

Writing in 1947, Goodrich, one of the leading commentators on the Charter, was keen to point out that there was clear continuation between the League and the UN. Goodrich saw both as ‘cooperative enterprises falling within the category of leagues

¹⁹ Declaration by the United Nations, 1 January 1942.

²⁰ Tooze above n 6 at 223.

²¹ *ibid* at 255.

and confederations’,²² with one exception. The exception was the presence of collective enforcement action by the UN Security Council, which could be taken against the will of a Member State or States.²³ Nonetheless, Goodrich saw the League as a continuation of the Concert of Europe of 1815, and the UN as a continuation of the League: the UN is seen as ‘the continued application of old ideas and methods with some changes deemed necessary in the light of past experience’.²⁴

Writing in 1946 Brierly, on the other hand, analysed the UN not as a continuation of the League in terms of improving the cooperative model of collective security, but as a radically different experiment in international organisation.²⁵ The League of Nations, although based on a constitutional document,²⁶ only set up an association of states, it did not purport to set up the beginnings of a system of world government. The League’s effectiveness depended upon the ‘conduct of the members individually’, and their willingness to comply with their obligations; meaning that they could ‘not be made to act together, and a majority of them’ could ‘not decide or act for the whole body’.²⁷ References in the Covenant were to the ‘members of the League’, who undertook to act in certain ways, except for Article 11(1), which stated that the ‘League shall take any action that may be deemed wise and effectual to safeguard the peace of nations’—dismissed as a ‘mere slip in drafting’ by Brierly.²⁸ Sovereign equality for independent states meant exactly that under the Covenant; whereas under the UN Charter, there was a distinct move away from ‘the purely cooperative basis of international organization’,²⁹ and, it is argued here, from the consensual basis of international law, which is one of the reasons why the Charter is so much longer than the Covenant (111 articles compared to 26). The Covenant contained the outlines of a Constitution, enabling members to adjust the workings of the Council and Assembly to

²² LM Goodrich, ‘From League of Nations to United Nations’ (1947) 1 *International Organization* 3 at 8.

²³ *ibid* at 10.

²⁴ *ibid* at 5.

²⁵ JL Brierly, ‘The Covenant and the Charter’ (1946) 23 *British Yearbook of International Law* 83.

²⁶ AD McNair, ‘The Functions and Different Legal Character of Treaties’ (1930) 11 *British Yearbook of International Law* 100 at 112.

²⁷ Brierly above n 25 at 85.

²⁸ *ibid*.

²⁹ *ibid*.

suit, whilst the Charter contained details on the powers of each UN organ, and gave decision making competence to the Security Council.³⁰ In this respect Brierly went much deeper in his analysis of the Charter than Goodrich. For Brierly, the move towards greater constitutionalisation and institutionalisation in the Charter was fraught with problems.

The first draft of the UN Charter, the Dumbarton Oaks proposals of 1944, was essentially predicated on Germany and Japan continuing to pose the greatest threat to world peace, as they were still immensely powerful (at least outwardly) in 1944—hence the draft captured idea of a police force for the world based on the continuation of the alliance of the Second World War into the post-1945 era. In contrast to the First World War that had been stumbled into, the Second World War involved planned aggression and, therefore, required executive-style government to prevent it happening again. The consensus at Dumbarton Oaks and San Francisco wrongly assumed that the ‘wartime unity of purpose among the Great Powers would be a permanent feature of their international relations’.³¹

Brierly saw the clear political differences within the permanent membership as a fatal flaw: ‘the Covenant scheme had weaknesses ... and perhaps it might not have worked even if it had been given a fair trial’,³²

but we must realize that what we have done is to exchange a scheme which might or might not have worked for one which cannot work, and that instead of limiting the sovereignty of states we have actually extended the sovereignty of the Great Powers, the only states whose sovereignty is still a formidable reality in the modern world.³³

Brierly’s criticism is based on the permanent members failing to cooperate, something which largely proved to be correct for the first 45 years of the UN’s existence. Whereas he did foresee the potential for world government within the Charter he did not foresee its actualisation.

The fact that the Charter was more clearly based on the power politics of the post-Second World War period, and that it has helped cement those configurations of power and imbue them with the potential not only to enforce peace and security but

³⁰ Art 25 UN Charter 1945.

³¹ Brierly above n 25 at 91.

³² *ibid* at 91–92.

³³ *ibid* at 93.

also to make binding laws, explains its survival but, unfortunately, it did not signify an advancement in international law. While we might point to the ban on the use of force in the Charter being normatively stronger than the qualified ban on aggression in the Covenant,³⁴ the fact is that this has not prevented great power aggressions on a regular and continuing basis: not only during the Cold War, but in the post-Cold War period, for example: in Iraq 2003, Georgia 2008 and Ukraine 2014. The Covenant may have been ineffectual, and it may have been flawed, but it did signify the start of an era of constitutionalist thinking in international relations and law, one where a world order built on fundamental principles of law might be envisaged.

In contrast, the normative strengths of the Charter, found particularly in its principles in Article 2, were undermined by the centrality of the Security Council to those principles. The ban on the threat or use of force in Article 2(4) had an exception in the right of self-defence for states in response to armed attacks in Article 51, but had a much broader exception in the shape of military action undertaken by the Security Council under Article 42. The principle of non-intervention by the UN in domestic affairs, found in Article 2(7) of the Charter, was inapplicable when the Security Council was taking enforcement action under Chapter VII. The triggers for Security Council action were not actual or potential breaches of international law, but threats to or breaches of the peace (Article 39); and, lastly, obligations upon states created under the Charter by Security Council decisions (Article 25) were potentially superior to other conflicting obligations by virtue of the primacy clause (Article 103); meaning that obligations created to deal with security matters potentially prevail over conflicting binding treaty commitments. While in domestic legal orders, rights may be overridden in extreme emergencies (eg to prevent the spread of fire or disease),³⁵ under the UN system the sense of emergency predominates, meaning that legal rights and duties are weakened and always potentially overridden by political decisions on matters of security, albeit ones having legal effects.

Of course Brierly was right in the sense that the veto provides a real political check on the extensive use of supranational powers by the Security Council under Chapter VII, but the potential is there when the deadlock is broken to create a form of

³⁴ Compare Art 2(4) of the UN Charter 1945 with Art 10 Covenant of the League of Nations 1919.

³⁵ H Kelsen, *Collective Security under International Law* (Washington, Naval War College, 1957) 102.

supranationalism, particularly when post 9/11 consensus was achieved over responses to security threats such as terrorism, foreign fighters and weapons of mass destruction. These are indeed security concerns, but the Security Council is empowered to tackle them, not simply as an executive body taking action to enforce existing norms, but rather as a central political organ acting as a ‘governing board’ with both law-making and executive powers,³⁶ so that by determining that there exists a threat to the peace, breach of the peace, or act of aggression, it can create obligations binding on the wider membership, and enforceable by means of a range of non-forcible and forcible measures.³⁷

IV. The UK and the UN

There were certainly ambitious ideas for international organisation debated in the UK Parliament towards the end of the Second World War. War-time Prime Minister Winston Churchill spoke in visionary terms in May 1944 about the intention to ‘set up a world order and organisations, equipped with all the necessary attributes of power, in order to prevent the breaking out of future wars, or the long planning of them in advance, by restless and ambitious nations’. This would require ‘a World Council, a controlling Council, comprising the greatest States which emerge victorious from this war’ as well as a ‘World Assembly of all Powers’.³⁸ The leader in *The Times* of 27 June 1945 summed up the mixture of ‘hopes and misgivings’ surrounding the debates around the adoption of the UN Charter:

It is far more widely recognized than it was in 1919 that no international instrument, no constitutional specific, will suffice to maintain peace ... The Charter by itself is nothing, if it fails to rally the loyalty of the major Powers who alone can give it body and life.³⁹

³⁶ HG Schermers and NM Blokker, *International Institutional Law* 5th edn (Leiden, Nijhoff, 2011) 310–15.

³⁷ Arts 25, 39, 41 and 42 UN Charter 1945.

³⁸ Hansard, HC Debates, vol 400, col 784, 24 May 1944.

³⁹ Cited in GL Goodwin, *Britain and the United Nations* (Oxford, Oxford University Press, 1957) 45–46.

Nonetheless, in August 1945, in presenting the Charter to the House of Commons for approval, Prime Minister Clement Attlee foresaw the Security Council as embodying the centralisation of force as well as methods of dispute settlement:

The British delegation [at San Francisco] took a foremost part in seeking to make the Security Council something more than a policeman who is called in when there is already a danger of a breach of the peace. We sought, and sought successfully, to make it a place where the policies of States, and especially the greater States, could be discussed and reconsidered for the time, especially when they showed signs of divergencies as to threaten the harmony of international relations. Collective security is not merely a promise to act when an emergency occurs, but it is active co-operation to prevent emergencies occurring ...⁴⁰

There is some evidence that British leaders saw the UN, in particular the Security Council, as a form of supranational power or, perhaps more reluctantly, a federation of great powers, in which the UK, along with the other permanent members, exercised powers rather than being subject to them.

The powers granted to the ‘federal government’ element of the UN are vast. The right or power of a federal government to use force within constituent states in order to maintain security and stability is a deeply problematic one even within established federal states (eg Russian use of force in Chechnya), but even more so when the right is exercised at the international level. Nonetheless, the Security Council was granted the power to forcefully intervene in Member States under Chapter VII of the UN Charter. However, the UK’s position as one of the permanent members of the UN Security Council signifies that it cannot be the direct object of UN intervention against its will, thereby limiting the effects on the UK of the supranational powers of the UN provided for in the Charter.

During the Cold War, the effects of obligations created by the Security Council on the UK were limited to duties to carry out measures in the rare instances when they were adopted against other states. The UK used its permanent seat to protect it from intervention in a variety of ways, not always involving the use of the veto.⁴¹ For instance in 1969, the Republic of Ireland requested a meeting of the Security Council to consider the situation in Northern Ireland with a view to deploying a UN peacekeeping force to the province because of the serious disturbances caused by the alleged denial of civil

⁴⁰ Hansard HC Debates, vol 413, col 665, 22 August 1945.

⁴¹ Contained in Art 27(3) UN Charter 1945.

rights to the minority Catholic community.⁴² Although the question was not even put on the agenda of the Security Council, the UK ambassador, Lord Caradon, was sufficiently perturbed that he justified the closing down of any discussion of Northern Ireland on the grounds that it was purely a domestic matter and so there was no threat to international peace.⁴³ Any proposal would have been vetoed by the UK in any event but the UK was able to use its position to prevent the matter progressing that far. Similarly in the situation in Southern Rhodesia in 1965, the UK initially used its position to prevent discussion of the matter on the basis that this was a domestic matter,⁴⁴ until it had clearly lost control over its colony following the unilateral declaration of independence by the white minority regime in 1965. Thereafter, the UK was active in seeking, and gaining, support for the imposition of comprehensive sanctions against Rhodesia,⁴⁵ and also the enforcement of the oil embargo element by means of an authorisation to intercept oil supplies reaching Rhodesia through the port of Beira in Mozambique.⁴⁶

The potential loss of the permanent seat by the UK in a future reformed Security Council would mean that UN-authorized intervention against it would become possible. The referendum on Scottish independence of 2014 caused speculation in regard to the permanent seat.⁴⁷ UN practice indicates that when a state breaks away from another, the new state has to apply for membership of the UN, while what remains of the old state continues membership particularly if it is the larger unit.⁴⁸ This would indicate that the (rump) UK would continue its seat in the UN, but it might not be able to control challenges to its permanent seat on the Security Council, given that the claims of Germany, Japan, Brazil and many others are simmering not far from the surface as the membership of the Security Council is long overdue a significant overhaul.

⁴² UN Doc S/9394 (1969).

⁴³ UN Doc S/1503 mtg (1969).

⁴⁴ ND White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* 2nd edn (Manchester, Manchester University Press, 1997) 39–40.

⁴⁵ UN Doc S/RES/232 (1966).

⁴⁶ UN Doc S/RES/217 (1965) UN Doc S/RES/221 (1966).

⁴⁷ See, for example, House of Commons Foreign Affairs Committee, 'Foreign Policy Considerations for the UK and Scotland in the Event of Scotland Becoming an Independent Country', Sixth Report of Session 2012–13, HC 643, 23 April 2013.

⁴⁸ B Conforti, *The Law and Practice of the United Nations* 3rd edn (The Hague, Kluwer, 2005) 44–45.

V. Legislating for Executive Action: The United Nations Act 1946

The UN Charter's provisions on the centralisation of the use of force under UN command are indicative of an intent to create a central power with military forces at its disposal,⁴⁹ but the failure to agree the military arrangements necessary to make this a reality meant that UN authorised military action remained decentralised and based on states volunteering for UN action. The Cold War prevented such actions being authorised, with the singular exception of the Korean War that broke out in 1950 when, in the absence of the Soviet Union, the Security Council recommended that military action be taken to repel the attack against South Korea and to restore international peace and security in the area.⁵⁰ The UK supported the resolution and contributed significantly to the campaign against North Korea. Those forces, although US-led, were commonly known as 'United Nations forces'.⁵¹ The UK was also instrumental in drafting a General Assembly Resolution that supported the unification of Korea,⁵² leading to military action in the north that provoked massive Chinese intervention, which eventually led to a cessation of hostilities along the 38th parallel in 1953.

The UK's sovereignty was not affected by the Charter's provisions on collective military security in that under the system that has emerged the UK cannot be obliged to provide troops. In contrast, Parliament provided for the rapid incorporation into domestic law of obligations to undertake non-forcible measures (sanctions) arising from decisions made under Article 41 of the UN Charter, in the shape of the United Nations Act 1946. Section 1 of that Act provides:

If, under Article 41 of the Charter of the United Nations signed at San Francisco on 26 June 1945 (being the article which relates to measures not involving the use of armed force) the Security Council of the United Nations calls 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

⁴⁹ Arts 42–47 UN Charter 1945.

⁵⁰ UN Doc S/RES/83 (1950).

⁵¹ See, for example, memorandum by UK Foreign Secretary Bevin, Cabinet Office Paper CAB 129/41, CP(50) 193, 31 August 1950, paras 5–8; in A Farrar-Hockley, *The British Part in the Korean War: Volume I A Distant Obligation* (London, HMSO, 1990) 192–93.

⁵² UN Doc A/RES/376 (1950).

applied, including ... provision for the apprehension, trial and punishment of persons offending against that Order ...

It was envisaged that Member States would be obliged to enforce UN sanctions against a target state, but that would necessitate incorporation of those obligations into the domestic laws of the sanctioning states; by, for example, prohibiting persons or companies within their jurisdiction trading or having other forms of commercial, economic or financial relations with or within the target state. The target of the sanctions would be a state that the Security Council determined had threatened or breached international peace, not individuals or companies, although if individuals or companies traded or otherwise commercially, financially or economically interacted with the target state they should be punished within the domestic legal orders of Member States. This was the basis upon which both the House of Lords and the House of Commons welcomed the United Nations Bill when it was introduced in 1946, the government declaring that Article 41 was the only Charter provision that required immediate legislation to enable the UK to fulfil its obligations under the Charter.⁵³

In the *Ahmed* case of 2010,⁵⁴ the first case decided by the UK Supreme Court, and one involving a new form of UN sanctions—measures targeted directly at individuals—Lord Hope stated that

there was no indication during the debates at the Second Reading in either House [in 1946] that it was envisaged that the Security Council would find it necessary under article 41 to require states to impose restraints or take coercive measures against their own citizens.⁵⁵

Parliamentary debates in 1946 indicated that the form of incorporation into domestic law—by an Order in Council made by the executive that was not subject to Parliamentary scrutiny—was a procedure that had ‘the necessary combination of speed and authority to enable instant effect to be given to the international obligations to which we are pledged’.⁵⁶ Those debates made it clear that non-forcible measures were directed against states.⁵⁷ As Lord Hope stated in the *Ahmed* case: ‘the use of the power

⁵³ Hansard, HL Debates, 12 February 1946, vol 139, cols 373–75; Hansard HC Debates, 1946, vol 421, col 1516.

⁵⁴ *Her Majesty's Treasury v Mohammed Jabar Ahmed and Others* [2010] UKSC 2.

⁵⁵ *ibid* at para 16.

⁵⁶ Hansard, HC Debates, 1946, vol 421, col 1517 (Morrison).

⁵⁷ *Ahmed* above n 54 at para 44.

as a means of imposing restraints or the taking of coercive measures targeted against individuals in domestic law is an entirely different matter'.⁵⁸

Targeted sanctions against individuals are implemented in the domestic legal order by the very organ of government that voted for them in the Security Council—the executive; thereby making the Order in Council a formality. In this way they appear to be a manifestation of federalism whereby legal obligations arise in the UK legal order as a consequence of the exercise of the Security Council's discretionary governing powers in matters of peace and security and, when seen in this way, those obligations are a result of executive decisions that are not rule of law compliant. Individuals can be listed by the Security Council or, indeed, by the UK following its obligations under general Security Council resolutions, on the basis of limited evidence (or intelligence) without significant due process and, furthermore, those targeted by such measures can remain listed indefinitely. Those targeted individuals are represented as threats to the peace and, as such, are subject to emergency measures that are exceptional to the normal protections provided by international and domestic human rights norms, civil liberties and criminal justice.

Following the *Ahmed* case in 2010, the system of executive orders based on the United Nations Act 1946 was replaced by the Terrorist Asset Freezing etc Act 2010. But even when obligations arising under Article 41 are adopted into UK law by means of this Act of Parliament, there is little willingness in Parliament to scrutinise obligations arising from Security Council decisions in terms of their compatibility with other international obligations accepted by the UK or, indeed, the existing laws of the UK providing for the protection of rights and freedoms.⁵⁹ Furthermore, giving the terrorist assets freezing regime a new legislative platform in 2010 did not alter the basic method by which the executive (ie the Treasury) is empowered to either temporarily list individuals on the basis of a 'reasonable suspicion' that they are or have been involved in terrorism or, more permanently, on the basis of a 'reasonable belief'. Even supporters of the Act could discern no clear difference between 'reasonable belief' and 'reasonable suspicion', except that they were both below the 'balance of probabilities'

⁵⁸ *ibid.*

⁵⁹ Hansard HC Debates, 15 November 2010, col 683 (Vaz).

standard of evidence required in civil cases.⁶⁰ Only one MP questioned the legal basis upon which the executive and not the courts could impose assets freezing orders.⁶¹ There is little political will in Parliament to challenge executive decisions made on security matters. Indeed, the fact that such obligations result from decisions of the Security Council is almost seen as putting them beyond domestic political scrutiny.⁶² Judicial scrutiny has also been hampered by a reluctance to challenge the executive on security matters and, although cases like *Ahmed* suggest greater judicial activism, reluctance remains in cases where the executive is implementing its security obligations arising from the UN Charter.

VI. Targeted Sanctions Regimes

The effects on the civilian population of the UN's comprehensive sanctions regime against Iraq (1990–2003), which severely undermined the rights to life and health of large sections of the civilian population especially children,⁶³ led to the development of less indiscriminate targeted or smart sanctions against regime elites and non-state actors. As a permanent member, the UK is a strong supporter of this development, often associated with the '1267' regime first imposed in 1999 by the Security Council against the Taliban government in Afghanistan (for its support for Al-Qaida),⁶⁴ and then directly against Al-Qaida itself. Security Council Resolution 1333 of 2000 required all states (not just Member States) *inter alia* to

freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him.⁶⁵

⁶⁰ *ibid*, col 701 (Opperman).

⁶¹ *ibid*, col 697 (Llwyd).

⁶² *ibid*, col 676 (Hoban); 681 (Hanson); 687 (Hancock).

⁶³ J Gordon, *Invisible War: The United States and the Iraq Sanctions* (Cambridge MA, Harvard University Press, 2010) 86–102.

⁶⁴ UN Doc S/RES/1267 (1999).

⁶⁵ UN Doc S/RES/1333 (2000) op para 8(c).

The Resolution invoked the language of the primacy clause of the Charter (Article 103) by calling upon all states to

to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the date of coming into force of the measures imposed.⁶⁶

However, the absolute primacy suggested by this provision has to be balanced by statements in other Security Council resolutions, which declared that states ‘must ensure that any measure taken to combat terrorism comply with their obligations under international law, and should adopt measures in accordance with international law, in particular human rights, refugee and humanitarian law’.⁶⁷

Furthermore, the Security Council has made concessions in the face of judgments of courts around the world, including those discussed below, giving targeted individuals seeking delisting avenues for bringing their claims. However, these concessions are administrative processes rather than judicial protections. It is interesting to note that review of allegedly wrongful listings by the Ombudsperson established by Security Council Resolution 1904 (2009) only applies to those on the Al-Qaida Sanctions List as administered by the Security Council’s 1267 Committee and not to any lists beyond that, including the Taliban list. This seemingly curious anomaly is only explicable by the overarching pragmatism of the Security Council on matters of accountability for wrongly listing individuals; in that complaints to international, regional and judicial bodies have largely derived from the 1267 list and the office of the Ombudsperson is a response to that. The lack of remedies elsewhere in the UN system, for wrongly listed individuals, puts the creation of the Ombudsperson in perspective, but it also fits the prevailing view in the Security Council that such measures are administrative ones taken in response to international threats to security caused by the activities of international terrorist organisations and, therefore, any remedial measures should only be of a controlled administrative nature. However, long-term listing of individuals constitutes a form of punishment that raises issues of access to legal remedies for violations of due process norms located in the international human rights obligations of states.

⁶⁶ UN Doc S/RES/1333 (2000) para 17.

⁶⁷ Declaration on Combatting Terrorism in UN Doc S/RES/1456 (2003) op para 6.

Although targeted sanctions imposed against Al-Qaida dominate debates, there were prior instances in the 1990s of targeted sanctions imposed against regime elites in Haiti and non-state armed groups (UNITA in Angola and the Bosnian Serbs).⁶⁸ The twenty-first century has seen numerous sanctions regimes against regime elites (in Libya, Guinea-Bissau, Iran, North Korea, Liberia, Sierra Leone, Somalia, Eritrea, South Sudan and Yemen), and non-state actors (in DR Congo, the CAR, Cote D'Ivoire, Lebanon, and Sudan, Libya, and against Islamic State).⁶⁹ These non-state actors and the threats they represent are not confined to the boundaries of one state and, therefore, the obligations created could potentially impact on the legal order within the UK. In supporting sanctions against Islamic State (by adding members from that group to the existing Al-Qaida list),⁷⁰ the UK representative on the Security Council welcomed the unanimous and rapid adoption of the measures,⁷¹ showing that consensus can readily be achieved on non-forcible measures directed against terrorism.

Security Council resolutions directed at foreign terrorist fighters (individuals travelling from their national state to another state for the purpose of carrying out terrorist activities) demonstrate the broadening legislative scope of its non-forcible measures. Adopted in September 2014, Resolution 2178 was in part directed at the individuals themselves in that it contained a demand 'that all foreign terrorist fighters disarm and cease all terrorist acts and participation in armed conflict'. It was also directed at 'all states', obliging them to ensure 'effective border controls', and encouraging them to 'employ evidence-based traveller risk assessment and screening procedures including collection and analysis of travel data, without resorting to profiling based on stereotypes founded on grounds of discrimination prohibited by international law'. With reference to listing processes already in place and states' general counter-terrorist obligations under Resolution 1373 (2001), Resolution 2178 (2014), *inter alia* decided that 'all States shall ensure that their domestic laws and regulations establish serious criminal offences sufficient to provide the ability to prosecute and to penalize' foreign terrorist fighters in a manner duly reflecting the

⁶⁸ Reviewed in detail in ND White, 'Sanctions Against Non-State Actors' in N Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Leiden, Brill, 2016) 127.

⁶⁹ *ibid.*

⁷⁰ UN Doc S/RES/2170 (2014) paras 18–21.

⁷¹ UN Doc S/7242 mtg (2014).

seriousness of the offence. These measures were implemented in the UK within a broader counter-terrorist framework in the Counter-Terrorism and Security Act 2015 that, *inter alia*, restricted the travel of individuals involved in terrorism-related activity and also provided for their temporary exclusion in order to protect the British public from a risk of terrorism, as well as provision for the necessary amendments to the TPIM (terrorism prevention and investigation measures) regime.⁷²

VII. General International Legislation in Resolution 1373 (2001)

Once a consensus is formed in the permanent membership of the Security Council around a concept as nebulous as terrorism, the power of the Security Council comes close to a form of supranational or central federal government, imposing obligations on all states to take measures against a range of non-state actors, wherever they are located in the world. The focus of the Security Council on peace and security means that it cannot be a world government in any full sense but, given the priority in the UN system for peace and security, and the broad normative meaning given to both ‘peace’ and ‘security’ evidenced by an expansive understanding of what constitutes threats to the peace within the Security Council, it has a greater range and impact than an executive organ simply responding to emergencies. Its targeted sanctions regimes against named actors have a longevity that belies emergencies but, moreover, its general legislative-type resolution on terrorism, Resolution 1373 of 2001, has opened up the possibility enabling states to tackle their domestic security problems while purporting to fulfil their obligations arising under the Resolution. This is particularly so given that the Security Council defines all forms of terrorism as threats to international peace and,⁷³ although the Security Council did offer an understanding of terrorism in a Resolution of 2004, it is not an internationally agreed definition and does not appear to have led to conformity by states in their domestic definitions of terrorism.⁷⁴ The Security Council’s ‘definition’ is built on offences already proscribed in the numerous international treaties on various

⁷² See discussion on Bill in Hansard HC Debates, 2 December 2015, col 207 et seq; 7 January 2015 col 336 et seq. Hansard HL Debates, 13 January 2015, col 661 et seq; 9 February 2014, col 1024 et seq. See also Terrorism Prevention and Investigation Measures Act 2011.

⁷³ UN Doc S/RES/1566 (2004) op para 1.

⁷⁴ *ibid* at op para 3.

aspect of terrorism, while in contrast, the definition of terrorism in the UK contained in section 1 of the Terrorism Act of 2000 is not so proscribed.

In the case of targeted sanctions imposed against suspected terrorists or terrorist supporters, the temporary freezing of an individual's assets, and restriction of his or her movements, can be construed as administrative measures necessary to prevent threats from terrorism manifesting in indiscriminate acts of violence. As such they are not arguably subject to full due process protections. However, a number of listings appear to be almost permanent without real review, and like indefinite preventive detention, cease to be responses to imminent existential threats but are rather forms of punishment without due process of law. There is a danger that by creating a legal framework allowing for quasi-permanent listings, the UN is endorsing a system of punishment for wrongs determined by executive organs of states and organisations without any determination or trial before a court. As is the case with targeted killings, the roles of judge, jury and executioner are rolled together. This is even more so as regards the auto-interpretation system of targeted measures triggered by Resolution 1373 of 2001. This piece of UN Security Council law-making has legitimated the development of separate 'lists' of terrorists by Member States, fulfilling their obligations under that resolution to: criminalise the financing of terrorism; freeze any funds related to persons involved in acts of terrorism; deny all form of financial support for terrorist groups; and suppress the provision of safe haven, sustenance or support for terrorists.⁷⁵ Given that there are no specific terrorist organisations listed in the Resolution, or by a collective process set up by the Resolution, states are given discretion to target those organisations and individuals it considers to be terrorists. The Terrorist Asset-Freezing etc Act 2010 is the current legislative platform for the implementation of Resolution 1373 (2001) in the UK. The 2010 Act provides the UK government (HM Treasury) with powers to freeze the funds and economic resources of those suspected or believed to be involved in terrorist activities, and restricts the making available of funds, financial services and economic resources to, or for the benefit of, such persons. It was adopted as a direct response to the UK Supreme Court's 2010 ruling in the *Ahmed* case.⁷⁶

⁷⁵ UN Doc S/RES/1373 (2001) op para 2.

⁷⁶ Above n 54.

VIII. Arguing for the Absolute Primacy of UN Obligations

While the UK's permanent seat and right of veto protects it from UN-authorized forcible intervention, the increasing focus of the Security Council, with the UK to the fore, on taking non-forcible measures against non-state actors, has meant that the effects of Charter obligations arising by dint of Security Council decisions have been felt within the UK's legal order. The identification of individuals to be targeted, either at UN level or at national level under the auspices of decisions made by the Security Council, has led to their freedoms being restricted and so to legal challenges that their rights have been violated. The advantage to the UK in securing obligatory Chapter VII resolutions against individuals is that they not only used to legitimate targeted measures and, thereby, avoid significant Parliamentary scrutiny, but also that the UK government has consistently argued that the obligations arising thereunder override the UK's other treaty commitments that are in conflict, pointing to Article 103 of the UN Charter by which 'obligations' arising under the Charter 'shall prevail' over conflicting treaty obligations.

The beginning of this line of argument can be traced to the time when the Security Council imposed sanctions imposed against Libya, at the instigation of the UK and US, aimed at forcing Libya to hand over two Libyan agents suspected of the Lockerbie bombing of 1998.⁷⁷ In defending itself against a case brought by Libya to the International Court of Justice (ICJ) in 1992, to the effect that Libya had the right to prosecute two suspects under existing international treaty commitments,⁷⁸ the UK and US both relied on Articles 25 and 103 of the UN Charter to claim that obligations arising from Security Council resolutions prevailed over Libya's rights and duties under the Montreal Convention of 1971. In the *Lockerbie* cases, the ICJ accepted this argument 'prima facie' at the provisional measures stage in 1992,⁷⁹ and, as the case did not reach the Merits stage when the issue would have been addressed in full, this interpretation

⁷⁷ UN Doc S/RES/748 (1992).

⁷⁸ Arts 6 and 7 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) 1971.

⁷⁹ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v United States, Libya v United Kingdom)* (1992) ICJ Rep 3 (UK), 114 (US) at para 42.

has been the one relied upon by the UK in subsequent cases brought against it before national and regional courts.

The UK government has extended its primacy argument to argue that obligations arising from Security Council decisions prevail over those duties it has under human rights treaties, both in defending itself against claims brought by targeted individuals and intervening in other key cases. It intervened in the *Kadi* case of 2008, brought against the European Community before the European Court of Justice, arguing that obligations arising under the Charter prevailed over fundamental rights.⁸⁰ However, the Court, in emphasising that the Community was based on the rule of law, held that the right to be heard as well as property rights of the plaintiff who had been listed by the Security Council's 1267 Committee were violated by the European regulation that gave force to Security Council Resolutions.⁸¹

Undeterred the UK has continued to argue for absolute primacy of security obligations derived from Security Council resolutions, in cases involving listing of suspected terrorists and other measures that restrict liberty. In the *Al-Jedda* case of 2007 brought against the UK, the government argued that the right to be free from arbitrary detention, guaranteed by Article 5 of the European Convention on Human Rights, was overridden by the obligation to detain contained in a Security Council resolution authorising the US and UK forces in Iraq to take necessary measures, including detention, for imperative reasons of security.⁸² The House of Lords upheld this argument, with Lord Bingham stating that obligations arising from the UN Charter must be respected above all else: 'emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 [of the UN Charter] to "any other international agreement" leaves no room for any excepted category...'⁸³ The European Court of Human Rights disagreed in 2011, but primarily on the basis that the Resolution in question did not expressly impose any obligation on states to detain, thereby leaving open the possibility that the Security

⁸⁰ *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, Joined Cases. C-402/05 P and C-415/05 P, European Court of Justice, Judgment, 3 September 2008, paras 262, 275–78.

⁸¹ *ibid* at paras 281, 334.

⁸² UN Doc S/RES/1546 (2004).

⁸³ *R (on the application of Al-Jedda)(FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, paras 34–35.

Council could override human rights obligations of states simply by using express language to that effect.⁸⁴

The UK has persisted in its contention about the overriding effect of obligations arising under the Charter as a result of Security Council resolutions, notably in cases where an individual has been listed at Security Council level. In the *Nada* case in 2012 brought against Switzerland before the Grand Chamber of the European Court of Human Rights, the UK intervened claiming that in the case in question the Security Council had used ‘clear and explicit language’ in Resolution 1267 of 1999 to impose obligations on states that would prevail over conflicting obligations under human rights treaties.⁸⁵ However, even though the Court accepted that this was a case of clearly conflicting obligations, it explored the latitude the Swiss government had in implementing its obligations arising under the Resolution to make its actions as human rights compliant as possible.⁸⁶ The UK intervened in the *Al-Dulimi* case of 2013 brought against Switzerland before a chamber of the European Court of Human Rights, repeating its argument about the prevailing effect of obligations arising under the Charter over conflicting human rights obligations.⁸⁷ The Court found that targeted measures, directed at individuals and non-state actors in Saddam Hussein’s regime in Iraq,⁸⁸ violated the right of access to a court under Articles 6 and 13 of the European Convention, despite there being a direct conflict in obligations for a state between those arising from the UN Charter and those arising from Security Council resolutions.⁸⁹

It would appear that the UK government has gradually lost the argument that the Security Council can create a form of security law that is automatically constitutionally superior even to human rights norms. At the very least the European courts will rigorously test those claims and will not simply give precedence to security obligations. However, the following analysis will show that these judgments at the

⁸⁴ *Case of Al-Jedda v The United Kingdom* (Application no 27021/08) Grand Chamber Judgment, 7 July 2011, para 109.

⁸⁵ *Case of Nada v Switzerland* (Application No 10593/08) Grand Chamber judgment, 12 September 2012, para 111.

⁸⁶ *ibid* paras 186, 195, 197–98, 213.

⁸⁷ *Case of Al-Dulimi and Montana Management Inc v Switzerland* (Application no 5809/08) Second Chamber judgment, 26 November 2013, para 85.

⁸⁸ UN Doc S/RES/1483 (2003).

⁸⁹ *Al-Dulimi* above n 87 at paras 113–14.

European level have not yet been accepted by the UK government, nor has the UK Supreme Court adjusted its jurisprudence to accept a human rights challenge to wrongful listing claims. The UK government, as a permanent member of the UN's executive body, supports a form of absolute primacy or supremacy for obligations arising from Security Council resolutions, as it enables it to use domestic executive orders to introduce immediately binding, unscrutinised and superior laws into UK domestic law. In purely pragmatic terms the UK's reluctance to give up, or substantially qualify, this form of UN-level federal law-making is understandable, particularly as it gives the government a very effective way of tackling suspected terrorists that is operated largely without hindrance from political and judicial forms of accountability.

IX. Supranational Measures within the Domestic Legal and Political Order

The impact of obligations arising under Security Council resolutions imposing non-forcible measures targeted at individuals, necessitating enforcement of such measures within domestic legal orders of Member States, has given rise to jurisprudence in domestic courts,⁹⁰ regional courts,⁹¹ and under the individual complaint mechanism to the Human Rights Committee.⁹² Before UK courts the key judgment is the *Ahmed* case decided by the UK Supreme Court in 2010, in which the Court was at the same time highly critical of the targeted sanctions regime and, as it proved, very limited in changing the effects of such measures on the lives of individuals. Lord Hope described the impact of the executive orders in the following terms:

[P]ersons who have been designated ... are effectively prisoners of the state ... moreover, the way the system is administered affects not just those who have been designated. It affects third parties too, including the spouses and other family members of those who have been designated. For them too it is intrusive to a high degree.⁹³

⁹⁰ For example, *Abdelrazik v Canada (Minister of Foreign Affairs)* [2010] 1 FCR 267.

⁹¹ *Kadi* above n 80, *Al-Jedda* above n 84, *Nada* above n 85, *Al-Dulimi* above n 87.

⁹² *Nabil Sayadi and Patricia Vinck v Belgium*, Communication No 1472/2006, 29 December 2008, 16 IHHR 427.

⁹³ *Ahmed* above n 54 at para 4 (Lord Hope). Discussing the Terrorism (United Nations Measures) Order 2006 (SI 2006/2657) giving force to UK obligations arising from Security Council Resolution 1373

Lord Hope went on to state that:

The consequences of the Orders ... are so drastic and so oppressive that we must be just as alert to see that the coercive action that the Treasury [has] taken really is within the powers that the 1946 Act has given them. Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.⁹⁴

Nonetheless, the approach of the Supreme Court in 2010 in the *Ahmed* case was limited by its previous decision in *Al Jedda* of 2007,⁹⁵ which was only reversed by the European Court of Human Rights in 2011.⁹⁶ The UK Supreme Court may revisit its decision in the light of that 2011 judgment when given the opportunity.⁹⁷ However, in 2010 the Supreme Court felt bound by its previous decision in *Al Jedda* to the effect that obligations arising as a result of Security Council decisions must prevail over obligations to protect and uphold human rights under the European Convention on Human Rights, to deny the applicants any remedies under the Human Rights Act 1998 that implemented Convention rights in UK law.⁹⁸ By viewing the human rights avenue as blocked, the Supreme Court turned to domestic law, stating that the primacy clause in Article 103 was only applicable to conflicting obligations arising under international treaties,⁹⁹ to find that the Al-Qaida and Taliban Order violated the complainants' right to the enjoyment of their property, 'which could only be interfered with by clear legislative words',¹⁰⁰ and their right to 'unimpeded access to a court', which 'is not to be excluded except by clear words';¹⁰¹ while the Terrorism Order violated the fundamental rights of the citizen by introducing a reasonable suspicion test without the

(2001); and the Al-Qaida and Taliban (United Nations Measures) Order 2006 (SI 2006/2952) giving force to obligations arising from Security Council Resolution 1267 (1999).

⁹⁴ *Ahmed* above n 54 at para 6 (Lord Hope).

⁹⁵ Above n 83.

⁹⁶ Above n 84.

⁹⁷ But see *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, when, despite expectations, neither the Human Rights Act nor Art 103 of the UN Charter, were argued before the Court.

⁹⁸ *Ahmed* above n 54 at paras 71–74 (Lord Hope).

⁹⁹ *ibid* at para 11 (Lord Hope).

¹⁰⁰ *ibid* at para 75 (Lord Hope), relying inter alia on *Entick v Carrington* (1765) 19 Howell's State Trials 1029, 1066.

¹⁰¹ *ibid* at para 75 (Lord Hope), relying inter alia on *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 at 286.

authority of Parliament.¹⁰² Both Orders were therefore *ultra vires* the United Nations Act 1946.

Lord Hope's statements warn about the dangers of leaving such measures to the 'uncontrolled judgment of the executive', but also address the argument that the UK should honour its obligations under the Charter arising from Security Council resolutions:

But these resolutions are the product of a body of which the executive is a member as the United Kingdom's representative. Conferring an unlimited discretion on the executive as to how those resolutions, which it had a hand in making, are to be implemented seems to me to be wholly unacceptable. It conflicts with the basic rules that lie at the heart of our democracy.¹⁰³

Despite these ringing words in *Ahmed*, the Supreme Court's reliance on rights under domestic law to declare that the executive orders promulgated without Parliamentary scrutiny under the United Nations Act 1946 were *ultra vires* the 1946 Act on the basis that it did not expressly permit the infringement of individual rights, proved to be a brief victory for civil liberties and the rule of law.¹⁰⁴

The *Ahmed* judgment led to the government curing the 'defects' of the executive orders by tabling primary legislation in the form of the Terrorism Asset-Freezing (Temporary Provisions) Act 2010. In the debates about the Terrorism Asset-Freezing Bill of 2010, which was to replace the temporary Act, some reference was made to the Supreme Court's judgment, with one MP referring to Lord Brown's statement that 'the draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated'.¹⁰⁵ This was understood to mean 'not that these were draconian because they were orders, but that they were draconian because of their content. So we need to be careful before reintroducing measures that are very similar to those orders'.¹⁰⁶ The point that measures could be the same whether made directly by executive order

¹⁰² *ibid* at para 61 (Lord Hope). But see *Youssef v Secretary of State for Foreign and Commonwealth Affairs* above n 95.

¹⁰³ *ibid* at para 45 (Lord Hope).

¹⁰⁴ See also *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, in which the Supreme Court quashed an executive order (SI 2009/2725) made under the Counter-Terrorism Act 2008 against an Iranian Bank pursuant to Security Council Resolutions (UN Doc S/RES/1747 (2006), UN Doc S/RES/1747 (2007) and UN Doc S/RES/1803 (2008)) on the basis, *inter alia*, that they violated notions of common law fairness.

¹⁰⁵ *Ahmed* above n 54 at para 192.

¹⁰⁶ Hansard HC Debates, cols 691–92, 15 November 2010.

pursuant to the 1946 Act or by executive order pursuant to a 2010 Act of Parliament seemed to be lost on the House. The reality was better reflected by a statement by one MP that during his 23 years in the House he found that ‘whenever the word “terrorism” appears in any order or other legislation, there tends to be cross-party support’.¹⁰⁷

X. Conclusion

Law-making that is a combination of international and national executive decision-making offends the rule of law in the sense used in this chapter because the executive has been allowed by Parliament and the Courts to by-pass human rights guarantees. The international and national executives have harnessed the supranational potential of the UN so that UK law is subject to the decision-making of the Security Council which, though located within a treaty and therefore a legal instrument, is almost wholly uncontrolled by that instrument or by the judicial mechanisms created by it, as evidenced by the International Court’s judgments in the *Lockerbie* cases. Plato warned that ‘where the law is subject to some other authority and has none of its own, the collapse of the state ... is not far off’.¹⁰⁸

Thus far the UK Supreme Court has failed to adopt a strong presumption that human rights obligations should not be overridden by obligations arising under Security Council resolutions, in contrast to European judgments discussed above.¹⁰⁹ Those judgments leave a number of questions unanswered, including the relationship between international, regional and national legal orders, but they do invite the UK to look more closely at ways of upholding its human rights obligations while respecting security duties arising out of Security Council decisions.

The analysis in this chapter has shown that the UN was not simply an improvement on the cooperative model of international organisation embodied in the League of Nations. The UN Charter contained elements of centralisation and supranationality that had the potential, when the geopolitical context allowed, to unleash a federalising international order. In discussing processes of federalisation

¹⁰⁷ *ibid* cols 688–89 (Vaz).

¹⁰⁸ Plato, *The Laws* (trans TJ Saunders, London, Penguin, 1970) 174.

¹⁰⁹ *Kadi* above n 80, *Al-Jedda* above n 84, *Nada* above n 85, *Al-Dulimi* above n 87.

Livingston warns that centralised instruments created to solve problems become part of the governmental architecture and, furthermore, can easily become outdated and difficult to remove. The idea of a federation of ‘Great Powers’ in the core membership of the Security Council, including the UK and France, is no longer valid, and the idea of a world government in matters of peace and security in the hands of five states, formed out of the alliance forged in the Second World War, bears little resemblance to the multipolar and changing world in which we live. Livingston states further:

As the nature of society changes, demands for new kinds of instrumentalities are created and these demands are met by changing or abolishing old instrumentalities and substituting new ones in their place. But it can scarcely be hoped that the new instrumentalities will keep pace with the changing pattern of social relationships, and as a result the pattern of instrumentalities tends to lag behind the changes in society itself ... This is complicated further by the fact that the instrumentalities, once put into operation, become rigidified and acquire status of their own.¹¹⁰

Hence, what started in 1945 as a new kind of instrumentality, namely an executive instrument for action on matters of international peace and security, has become a centralised governing and law-making body and the pivotal component of a federalising international legal and political order, increasingly encroaching on national legal and political orders, but only possessing the most rudimentary elements of accountability to those national orders. There are examples of states refusing to comply with Security Council sanctions, for example African states with regard to the measures imposed on Libya in 1992 for its alleged support of terrorism,¹¹¹ but such non-compliance is unlikely in the case of the UK as it is part of the UN executive.

Tushnet, in considering national federal systems, makes the following point:

Federal systems in the modern world drift towards centralization because of globalization and the dominance of a legal realist legal culture. The rate of drift, however, is affected by elements in the design of federal institutions. A constitutional specification of powers to be exercised solely by national units, *a priori* judicial review, a dual judiciary, and judges trained in formalist traditions all retard the drift towards centralization.¹¹²

At the international level there is a drift towards centralisation in the Security Council for certain security matters, which can only be countered by states asserting their sovereignty, not to exclude human rights criticism as has occurred in the past, but to

¹¹⁰ Livingston above n 2 at 93–94.

¹¹¹ E de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford, Hart, 2004) 382.

¹¹² M Tushnet, ‘Federalism and Liberalism’ (1996) 4 *Cardozo Journal of International and Comparative Law* 329 at 340.

protect the human rights they have agreed to uphold. National judiciaries, as well as regional courts, will have to compensate for the International Court of Justice's inherent weaknesses as a court of review, and reliance by courts on agreed human rights norms as opposed to accepting realist arguments based on security, will further limit the drift towards a federalising international order.

In order to nudge security obligations towards rule of law compliance at both international and national levels, UK courts will need to develop a more critical and coherent approach to the obligations arising under the Charter in order to reconcile those obligations with ones arising from human rights and other treaties. Article 103 was not intended, and in any case should not be seen, as a constitutional supremacy clause to be relied upon to make it easier for the Security Council and governments (ie executive powers) to take unconstrained and open-ended security measures; it was intended as a conflicts clause drafted to ensure that states could not refuse to carry out their obligations arising under the Charter by dint of pre-existing and directly conflicting treaty obligations, for example under trade agreements.¹¹³ Furthermore, national Parliaments have to bear a greater burden of scrutiny of processes and legislation that implement these obligations and potentially undermine human rights and civil liberties, since it will only be by a combination of national political and judicial scrutiny that the executive encroachment on basic rights on the grounds of security will be checked.

A largely unchecked amalgam of international and national executives has utilised powers granted in the UN Charter to develop an extremely strong and overriding coercive regime of targeted sanctions, but an extremely weak one in terms of rule of law compliance. In straightforward terms, these 'sanctions' are not imposed in response to breaches of national or international law, but on the basis of suspicion of involvement in terrorism. The origins of this regime in the political discretion of the Security Council, where decisions on sanctions are taken largely behind closed doors,¹¹⁴ signifies that when decisions impact directly and significantly on domestic legal orders

¹¹³ R Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 *International and Comparative Law Quarterly* 583 at 612.

¹¹⁴ D Hovell, 'The Deliberative Deficit: Transparency, Access to Information and UN Sanctions' in J Farrall and K Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge, Cambridge University Press, 2009) 95.

and the rights of individuals therein, the result is the creation of federalised security measures that have been permitted by weaknesses in the national constitutional order to erode the rule of law in the UK. The current consensus in the Security Council that has driven this development is, so far, confined to non-forcible measures, but there is always a possibility of its extension to forcible measures. In August 2015, the UK government authorised a drone strike in Syria against an individual belonging to Islamic state, as an act of self-defence of the UK as well as Iraq.¹¹⁵ Although not authorised by the Security Council, that body took a step in the direction of sanctioning targeted killings when, following terrorist attacks in Paris in November 2015, it adopted what appeared to be a non-binding resolution that called upon states to take ‘necessary measures’ (Security Council code for the use of force) against Islamic State in Syria and Iraq.¹¹⁶ This falls short of authorising targeted killings of suspected terrorists, particularly those within the UK, but the fact that it is a step towards the centralised sanctioning of such uses of force illustrates the dangers of an unchecked creeping federalising international order.

¹¹⁵ Letter of the UK letter to President of the Security Council, 7 September 2015, UN Doc S/2015/688.

¹¹⁶ UN Doc S/RES/2249 (2015) op para 5. The Council expressly referred to members of Islamic State listed by the Security Council under its targeted sanctions regime.