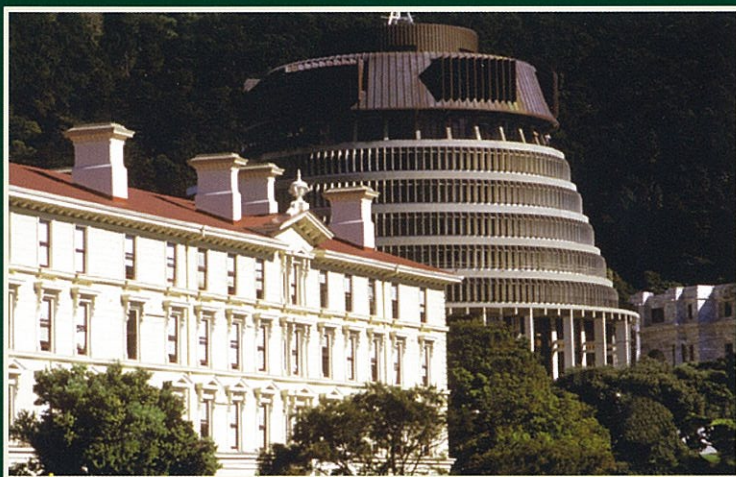


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SPECIAL CONFERENCE ISSUE
FROM PROFESSING TO ADVISING TO JUDGING:
CONFERENCE IN HONOUR OF SIR KENNETH KEITH

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*Te Whare Wānanga
o te Upoko o te Ika a Māui*



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THE ROLE OF CONSTITUTIONAL PRINCIPLES IN PROTECTING INTERNATIONAL PEACE AND SECURITY THROUGH INTERNATIONAL, SUPRANATIONAL AND NATIONAL LEGAL INSTITUTIONS

*David Feldman**

International institutions encourage states to adhere to constitutional principles including commitment to fundamental rights, but rarely allow their own activities to be controlled by the same standards. This dislocation of standards causes problems when international organisations adopt methods which ignore people's fundamental rights. National and supranational bodies must then decide whether to subject their basic constitutional standards to international law, try to inject such standards into international law, or insulate their legal orders against international institutions. The problem is examined here from two perspectives — that of international or supranational institutions and that of national courts — concentrating on the response of the European Court of Justice, the European Court of Human Rights, and national courts in England and Wales and Bosnia and Herzegovina, to action authorized or required by the United Nations Security Council in resolutions made under Chapter VII of the United Nations Charter to preserve international peace and security. It is suggested that the tensions are generating a series of principled and constructive developments at national and supranational levels respecting fundamental constitutional principles, and justifying a hope that international institutions may in due course put in place arrangements that fully respect important constitutional values in their own work.

I INTRODUCTION

This paper considers two issues concerning the relationship between international law and constitutional principles. First, should agents of international action be bound by principles of a

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constitutional kind, defining their duties and powers and providing accountability mechanisms? Secondly, how should national and supranational authorities respond when their constitutional obligations collide with requirements of international law?

These questions have become particularly pressing as a result of increasingly common moves to use international law and institutions to impose obligations or standards on national authorities. Afghanistan, Bosnia and Herzegovina, and Iraq provide examples of international intervention (economic, diplomatic and military) to induce states and proto-states to adopt constitutional democracy. Some theorists even postulate a right in international law to democratic governance, or speak of an emerging global norm of constitutionalism,¹ however problematic those claims may be.² At the same time, international action against threats to international peace and security from state and non-state actors, for example through terrorism or non-cooperation with the enforcement of international criminal law, seeks to impose obligations on states and supranational organisations to take measures which may bypass national or supranational organisations' systems for securing democratic or legal accountability and interfere seriously with people's freedom and well-being.

Constitutionalism and respect for democracy and human rights can certainly advance peace and security by enhancing the legitimacy of both state and international authorities. By "constitutionalism", for present purposes, I mean a commitment on the part of members of society (or, at any rate, those opinion-formers who particularly influence the development of the law and practice of the constitution) to debating issues relating to the constitution using arguments about constitutional law, practice, and values.³ However, when international agencies pursue a vision of the international rule of law through means which do not respect the values of democratic constitutionalism and human rights, their actions contradict the claim that those values are fundamentally important, and operationally weaken respect for the values among people or

comments, and to Professor James Crawford, Professor Constance Grewe, Mr Angus Johnston, Mr Marko Milanović, Ms Penelope Nevill, Judge Tudor Pantiru and colleagues at the Constitutional Court of Bosnia and Herzegovina for providing important information and for discussions which saved me from error and helped to clarify my views. Opinions expressed here are my own, together with remaining errors and idiosyncrasies.

- 1 See for example Thomas M Franck "The Emerging Right to Democratic Governance" (1992) 86 Am J Int'l L 46; Bruce Ackerman "The Rise of World Constitutionalism" (1997) 83 Virginia L Rev 771; Susan Marks *The Riddle of All Constitutions: Law, Democracy, and the Critique of Ideology* (Oxford University Press, Oxford, 2000); Gregory H Fox and Brad R Roth (eds) *Democratic Governance and International Law* (Cambridge University Press, Cambridge, 2000).
- 2 David Feldman "Constitutionalism, Deliberative Democracy and Human Rights" in John Morison, Kieran McEvoy and Gordon Anthony (eds) *Human Rights, Democracy and Transition: Essays in Honour of Stephen Livingstone* (Oxford University Press, Oxford, 2007) chapter 20.
- 3 For further discussion see David Feldman "None, One or Several? Perspectives on the UK's Constitution(s)" [2005] CLJ 329 ["Perspectives on the UK's Constitution(s)"]; Feldman "Constitutionalism, Deliberative Democracy and Human Rights", above n 2.

organisations whom the international agencies hope to influence. I shall argue that this is a particular problem when international organisations claim to be free of legal constraint and argue that their agents are legally unfettered in their dealings with national authorities and ordinary people. When the idea of right is linked to a *Dirty Harry* approach to pursuing it, the values which Dirty Harry purported to uphold are seriously undermined.

The activities of the United Nations provide a useful focus for our inquiry. Article 25 of the United Nations Charter (UN Charter)⁴ requires member states of the United Nations to implement decisions of the United Nations Security Council (UN Security Council) in accordance with the Charter. Chapter VII of the Charter empowers the UN Security Council to take action to preserve international peace and security. Article 39 allows the UN Security Council to make decisions imposing binding obligations on member states. Article 103 provides that the obligation to comply with decisions overrides conflicting obligations arising from other treaties. The only implied exception so far to secure significant support is that a Chapter VII decision may not override jus cogens, peremptory norms of international law.⁵ It is not clear how much room that leaves to apply constitutional values in international law, for example in relation to decisions imposing sanctions on states or individuals or authorising internment to maintain security. However, the UN Security Council cannot alter the obligations of state institutions under their constitutions. The state may thus face a choice between disregarding the constitution from which its authority comes and disregarding its responsibility as a state to uphold international law.

Whilst this paper identifies a number of potentially destructive tensions between international, supranational and national legal orders in this context, it argues that there is room for some optimism. A notion of constitutional standards is struggling to emerge on the international and supranational planes, and should be encouraged. There are normative principles in international law that can be applied to international organisations and their agents to give substance to the idea of an international community committed to democratic constitutionalism. When a national body faces international demands which clash with national constitutional obligations, its response, too, can and should depend on constitutional principles.

4 Charter of the United Nations (26 June 1945) 1 UNTS 16.

5 See Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, art 30(1); Case T-315/01 *Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649 [*Kadi*] noted in Amandine Garde "Is It Really For The European Community to Implement Anti-Terrorism UN Security Council Resolutions?" [2006] CLJ 281; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Further Requests for the Indication of Provisional Measures) [1993] ICJ Rep 325, 407 opinion of Sir Elihu Lauterpacht, para 100; Rudolf Bernhardt "Commentary on Article 103 of the UN Charter" in Bruno Simma and others *Charter of the United Nations — A Commentary* (2 ed, Oxford University Press, Oxford, 2002) 1295; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1 (Grand Chamber, ECtHR) [*Bosphorus* (ECtHR)].

II THE PERSPECTIVE OF INTERNATIONAL LAW: CONSTITUTIONALISING INTERNATIONAL AGENCIES

Professor Philip Allott has argued that it is possible, and desirable, to adopt a notion of constitutionalism in international law. He develops distinctions between the legal, real, and ideal dimensions of constitutions. The "legal" constitution is a system of normative requirements set out in an authoritative form, or "retained acts of will".⁶ The "real" constitution is the structure which actually operates in the existing system of social power-relationships. The "ideal" constitution is an aspirational body of norms which "presents to society an idea of what society might be".⁷ The total constitution encompasses society's efforts to integrate all three dimensions into every aspect of social life, and is a necessary condition for the existence of a true society.⁸

It seems inevitable that every society will have a real constitution, and every society with a developed legal system has a legal constitution. The rules in these constitutions are likely to be contested, not least because people are likely to have radically different pictures of the ideal constitution. Constitutionalism, as I use the term, can be seen as a process of seeking to narrow the gap between the requirements of the real and legal dimensions of a constitution by developing aspirational arguments derived from a model of the ideal constitution.⁹

In relation to international law, Allott considers that, despite the rhetoric of "international community",¹⁰ the constitutional underpinnings for a global society are lacking because states and institutions do not consider themselves bound to identify constitutional values on the international plane and behave accordingly. International society is therefore "barely capable of supporting

6 Philip Allott *Eunomia: New Order For a New World* (2 ed, Cambridge University Press, Cambridge, 2001) 134-135.

7 Ibid, 135-136.

8 Ibid, 134-139.

9 Feldman "Constitutionalism, Deliberative Democracy and Human Rights", above n 2; Feldman "Perspectives on the UK's Constitution(s)", above n 3. I also suggest that it is inevitable that people in different social or institutional positions will view the constitution(s) through the lenses of their own social and institutional viewpoints, so that there will never be agreement on what the constitution in Allott's first sense requires but rather a series of overlapping pictures of the constitution. Nevertheless, this added complexity does not detract from the value of the distinctions which Allott draws. See further Neil Walker "Postnational Constitutionalism and the Problem of Translation" in JHH Weiler and Marlene Wind (eds) *European Constitutionalism Beyond the State* (Cambridge University Press, Cambridge, 2003) 33 ff.

10 As Professor Don Greig has argued, the term "international community" can be a useful shorthand for a group of states and international bodies engaged in a negotiation process, but its legal significance is limited and its overuse for rhetorical purposes can propel states and organisations into actions of dubious legality. See Don Greig "'International Community', 'Interdependence', and All That ... Rhetorical Correctness?" in Gerrard Kreijen and others (eds) *State, Sovereignty, and International Governance* (Oxford University Press, Oxford, 2002) chapter 23, especially at 564-566.

[international law] as reality or as system".¹¹ Adopting constitutional norms in all three senses is a condition, in Allott's view, for developing a morally acceptable world society. Nevertheless, if it could be established, international constitutionalism would offer three advantages.

First, it would give added legitimacy and authority to international institutions, help them to visualise their missions in a normative framework, structure their decision-making, and give them standards by which to judge their own performance. At present in the UN Security Council, power politics are more significant than principle.¹² Secondly, if the claims of international organisations and their agents to special powers, privileges and immunities are to be regarded as legitimate, it must be possible to establish their extent as a matter of law, and the bodies concerned must be expected to remain within their limits. As well as helping to safeguard ordinary people who get caught up in the work of international agencies, this would encourage states to respect decisions of the UN Security Council which otherwise look like outcomes of international realpolitik. Thirdly, adhering to constitutional principles in international law would help to turn a haphazard collection of states and organisations into a genuine international community.¹³ If there is no "international community", it is at least partly because of the absence of constitutionalism in international law and institutions.¹⁴

The reasons for organising and controlling the functions and power of international agencies by constitutional principles are thus essentially the same as those for using constitutional principles at a national level to organise and control the functions and power of national bodies, and are no less significant.

There is no dearth of standards. The Preamble to the UN Charter records the determination to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". UN Security Council resolutions regularly claim to have been adopted in order to advance those standards. Yet there have been few attempts to ensure that those standards are systematically taken into account when drafting resolutions, or to clarify the roles of the standards as limits to or aids in interpreting the resolutions. Why do many of the people who operate international agencies resist international constitutionalism?

11 Allott, above n 6, 285.

12 See Jeremy Matam Farrall *United Nations Sanctions and the Rule of Law* (Cambridge University Press, Cambridge, 2007) for the most comprehensive examination to date of the practices of the United Nations in relation to its sanctions systems.

13 See Bardo Fassbender "The Meaning of International Constitutional Law" in Nicholas Tsagourias (ed) *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press, Cambridge, 2007) 307–328.

14 This explains why HLA Hart *The Concept of Law* (2 ed, Clarendon Press, Oxford, 1994) 243–247 doubted that international law was a system of law, while accepting that it was closely analogous to such a system.

One possible cause is a perception that the idea of a constitution has no application to an international body. International bodies are created by agreement between sovereign states, which can confer any functions and powers on which they can agree. Institutions derive their authority from that agreement and continuing consensus among the states, not from the treaty which records that consensus. By contrast, the authority of state organs might appear to derive from a constitution, which delimits that authority and which the organs cannot disregard or change (except in accordance with it), because they are the recipients, not the source, of the constitution's authority.

This picture exaggerates the differences between national and international institutions in two ways. First, the continuing role of consensus between states in authorising the behaviour of international institutions is usually limited. In 1945, the establishment of the United Nations undoubtedly depended on the agreement of states, but once up and running it acquired an independent institutional existence, with a secretariat, decision-making organs, a budget, and an ability to determine its course of action independently of the agreement of any state or group of states, preventing the paralysis that would usually result if all states had to agree to each decision. It is a forum for mediating competing views and taking action notwithstanding dissent among states. Professor James Crawford points out that the text of the UN Charter treats the United Nations as a singular body, and the peoples and governments which are said to establish it as clearly plural; the text of the UN Charter also draws no distinction between the United Nations as an institution with its own identity and the United Nations as a mechanism for giving effect to the common policies of its member states.¹⁵

International bodies such as the UN Security Council depend for their authority not on inter-state agreement but on their fidelity to their founding instruments. For its day-to-day authority, the UN Security Council must show that it is performing the functions conferred by the UN Charter, or it becomes an international outlaw. As Crawford writes:¹⁶

[A] state is not bound by the purported exercise of a power not granted What can be done about breaches may be another thing, but that can be true with respect to the unlawful conduct of states inter se as well. The absence of a remedy is not to be equated with the absence of a right.

The constitutive instruments of international organisations have constitutional authority for those organisations because they are established and operate in the context of higher-order international legal norms governing the establishment of such organisations, although there is a separate issue as to whether the United Nations, as an organisation of all or virtually all states in the world, can effectively change those higher-order norms (one can call them "international

15 James Crawford "The Charter of the United Nations as a Constitution" in James Crawford *International Law as an Open System: Selected Essays* (Cameron May, London, 2002) 123, 127. The same applies to institutions such as the European Union, the Council of Europe, and the World Trade Organization.

16 Ibid, 133.

constitutional law") to exempt the United Nations from the operation of ordinary rules of international law.¹⁷

Secondly, state agencies constantly help to develop the constitutions under which they act. A national constitution derives much of its initial authority from the people and processes by which it is created, but thereafter its continuing authority increasingly depends on the values it encapsulates and how it is applied. Perceptions of the values are influenced by the way that institutions interpret and apply them, and the resulting outcomes. Thus institutions whose activities the constitution controls constantly help to reshape its values, consciously or otherwise. International institutions may be able to play a similar role in shaping the development of international constitutional law.

Another argument against according constitutional authority to the UN Charter asserts that the United Nations, being intrinsically political rather than legal, cannot sensibly be subjected to legal standards. In emergencies, the UN Security Council must act in accordance with international politics and the exigencies of the situation, not law (constitutional or otherwise). Sir Michael Wood expressed this elegantly in his 2006 Hersch Lauterpacht Memorial Lectures,¹⁸ arguing both that the practice of the UN Security Council is proper in the light of the Charter and that no doctrine of international law (except, perhaps, *jus cogens*) limits the competence of the UN Security Council when exercising its functions under Chapter VII of the Charter.

Here again, the differences between national and international law can be exaggerated. Nobody denies that special measures are sometimes justifiable. There is currently a debate in constitutional theory about the propriety of relaxing or removing legal and constitutional controls over states' executives in the face of a pressing threat from war or terrorism.¹⁹ Human rights treaties themselves often permit derogations in certain emergencies — article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)²⁰ offers an example — and usually allow an interference with some or all rights on specified grounds in ordinary circumstances. But there are always preconditions for such extraordinary steps, set out in the relevant constitution or treaty.²¹ There is no convincing reason to treat differently the UN Security Council's power to

17 Ibid, 135. See further below text at n 23.

18 Sir Michael Wood "The UN Security Council and International Law" (Hersch Lauterpacht Memorial Lectures, Cambridge, 7–9 November 2006) www.lcil.cam.ac.uk (accessed 26 June 2008). Sir Michael was the Legal Adviser to the Foreign and Commonwealth Office in the United Kingdom from 1999 to 2006. A revised version of the lectures will be published by Cambridge University Press.

19 See for example Bruce Ackerman "The Emergency Constitution" (2004) 113 Yale LJ 1029; David Dyzenhaus *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge, 2006) chapters 1 and 4, especially 1–16.

20 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS 5.

21 See for example *A v Secretary of State for the Home Department* [2005] 2 AC 68 (HL).

interfere with rights, authorise or require others to do so, or ignore other principles of international law.

There is some evidence that the UN Security Council has begun to recognise and take steps to mitigate the effect of its indifference to human rights on the perceived legitimacy of its activities under Chapter VII of the UN Charter. In establishing a sanctions committee to implement its anti-terrorism resolutions requiring states to freeze the assets of suspected supporters of terrorism, it has made some concessions to the due-process rights of individuals on whom sanctions are imposed. There are regular reviews of the continuing need for sanctions. States may relax orders on humanitarian grounds (subject to UN Security Council approval). As far as possible, state authorities are encouraged to tell people that they are subject to orders and that there is a possibility of relaxing them.²² The subjects themselves have no right to address the Sanctions Committee directly, but states can, and may have an obligation to do so.²³

This indicates a new development in Allott's real constitution of international practice. It is possible that the legal constitution, too, is developing, under the influence of developments in the real and ideal constitutions. We have seen how the arguments for treating an international institution as being without legal fetters depend on an assumption that its authority derives from that of the states whose acts established it. The states cannot exempt an institution from international legal obligations which bind the states themselves unless the rules making up the legal dimension of international constitutional law allow states to confer greater power on an institution they create than the states have themselves, by relieving the institution of legal limits which bind them. It is not clear that international law allows this — *nemo dat quod non habet* — but even if it does such authority would require universal or virtually universal agreement among states.²⁴ It would be perverse to interpret any treaty as reflecting such an agreement in the absence of express and unambiguous language; no state should be able to exercise its international legal sovereignty to undermine international law itself. State sovereignty does not entail any state being able to do anything it likes. If it did, it would undermine the very notion of international law as a system binding sovereign states.

22 See UNSC Resolution 1267 (15 October 1999) S/RES/1267/1999 para 6; UNSC Resolution 1333 (19 December 2000) S/RES/1333/2000; UNSC Resolution 1390 (28 January 2002) S/RES/1390/2002; UNSC Resolution 1452 (20 December 2002) S/RES/1452/2002 para 1, allowing states to grant derogations from freezing orders on humanitarian grounds, subject to approval from the Sanctions Committee; UNSC Resolution 1526 (30 January 2004) S/RES/1526/2004 para 18, encouraging states to inform people subject to freezing orders of the existence of the orders, so far as possible, and of the possibility of derogating from them on humanitarian grounds.

23 See Case T-253/03 *Chafiq Ayadi v Council of the European Union* [2006] ECR II-2139; see text at n 52 ff.

24 Crawford, above n 15, 127.

States give up freedom when they enter into international agreements. The core notion of sovereignty is only that a state should retain the freedom to enter into other agreements and exercise control over the territory of the state notwithstanding the restrictions which it has voluntarily accepted or are imposed on it by general principles of international law. As Professor Don Greig has argued, the practical scope of a state's sovereignty is limited by the actions of that state, among other elements.²⁵ One cannot treat a state's sovereignty as illimitable. The idea that illimitable state sovereignty is fundamental to the regime of international law is not, as often supposed, a natural consequence of the Treaty of Westphalia — which left many entities of inferior status playing a role on the international stage — but was developed by theorists of international law in the nineteenth century and legitimated by a radical misreading of the consequences of that treaty.

Taking international law and the international rule of law seriously compels us to recognise that neither the sovereignty of nation states nor the political or diplomatic character of the UN Security Council or other international institutions can justify exempting them from ordinary legal principles. When exercising functions that interfere with people's rights, international institutions must expect that a strict interpretation will be applied to their powers. Even if one regards state sovereignty as being at the heart of the powers of international organisations, there is no reason to assume that a state would consent to an organisation exercising a power so as to compromise the interests of that state or the rights of its nationals and residents if the exercise of the power goes beyond a reasonable reading of the scope of the power. It should therefore be possible to explore the limits to the powers of the UN Security Council by applying ordinary legal principles to establish the scope of the authority conferred by an international instrument such as the UN Charter. We are not compelled to accept the arguments for treating the UN Security Council as being above the law either by authoritative rules of international law (Allott's "legal" constitution) or any acceptable aspirational norms (Allott's "ideal" constitution).

Moves to make the rule of law an international reality in the realm of the UN Security Council are of recent origin and their implications are still being worked out. Nevertheless, we have noted signs of a developing framework of practical constitutionalism as international institutions (including the UN Security Council itself) start to improve respect for human rights in their work, and there are further examples of this gradual thaw.

In the context of the European Community and European Union, the European Court of Justice (ECJ) first had to deal with the issue in a European Community law context in *Bosphorus Hava Yollari Turizm Ticaret AS v Minister for Transport, Energy and Communications, Ireland* (*Bosphorus* (ECJ)).²⁶ A UN Security Council Resolution made under Chapter VII of the UN

25 Greig, above n 10, 523 ff.

26 Case C-84/95 *Bosphorus Hava Yollari Turizm Ticaret AS v Minister for Transport, Energy and Communications, Ireland* [1996] ECR I-3953 [*Bosphorus* (ECJ)].

Charter required states to take action against property owned by people in the Federal Republic of Yugoslavia, or owned by a company controlled by shareholders in the Federal Republic of Yugoslavia, by way of economic sanctions to discourage the Federal Republic of Yugoslavia from supporting the Serb paramilitaries fighting in the Republic of Bosnia-Herzegovina. A European Community Regulation required member states to give effect to that Resolution. The applicants had leased an airliner in good faith from an airline based in the Federal Republic of Yugoslavia. When they landed it in Ireland it was impounded. When challenged, the Irish government argued that they were required to impound it by the UN Security Council Resolution and by the European Community Regulation, and had no discretion. The Irish High Court held that the Minister had acted unlawfully in impounding the aircraft and required him to consider representations from the airline to show that it had not acted in breach of the sanctions.²⁷ The UN Security Council Resolution was irrelevant, because Ireland is a dualist state so it could not directly affect Irish law. However, the European Community Regulation did have direct effect, and on appeal the Supreme Court requested a preliminary ruling from the ECJ on the interpretation of the Regulation. The ECJ held that human rights protection was available in European Community law, because fundamental rights derived from the common constitutional traditions of member states and the international treaties to which they had contributed formed general principles of European Community law.²⁸ Nevertheless, having taken human rights claims into account, the Regulation properly interpreted had required the aircraft to be impounded, and it was possible to justify the resulting interference with the applicants' rights.²⁹

The Council of Europe then became involved through the instrumentality of the European Court of Human Rights (ECtHR) when the hirers argued that their right to peaceful enjoyment of possessions under article 1 of Protocol No 1 to the ECHR had been violated by Ireland's compliance with the European Community Regulation. In addition to the question of the relationship between municipal, European Community, ECHR and general international law, this gave rise to a sensitive issue as to the relationship between the human rights jurisdiction of the ECtHR and the European Community law jurisdiction of the ECJ. In *Bosphorus Hava Yolari Turizm Ve Tikaret Anonim Sirketi v Ireland*³⁰ the ECtHR held that the interference with the applicants' property rights was justified. It served a legitimate aim (discouraging support for aggressive action in Bosnia and

27 *Bosphorus Hava v Minister for Transport* [1994] 2 ILRM 551.

28 See for example Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case 5/88 *Wachauf v Federal Republic of Germany* (Judgment) [1989] ECR 2609 para 17.

29 *Bosphorus* (ECJ), above n 26, 3894–3987 paras 15–18, 21–26. When the case returned to the Irish High Court, Barr J decided that the Minister had failed to comply with due process principles, and ordered the immediate release of the aircraft, a decision affirmed by the Irish Supreme Court: *Yollari (Bosphorus Hava) and Turiam Ve Ticaret Anonim Sirketi v Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1997] 2 IR 1 Barr J.

30 *Bosphorus* (ECtHR), above n 5.

Herzegovina) and the absolute nature of the obligation on states was proportionate in view of the seriousness of the war. But the ECtHR was divided as to the degree of respect it should accord to the ECJ's assessment of human rights arguments. The majority indicated that it regarded the protection given to fundamental rights by European Community law as "equivalent" to that offered to Convention rights by the ECHR, a potentially dangerous suggestion: when a state's action in interfering with a Convention right was intended to comply with legal obligations arising from membership of the European Community or European Union, it could be presumed that the state has not violated the Convention right, unless the presumption were rebutted by showing that the ECJ's protection of Convention rights was "manifestly deficient".³¹

Professor Sir Francis Jacobs has said that the judgment "held in effect that, given the standard of scrutiny by the ECJ of European Community measures for compliance with human rights, where such scrutiny had taken place it was, and would remain, unnecessary for the Strasbourg case to conduct its own review".³² His comment highlights two dangers. First, the judgment of the ECtHR could produce dual standards of review under the ECHR: relatively rigorous review by the ECtHR in cases where there have been no proceedings under European Community law; and a light-touch or no-touch standard where the matter has been examined under European Community law. Secondly, the reference in the Court's judgment to obligations arising from states' membership of international organisations gives rise to the possibility that a similar approach will be taken to the obligations of states as members of other international bodies such as the United Nations or the World Trade Organisation. This effectively subjects rights in the ECHR to other treaty obligations without any opportunity to ensure that those organisations take fundamental rights seriously or that their commitment to human rights offers at least as strong protection for relevant rights as the ECHR.

In separate concurring opinions seven of the 17 judges made it clear that they did not support a general rule that the ECtHR would automatically regard protections offered by European Community law as sufficient to meet the obligations of European Community member states under the ECHR. It would have to be shown on a case-by-case basis that the European Community and European Union authorities had allowed for concrete review of the compatibility of requirements of European Community law with the ECHR. To rely wholly on the European Union's judicial system to ensure "equivalent protection" for rights to that afforded by the ECtHR.³³

31 Ibid, para 156.

32 Francis G Jacobs *The Sovereignty of Law: the European Way* (Cambridge University Press, Cambridge, 2007) 61. Sir Francis is a notable authority on both human rights law and European Community law and was the Advocate General to the European Court of Justice [ECJ] in *Bosphorus* (ECJ), above n 26.

33 *Bosphorus* (ECtHR), above n 5, separate concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, para 3.

...would be tantamount to consenting tacitly to substitution, in the field of European Community law, of Convention standards by a European Community standard which might be inspired by Convention standards but whose equivalence with the latter would no longer be subject to authorised scrutiny.

Judge Ress gave a concrete example of a possible problem: standing to challenge European Community measures before the ECJ is very restrictive.³⁴ The right of access to a court under article 6.1 of the ECHR might require the ECJ to adopt a more generous standing test where civil rights and obligations are in issue.

These words may have influenced the Court of First Instance of the European Community (Court of First Instance) later in 2005 to develop additional protection for fundamental rights in cases involving UN Security Council resolutions.³⁵ In *Ahmed Ali Yusuf and Al Barakar International Foundation v Council of the European Union and Commission of the European Communities*,³⁶ the applicants sought to annul two European Community Council Regulations which included a freeze on suspected Taleban funds and funds of suspected associates of Osama bin Laden and Al-Qaeda. A schedule to the Regulations, made to implement UN Security Council resolutions under Chapter VII of the UN Charter,³⁷ listed by name people and organisations whose assets were to be frozen. The applicants claimed, inter alia, that the Regulations violated their fundamental rights.

The Court of First Instance accepted that the obligations of member states of the European Union under the UN Charter as members of the United Nations:³⁸

...prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the European Convention on Human Rights and, for those that are also members of the Community, their obligations under the EC Treaty.

34 Ibid, separate concurring opinion of Judge Ress, para 2.

35 Another reason for the change in the ECJ's approach is that the later cases concerned lists of people drawn up by European Union institutions to comply with United Nations Security Council [UN Security Council] requirements, rather than a list drawn up by the UN Security Council itself. The European Union institutions, unlike the UN Security Council, could be subject to judicial review of their list-making by the Court of First Instance of the European Community [Court of First Instance] and the ECJ.

36 Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2005] ECR II-3533 [*Yusuf*].

37 UNSC Resolution 1267 (15 October 1999) S/RES/1267/1999; UNSC Resolution 1333 (19 December 2000) S/RES/1333/2000; UNSC Resolution 1452 (20 December 2002) S/RES/1452/2002; UNSC Resolution 1455 (17 January 2003) S/RES/1455/2003.

38 *Yusuf*, above n 36, para 231.

In international law, a party may not invoke internal law as a justification for failing to perform a treaty,³⁹ and article 103 of the UN Charter provided that obligations under the UN Charter prevail over obligations under other international instruments. This applied equally to decisions contained in UN Security Council resolutions in accordance with article 25 of the UN Charter,⁴⁰ and was reinforced by article 297 of the Treaty Establishing the European Community.⁴¹ Such obligations could justify national measures which would otherwise have been contrary to European Community law.⁴²

On the other hand, the European Community itself, not being a member of the United Nations or an addressee of UN Security Council resolutions, was not directly bound by those obligations.⁴³ Yet the Court of First Instance considered it to be bound indirectly, because the member states could not transfer to the European Community more powers than they possessed taking account of their obligations to the United Nations.⁴⁴ European Community law had to be interpreted and its scope limited in the light of the relevant rules of international law.⁴⁵ The European Community had to avoid infringing obligations imposed on member states by the UN Charter or impeding their performance, and was moreover bound by the Treaty Establishing the European Community itself to adopt all the measures necessary to enable the member states to fulfil their obligations.⁴⁶

Since the UN Security Council resolutions left European Community institutions no discretion as to the content of the Regulations, the Court of First Instance accepted that it had no jurisdiction to decide whether the Regulations breached fundamental rights. Furthermore, the Court of First

39 Ibid, para 232, citing Vienna Convention on the Law of Treaties, above n 5, art 27 read in the light of art 5.

40 Ibid, para 233, citing *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984], ICJ Rep 392, 440 para 170; *Yusuf* above n 36, para 234, citing *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)* (Provisional Measures) [1992] ICJ Rep 114, 126 para 42 and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Provisional Measures) [1992] ICJ Rep 3, 16 para 39.

41 For an official, consolidated version of the Treaty Establishing the European Community as amended to 29 December 2006 see 2006 OJ C 321 E/37. Article 297 required member states to consult each other with a view to taking together the steps needed to prevent the function of the common market being affected by measures which a member state is required to take in order to carry out obligations accepted for the purpose of maintaining peace and international security: *Yusuf*, above n 36, para 238.

42 Ibid, para 241, citing Case C-124/95 *Centro-Com* [1997] ECR I-81.

43 Ibid, para 242, citing Case T-184/95 *Dorsch Consult v Council and Commission* [1998] ECR II-667, para 74.

44 *Yusuf*, above n 36, paras 243–245.

45 Ibid, para 249.

46 Ibid, para 254; Treaty Establishing the European Community, above n 41, art 301.

Instance held that it could not review the legality of the Regulations if that would impugn the consistency of the UN Security Council resolutions with international human rights law, since the Charter provides for the resolutions to override other treaty obligations.⁴⁷ On the other hand, the power of the UN Security Council to make Chapter VII resolutions was subject to *jus cogens*, "understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible".⁴⁸ But despite giving a generous meaning to *jus cogens*, the freezing of funds did not infringe it, because the UN Security Council resolutions were sufficiently circumscribed and provided subjects with sufficient procedural safeguards to avoid violating the right to property. In the circumstances there was no need for people affected to be given a prior hearing.⁴⁹ The Court of First Instance noted that no subsequent judicial protection was available to the applicants, but considered that this lacuna was not in itself contrary to *jus cogens*,⁵⁰ a view maintained in later cases.⁵¹

In *Chafiq Ayadi v Council of the European Union*⁵² the Court of First Instance went further in basing the legitimacy of asset-freezing on the quality of human rights protection allowed. As UN Security Council resolutions allowed states to limit freezing orders to allow subjects to cover basic expenses (which were not exhaustively defined), and left open the possibility of unfreezing assets to cover extraordinary expenses,⁵³ the authorities in member states had power to relax the freezing order in suitable cases.⁵⁴ Furthermore, the UN Security Council had required states to cooperate with its Sanctions Committee in periodically considering whether people should be removed from the list of those whose assets were to be frozen.⁵⁵ Since individuals have no standing to appear before the Sanctions Committee and therefore rely on diplomatic support from states, this gave rise to obligations on states, in order to respect the fundamental rights of individuals under the European

47 Ibid, paras 264–276.

48 Ibid, para 277.

49 Ibid, para 288 ff.

50 Ibid, para 341 ff.

51 See *Kadi*, above n 5.

52 *Chafiq Ayadi v Council of the European Union*, above n 23.

53 Ibid, para 119 Judgment of the Court, referring to UNSC Resolution 1452 (20 December 2002) S/RES/1452/2002 and Council Regulation 561/2003, art 2(a), amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban: [2003] OJ L 82, 1–2.

54 Ibid, para 132.

55 Ibid, para 142.

Community law, to ensure that a person who asks to be removed from the asset-freezing list can present their arguments to the competent national authorities. The member state had then to:⁵⁶

...act promptly to ensure that such persons' cases are presented without delay and fairly and impartially to the Committee, with a view to their re-examination, if that appears to be justified in the light of the relevant information supplied.

European Community law also provided people affected with a right to bring an action in national courts for judicial review of a decision not to submit their cases for re-examination by the Sanctions Committee and of any other infringement by national authorities of the right to request review of their cases.⁵⁷

This major step forward echoed the growing case law of the ECtHR to the effect that states have a positive obligation to take reasonable steps to protect people within their jurisdictions against having Convention rights infringed by other people or states.⁵⁸ But it goes further by making it clear that the positive obligation applies when the rights are threatened by an international institution as well as when they are threatened by another state or person. As rights which arise from general principles of European Community law bind both Community institutions and member states when acting to implement Community law, courts of member states must try to apply national law in such a way as to protect the rights of people adversely affected by Security Council resolutions to which European Community law gives effect.⁵⁹

The Court of First Instance has since held that, when giving effect to a UN Security Council resolution that requires freezing of assets but does not name people or organisations whose assets are to be frozen, institutions of member states and of the European Union have a duty to give a fair hearing after the event, with disclosure of evidence, to people affected, and to give reasons for decisions. Those must not be merely general and formulaic. When freezing someone's assets the Council of the European Union is:⁶⁰

... bound to state the matters of fact and law on which the legal reasoning of its decision depends and the considerations which led it to adopt the decision. The grounds for such a measure must therefore indicate

56 Ibid, para 149.

57 Ibid, paras 144–150. As an example of the operation of judicial review in this context the Court of First Instance referred at para 150 to *Nabil Sayadi and Patricia Vinck v Belgian State* 11 February 2005 (Tribunal de première instance de Bruxelles, Fourth Chamber, unreported) ordering the Belgian State to request urgently that the Sanctions Committee remove the claimants' names from the list of persons whose assets are to be frozen, on pain of paying a daily penalty.

58 See most notably *Ilaşcu v Moldova and Russia* (2004) 40 EHRR 1030 (Grand Chamber, ECtHR).

59 Case C-117/06 *Möllendorf and Möllendorf-Niehuus* [2008] 1 CMLR 11.

60 Case T-47/03 *Sison v Council of the European Union* [2007] 2 CMLR 17 para 190 [*Sison* (ECJ)].

the actual and specific reasons why the Council considers that the relevant rules are applicable to the party concerned.

However the nature of a freezing order will normally militate against giving a prior opportunity to be heard. Once it has been made, the person subject to the order might not be given full reasons for it.⁶¹

... overriding considerations concerning the security of the European Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds.

The same may apply to disclosure of evidence.⁶² A violation of these principles leads, by virtue of the right to effective judicial protection, to the inevitable annulment of the decision so far as it relates to the victim.⁶³

To make this effective, the ECJ has held that its procedural rules must be relaxed if necessary to allow an unincorporated association to bring an action to annul a measure aimed at that association, because the European Community is based on the rule of law and fundamental rights which require effective judicial protection when measures adversely affect financial rights and reputations.⁶⁴ In *Gestoras Pro Amnistia and others v Council of the European Union*,⁶⁵ the applicant claimed damages having been named as a subject of police and judicial action in an European Union common position.⁶⁶ The Court of First Instance and the ECJ held that the European Union Treaty gave them no jurisdiction to entertain an action for compensation for damage caused through the

61 Ibid, para 180.

62 See *Sison* (ECJ), above n 60, paras 166–174, 184, 184–195, 198, and the subsequent judgment of the Court of First Instance: Case T-47/03 *Sison v Council of the European Union* [2007] 3 CMLR 39 [*Sison* (Court of First Instance)]; Case T-228/02 *Organisation des Modjahedines du People d'Iran v Council of the European Union* [2007] 1 CMLR 34, noted in Angus Johnston "Thawing Out? The European Courts and the Freezing of Terrorist Assets" [2007] CLJ 273; Case T-327/03 *Stichtung Al-Aqsa v Council of the European Union* (11 July 2007).

63 *Sison* (Court of First Instance), above n 62, paras 227, 235.

64 Case C-229/05 *Osman Ocalan on behalf of the Kurdistan Workers' Party (PKK) and others v Council of the European Union* [2007] ECR I-439. This can be seen as a response to Judge Ress's observation in *Bosphorus* (ECtHR) concerning the need for the ECJ to relax its locus standi rules in order to provide protection for human rights equivalent to that offered by the ECtHR: see text at n 34.

65 Case C-354/04 *Gestoras Pro Amnistia and Others v Council* [2007] ECR I-1579. See to similar effect Case T-228/02 *Organisation des Modjahedines du people d'Iran v Council of the European Union*, above n 62.

66 A common position is an act of the European Union Council reflecting an agreement between the member states of the European Union which is not intended to produce of itself legal effects on third parties, but which is binding on the states concerned. Common Position 2001/931, made under Title VI of the European Union Treaty, required member states to afford one another the widest possible assistance through police and judicial cooperation in criminal matters.

implementation of a common position under Title VI. Nevertheless, they rejected the claim that there was an absence of effective judicial protection for the applicants. Common positions are implemented by national authorities. European Union law requires states to ensure that people can challenge in national courts or tribunals the lawfulness of any national "decision or ... measure relating to the drawing up of an Act of the European Union or its application to them and to seek compensation for any loss suffered".⁶⁷ If the authorities claim to be acting in accordance with a common position, an applicant could argue that the common position, "because of its content, has a scope going beyond that assigned by the European Union Treaty".⁶⁸ A national court, before deciding whether an act described as a common position was really intended to produce legal effects on third parties would be able to request a preliminary ruling from the ECJ, which has jurisdiction to give preliminary rulings "in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties".⁶⁹ This includes power to decide whether a measure classified as a common position is actually intended to have such effects, and so should be treated as another kind of measure entailing enhanced judicial protection for third parties.⁷⁰ Finally, European Union law both requires states to provide an opportunity to bring an action against them in their national courts to claim compensation for improper state action pursuant to a common position, and requires the award of compensation by the Court of First Instance or ECJ for pecuniary and non-pecuniary damage if the failure is attributable to the competent European Union institution and manifestly and gravely disregards the limits set on its discretion.⁷¹

This shows that a combination of European Community and European Union constitutional law and national law increasingly protects people whose fundamental rights are affected by sanctions imposed or directed by the UN Security Council. Admittedly where a measure against a person has been annulled it has so far proved impossible to prevent them being reinstated, and it is difficult to establish that inclusion is improper when states usually refuse, on security grounds, to reveal evidence supporting the decision. Nevertheless, the ECJ's approach to reviewing measures is progressively becoming more rigorous, even if they are in an European Union common position which is in theory unreviewable. The latest indication of this trend is an Opinion of Advocate General Maduro in the appeal of the applicant in Case C-402/05 *Kadi v Council of the European*

67 *Osman Ocalan on behalf of the Kurdistan Workers' Party (PKK) and others v Council of the European Union*, above 64, para 56.

68 *Ibid*, para 54.

69 *Ibid*, para 53.

70 *Ibid*, paras 53–54.

71 *Sison* (Court of First Instance) above n 62, paras 234–235 (though in that case the annulment of the challenged decision was a sufficient remedy).

Union and Commission of the European Communities.⁷² The Advocate General advanced the view that since European Union constitutional law regards the European Union as an autonomous legal order, distinct from both municipal and international legal orders (despite having been established by treaty), European Union institutions could lawfully give effect to UN Security Council Chapter VII resolutions freezing the applicant's assets only so far as the resolutions respected fundamental rights regarded by the ECJ as binding on institutions and member states of the European Union by virtue of general principles of European Union law. Rejecting the claim that the ECJ could not review UN Security Council resolutions by reference to European Union standards, he argued that the absence of procedural rights at United Nations level for people whose names are included in lists of suspected terrorists whose assets are to be frozen made it essential for the ECJ to conduct rigorous review of the compatibility of the listing with general principles of European Union law, and the ECJ is competent to conduct such review by virtue of the autonomous character of the European Union legal order. It will be interesting to see whether the ECJ agrees, or prefers the contrary arguments advanced by the Council, the Commission, and the United Kingdom government which intervened.

The ECtHR has been less effective, perhaps because it is an institution of international law and cannot claim to have an obligation to uphold an autonomous legal order. It seems to be more concerned than the ECJ to avoid treading on the toes of other international organisations in combating terrorism. It has done this first, as noted earlier, by allowing a presumption that the ECJ is as capable of protecting human rights as the ECtHR.⁷³ It has also on occasion avoided making a decision by attributing the act in question to a body which is not subject to its jurisdiction. In *Behrami and another v France*,⁷⁴ when agents of a state party to the ECHR carried out acts outside

72 Case C-402/05 *Kadi v Council of the European Union and Commission of the European Communities* (ECJ, appeal pending). The appeal is from the decision of the Court of First Instance in *Kadi*, above n 5. The case is pending before the ECJ. The Advocate General's opinion is accessible at curia.europa.eu (accessed 3 August 2008). See especially paras 19–54.

73 *Bosphorus* (ECtHR), above n 5. However, in a separate joint concurring opinion in the *Bosphorus* case six judges (Rozakis, Tulkens, Traja, Botoucharova, Zagrebelski and Garlicki) wrote (para 1):

It has now been accepted and confirmed that the principle that Article 1 of the Convention makes "no distinction as to the type of rule or measure concerned" and does "not exclude any part of the member States' 'jurisdiction' from scrutiny under the Convention" (see *United Communist Party of Turkey and Others v Turkey*, judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I, pp 17–18, § 290) also applies to European Community law. It follows that member states are responsible, under article 1 of the Convention, for all acts and omissions of their organs, whether these arise from domestic law or from the need to fulfil international legal obligations.

Judge Ress in his separate concurring opinion in the same case considered that states parties act inconsistently with Convention rights if they conclude treaties (at any rate, with each other) inconsistent with their obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR]. See also text at n 82.

74 *Behrami v France* (Admissibility) (2007) 45 EHRR SE10 (Grand Chamber, ECtHR).

their territories as part of the United Nations mission in Kosovo pursuant to a UN Security Council Chapter VII resolution, and the mission was established and controlled by the UN Security Council, a majority of judges of the ECtHR regarded the act as being attributable to the United Nations, not the sending states which were parties to the ECHR. Proceedings against the sending states were therefore inadmissible *ratione personae*. The same would seem to apply to agents working under an European Union law mandate. On the other hand, acts of state agents who are not under the control of the United Nations or European Union, on foreign territory where they exercise effective control, remain attributable to the state.⁷⁵

The quality of reasoning in this decision is disappointing, as is the result: a lacuna in the protection offered to fundamental rights in public international law. As Dr Guglielmo Verdirame has pointed out, the conclusion that the impugned detention order did not occur by virtue of a decision of the French authorities seems inconsistent with the brute facts of the case.⁷⁶ Nevertheless, the reasoning has recently been extended to the work of an international agency operating in but outside the control of a state in a manner endorsed by a Chapter VII resolution. In *Berić and others v Bosnia and Herzegovina*⁷⁷ the applicants had been summarily dismissed from elected and appointed positions as politicians, public servants and judges in Bosnia and Herzegovina by the High Representative for Bosnia and Herzegovina. The High Representative was appointed⁷⁸ by UN Security Council Resolution 1031⁷⁹ under Chapter VII of the Charter pursuant to Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Agreement) of 1995.⁸⁰ His remit was to facilitate the civilian implementation of the peace agreement in Bosnia and Herzegovina. UN Security Council resolutions later endorsed the view that the High Representative should interpret Annex 10 as giving him (*inter alia*) power to make laws, dismiss appointed and elected officials, politicians, judges, prosecutors and police officers, and establish institutions, among other things. When people who had been dismissed alleged that it

75 *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332 (HL) [*Al-Jedda*]; see below text at n 121. Presumably acts or omissions of states in implementing United Nations or European Union measures on their own territories are also attributable to the state concerned, although this has never been formally decided: see *Bosphorus* (ECtHR), above n 5.

76 Guglielmo Verdirame "Breaches of the European Convention on Human Rights Resulting From the Conduct of International Organisations" [2008] EHRLR 209, 212–213.

77 *Berić and others v Bosnia and Herzegovina* (Admissibility) (2007) 48 EHRR SE6 (Section IV, ECtHR) [*Berić*].

78 The High Representative is nominated by the Steering Group of the Peace Implementation Council, a group of states that pays for the work of the Office of the High Representative, and the nomination is endorsed by the UN Security Council.

79 UN Security Council Resolution 1031 (15 December 1995) S/RES/1031/1995 paras 26–28.

80 General Framework Agreement for Peace in Bosnia and Herzegovina [Dayton Agreement] (14 December 1995) 35 ILM 75.

violated their right to a fair hearing, the ECtHR held the applications to be inadmissible *ratione personae*. The High Representative's acts were attributable to the United Nations, applying the principles laid down in *Behrami*. The UN Security Council had delegated its functions in respect of a threat to international peace and security, while retaining effective control as it was still able to change the powers of the High Representative. The State, by contrast, had no real control over the High Representative and no role in relation to the High Representative's dismissal decisions.⁸¹

The combination of attribution and general international law arguments means that the ECtHR has never yet held action by states or the European Community or European Union to implement a Chapter VII resolution to have violated a Convention right. Indeed, it has gone further, and held that states — despite being required by article 1 of the ECHR to secure the Convention rights to everyone within their jurisdictions — remain free to enter into new treaty obligations which may affect those rights, at least in some circumstances. For example, the right of access to a court under article 6.1 of the ECHR can be restricted to give effect to another treaty if the restriction serves a legitimate aim and is proportionate to that aim. Treaty obligations imposed or accepted on account of the special position of an occupied or otherwise unstable state following war, such as Germany after World War II, or to allow an important development such as the reunification of Germany, can therefore justify denying people access to national courts.⁸² The ECtHR takes account of principles of public international law such as state immunity and *pacta sunt servanda*.

This may leave people without effective legal redress for violations of human rights. The Council of Europe Commission for Democracy through Law (the Venice Commission),⁸³ examining the constitutional position in Bosnia and Herzegovina, has accepted that the special status of the High Representative and the United Nations Mission to Bosnia and Herzegovina and the support of UN Security Council resolutions under Chapter VII deprive people of remedies for denial of due process in relation to serious interferences with people's rights.⁸⁴ This conclusion is reinforced by the ECtHR's decision in *Berić v Bosnia and Herzegovina*.⁸⁵ The Venice Commission

81 The Office of the High Representative has recently begun to review some of these decisions, revoking bans on holding public office without admitting that their imposition had been erroneous, but there is no transparency or due process in the reviews.

82 *Prince Hans-Adam II of Liechtenstein v Germany* (Merits) 12 July 2001 App no 42527/98 (Grand Chamber, ECtHR). It is not clear whether this applies only in such exceptional circumstances. *Waite and Kennedy v Germany* (1999) 30 EHRR 261, para 67 (Grand Chamber, ECtHR) took the view that member states would not be absolved from their responsibility under the ECHR if they establish international organisations to strengthen cooperation, attribute competences to them, and confer immunities on them.

83 The Venice Commission monitors progress towards democracy and the rule of law in a number of states and makes recommendations to and on behalf of the Council of Europe.

84 Opinion of the Venice Commission *The Constitutional Situation in Bosnia and Herzegovina and Powers of the High Representative* (CDL-AD(2005)004, Venice) paras 92-100.

85 See text at n 77.

also considered the process by which the United Nations Mission to Bosnia and Herzegovina decertified police officers, depriving them of their livelihoods. It pointed out that the ECtHR has held that the immunity of international organisations can be justified even if it interferes with the right of access to a court under article 6.1 of the ECHR, but the proportionality of the interference may depend on factors like the adequacy of alternative procedures for obtaining redress from the organisation.⁸⁶ The Commission recommended that the UN Security Council should set up a review panel to review systematically the decertification decisions, respecting the right to a fair hearing,⁸⁷ but as yet nothing has been done.

To sum up the story so far, some international and supranational bodies show signs of growing consciousness of the importance of the rule of law and human rights in their own work and in the international sphere more generally. European Union law is playing a leading role. The Venice Commission provides a critique of international institutions' compliance with the rule of law. Even the UN Security Council and its sanction committees seem increasingly aware of the importance of applying constitutional values for their perceived legitimacy and international support. Nevertheless, some international organisations are reluctant to accept that constitutional standards apply to them, even when asserting the importance of others complying with them. Yet as a matter of international law there is scope for interpreting or giving effect to the UN Charter and Chapter VII resolutions in accordance with constitutional principles in a way that can enrich the normative foundations of international law and so provide a basis for the development of an international society.

III THE PROBLEM FROM THE PERSPECTIVE OF NATIONAL CONSTITUTIONS

Can the violation of a national constitutional requirement ever be justified in municipal law in order to comply with an international legal obligation? One might expect that this would depend on whether, or the extent to which, the state concerned adopts a monist or dualist view of the relationship between the municipal and international legal orders. For example, in Ireland, a dualist state, an obligation imposed by a UN Security Council Chapter VII resolution cannot justify violating constitutional rights or other municipal legal rules.⁸⁸ Yet even where international and municipal law are seen as part of a continuous system of norms, the hierarchical position of international legal norms in the municipal legal order depends on the state's constitution. That may accord international law priority over state laws but place it below the constitution, or alternatively

86 See for example *Beer and Regan v Germany* (1999) 33 EHRR 3 (Grand Chamber, ECtHR) concerning labour law disputes with the European Space Agency.

87 Opinion of the Venice Commission *Decertification of Police Officers by the United Nations Mission to Bosnia and Herzegovina* (CDL-AD(2005)024, Venice) especially paras 4 and 57 ff.

88 *Bosphorus Hava Yollari Turizm AS v Minister for Transport, Energy and Communications* [1994] 2 ILRM 551 (HC Ire), and [1997] 2 IR 1 (SC Ire).

make it subject to ordinary laws as well.⁸⁹ In the same way, only the constitutional order of a supranational body such as the European Union could determine the extent to which institutions of the European Union are bound by international obligations of member states by virtue of unrelated treaties into which they have entered. No constitutional system should allow fundamental principles such as the rule of law to be undermined by international law without approval by an appropriate institution (normally a legislative body), particularly if giving effect to international law would damage people's legal positions.⁹⁰

We can illustrate this with two examples. The first is Bosnia and Herzegovina, on one view still an international protectorate over twelve years after the war in former Yugoslavia. Its constitution originated in annex 4 to the Dayton Agreement.⁹¹ Article II requires Bosnia and Herzegovina to secure the highest level of protection for internationally recognised human rights, and provides that the ECHR has effect directly and has "priority over all other law". Many other international human rights agreements are also to be given effect. The Constitution commits the state to the rule of law, and article VI requires the Constitutional Court to "uphold this Constitution". The constitutional rights in article II are derived from the ECHR but can confer wider protection, and the authority of the ECHR in Bosnia and Herzegovina stems from the Constitution, not vice versa.⁹²

In a number of cases the Constitutional Court has adapted to the municipal sphere the notion of states' positive obligations as developed by the ECtHR, holding that the State and its organs have positive obligations arising from the Constitution to take reasonable steps to protect the constitutional rights of people within the country. For instance, people suffered massive losses having deposited, at the behest of the government of former Yugoslavia, foreign currency earnings in special foreign currency savings accounts with state-owned banks. The savings became part of the State's foreign currency reserve. When Yugoslavia broke up, the money had disappeared and the

89 See David Feldman "The Internationalization of Public Law and its Impact on the United Kingdom" in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (6 ed, Oxford University Press, Oxford, 2007) chapter 5, 108–133.

90 *Yusuf*, above n 36. Moses J in the English Divisional Court in *R (Al-Jedda) v Secretary of State for Defence* [2005] EWHC 1809 (Admin), para 34 referred to the "startling" notion that a fundamental right could be removed "not least because it has been achieved without any express warning in the resolution itself and without any announcement by the Executive, still less the opportunity for scrutiny by Parliament".

91 Dayton Agreement, above n 80.

92 This is inevitable given that the state was not a member of the Council of Europe, and had not signed or ratified the ECHR, at the time when the Dayton Agreement and the Constitution came into force in December 1995. The Constitution was at that stage the only possible source of authority for giving effect to rights under the ECHR (and other human rights treaties) in municipal law, despite the fact that Bosnia and Herzegovina inherited a monist approach to the relationship between municipal and international law from the Socialist Federative Republic of Yugoslavia. See David Feldman "European Human Rights and Constitution-Building in the Post-Conflict Society: The Case of Bosnia and Herzegovina" (2005) 7 *Cambridge Yearbook of European Legal Studies* 101.

banks disclaimed responsibility. The successor states disagreed as to which was responsible for what losses. More than ten years of negotiations between them failed to produce satisfactory compensation for depositors. Eventually the Constitutional Court held that the State had failed to meet its constitutional positive obligation to take reasonable steps to protect the rights of its citizens.⁹³

The Court took a similar approach in two cases involving the actions of international agencies exercising functions with the support of UN Security Council resolutions adopted under Chapter VII of the UN Charter. In November 1995 the Republic of Bosnia and Herzegovina had agreed with the North Atlantic Treaty Organisation (NATO) that NATO, its personnel, property and assets were to enjoy, *mutatis mutandis*, the privileges and immunities of experts on mission under the Convention on the Privileges and Immunities of the United Nations of 13 February 1946. At the same time the agreement required personnel enjoying those privileges to "respect the laws of the Republic of Bosnia and Herzegovina insofar as it is compatible with the entrusted tasks/mandate" and to "refrain from activities not compatible with the nature of the Operation".⁹⁴ In December 1995 Annex IA to the Dayton Agreement gave the Implementation Force a mandate to take such actions as were required in the view of the Implementation Force's commander to allow it to provide military support for the implementation of the peace agreement. In 1996 the Stabilisation Force succeeded the Implementation Force, and UN Security Council Resolution 1088 stressed that the parties had continuing and coextensive responsibilities towards the Stabilisation Force.

In *Appeal of Mr Bogdan Subotić*,⁹⁵ the appellant had been arrested in Bosnia and Herzegovina by United States soldiers forming part of the Stabilisation Force, for "violating the Dayton agreement", not an offence in law. He had been taken, handcuffed, blindfolded and with his ears covered, by helicopter to an unknown location. After five days of interrogation he had suffered a heart attack. Following brief treatment the interrogation had continued. Eventually he had been taken, tied and blindfolded again, back to his house in an off-the-road vehicle, and left there. Meanwhile items had been confiscated from his house.

The appellant sought redress unsuccessfully from government agencies in the Republika Srpska, then brought a claim against the State of Bosnia and Herzegovina before the Constitutional Court alleging breach of his constitutional rights to liberty, freedom from torture and inhuman or degrading treatment, and respect for private and family life. The state authorities argued that the

93 Case AP-164/04 *Appeals of Derviš and Meliha Hadžiabdić and others* (Merits) 1 April 2006 (Constitutional Court of Bosnia and Herzegovina) [*Derviš*].

94 Agreement between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organization (NATO) Concerning the Status of NATO and its Personnel (23 November 1995) (1994) 35 ILM 102, arts 2 and 3.

95 Case AP-696/04 *Appeal of Mr Bogdan Subotić* (Merits) 23 September 2005 (Constitutional Court of Bosnia and Herzegovina) [*Subotić*].

claim was inadmissible, partly because the Constitutional Court had no jurisdiction in relation to the acts of the Stabilisation Force. The Court rejected this argument. Since the claim was against the State, not against the Stabilisation Force, the Court would not have to adjudicate on the lawfulness of the Stabilisation Force's acts, but would be concerned only with the State's compliance with its constitutional obligations. The obligation to ensure the highest level of protection of human rights for people on its territory applied even where the interference came from international agents who were not accountable to national authorities.⁹⁶ The State had failed to discharge its positive obligation. Whilst the Court recognised that "the competent local authorities can face a difficult task if it is necessary to undertake appropriate measures in relation to the Stabilisation Force members as an international organization that enjoys immunity and which, besides that, has much stronger means and measures of coercion than the state itself",⁹⁷ the authorities had not taken the smallest step towards conducting an effective investigation and had made no attempt to persuade the Stabilisation Force to release the appellant and compensate him for the damage caused. The State was therefore liable to pay compensation to the claimant for violation of his constitutional rights if the Stabilisation Force refused to do so.⁹⁸

In the case law of a parallel institution, the Human Rights Chamber for Bosnia and Herzegovina,⁹⁹ there was a still clearer assertion of the positive obligations of the State despite competing obligations in international law. In 2002 the Chamber held that the State had to secure the rights of individuals notwithstanding any possible clashes with the State's obligations under UN Security Council Chapter VII resolutions.¹⁰⁰

The Constitutional Court combined and further developed these lines of authority in *Appeal of Milorad Bilbija and Dragan (Bilbija)*.¹⁰¹ The High Representative had dismissed Mr Bilbija from

⁹⁶ Ibid, para 37.

⁹⁷ Ibid, para 54.

⁹⁸ Ibid, paras 54–55, citing Case CH/98/668 *Čebić v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina* (Admissibility and Merits) 2 June 2003 paras 80 and 86 (Human Rights Chamber for Bosnia and Herzegovina) and Case U-28/00 *Appeal of F Dž* (Merits) 28 November 2003 (Constitutional Court of Bosnia and Herzegovina) (immunity of international forces — in that case the United Nations Protection Force — according to international law did not exempt state authorities from responsibility if the forces were acting as state representatives in maintaining peace and security).

⁹⁹ The Chamber was established by Annex 6 to the Dayton Agreement. It had fourteen members (six national judges and eight internationals) and determined claims that public authorities in Bosnia and Herzegovina had violated rights under the ECHR. (Bosnia and Herzegovina did not become a party to the ECHR and so come within the jurisdiction of the ECtHR until 2002.) The Chamber and the Constitutional Court regarded each other as being of coordinate jurisdiction, and did not review each other's decisions.

¹⁰⁰ *Boudellaa and others v Bosnia and Herzegovina* (Admissibility and Merits) 11 October 2002 13 BHRC 297 (Human Rights Chamber for Bosnia and Herzegovina) [*Boudellaa*].

¹⁰¹ Case AP-953/05 *Appeal of Milorad Bilbija and Dragan Kalinić* (Admissibility and Merits) 8 July 2006 (Constitutional Court of Bosnia and Herzegovina) [*Bilbija*].

his position in the Intelligence and Security Agency in Banja Luka and from other public and party positions. The High Representative's decision asserted that the appellant was an integral part of a pervasive system within Republika Srpska (one of the entities constituting Bosnia and Herzegovina), fostering a culture of silence and deceit whereby war crime indictees were protected from justice. By another decision, the High Representative had removed Mr Kalinić from his positions as Chairman of the National Assembly of Republika Srpska and President of the Serb Democratic Party. The decision stated that the appellant had been culpable in respect of the failure of the Serb Democratic Party to stop material support and sustenance being provided to individuals indicted by the International Criminal Tribunal for the former Yugoslavia, and that the Serb Democratic Party and its President lacked the ability to prevent party funds being used to support and assist their former President, who had been indicted by the former International Criminal Tribunal. The decisions barred both appellants from holding any official, elective or appointive public office, from running in elections, and from holding office within political parties, unless and until such time as the High Representative should expressly authorise them to do so. Their remuneration, status and privileges ceased immediately. When ordinary courts held that they lacked jurisdiction to review decisions of the High Representative,¹⁰² the appellants appealed to the Constitutional Court. They argued that, through his decisions, the High Representative had intervened in the legal order of Bosnia and Herzegovina, producing legal effects which violated their constitutional rights, including the right to an effective remedy for violations of constitutional rights.

The Constitutional Court held that the absence of an effective remedy before the ordinary courts gave rise to a substantial question as to whether there had been a violation of constitutional rights. The Court lacked jurisdiction to review the legality of administrative or individual decisions of the High Representative,¹⁰³ so Mr Kalinić's claim was inadmissible, but Mr Bilbija's claim against the State, not the High Representative, was admissible. On the merits, the Court noted that the High Representative was an international agent acting with powers conferred by Annex 10 to the Dayton Agreement, and appointed in accordance with UN Security Council resolutions adopted under

¹⁰² Mr Bilbija challenged the ruling of the Court of Bosnia and Herzegovina No U-20/05 of 28 February 2005 and the ruling of the County Court of Banja Luka No U-107/05 of 27 September 2005. Mr Kalinić challenged the ruling of the Supreme Court of Republika Srpska No U-860/04 of 18 May 2005.

¹⁰³ The Court had previously held that it had jurisdiction to review the constitutionality of laws of general application imposed by the High Representative once they were in place within the legislative hierarchy of the state (Case U-9/00 *Eleven Members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina* 3 November 2000 (Constitutional Court of Bosnia and Herzegovina)), but not to review individual decisions removing people from office (Case U-37/01 *Appeal of 37 Members of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina against the Decision of the High Representative for Bosnia and Herzegovina No 86/01 of 23 February 2001* (*Official Gazette of the Federation of Bosnia and Herzegovina, No 9/01*) (Admissibility) 2 November 2001 (Constitutional Court of Bosnia and Herzegovina)).

Chapter VII to the UN Charter. On the other hand, the Venice Commission had expressed concern that the High Representative was not an independent court, there was no possibility of appeal, and he had no democratic legitimacy emanating from the people of Bosnia and Herzegovina. Those removed from office had been denied due process.¹⁰⁴

The Court held that the State had a positive obligation to protect the rights of people within its territory even when the State had transferred functions to an international agency. One aspect of the obligation was to take reasonable steps to secure an effective remedy for people whose rights were infringed.¹⁰⁵ Whilst UN Security Council Chapter VII resolutions were binding in international law,¹⁰⁶ a judicial decision on the scope of the State's constitutional obligations could not affect the validity or effectiveness of the High Representative's individual decisions. The Constitutional Court had to give effect to the State's national constitution.¹⁰⁷ The State's obligation in public international law to co-operate with the High Representative and to act in conformity with decisions of the UN Security Council could not determine the constitutional rights of people within the jurisdiction of Bosnia and Herzegovina. The reference in article II of the Constitution to the highest level of internationally recognized human rights was not to be understood as restricting rights by reference to limitations arising in public international law. International law did not relieve the State of its constitutional obligation to take reasonable steps toward securing an effective legal remedy against individual decisions of the High Representative, for example by drawing the attention of the High Representative or the Peace Implementation Council to the alleged violations of constitutional rights of individuals on the grounds of the non-existence of an effective legal remedy and seeking to ensure the protection of constitutional rights of its citizens through the Peace Implementation Council's Steering Board and the UN Security Council. There was no evidence that any such steps had been taken. The State had therefore violated its positive obligation.¹⁰⁸

¹⁰⁴ Opinion of the Venice Commission *The Constitutional Situation in Bosnia and Herzegovina and Powers of the High Representative*, above n 84, paras 92–100.

¹⁰⁵ *Bilbija*, above n 101, paras 53 and 55. For other examples of the same principle, see *Derviš*, above n 93 and *Subotić*, above n 95.

¹⁰⁶ *Bilbija*, above n 101 para 62. For the view that the difference between recommendations and decisions is no longer significant on account of a state practice of treating both as equally binding, see Vera Gowlland-Debbas "The Limits of Unilateral Enforcement of Community Objectives in the Framework of United Nations Peace Maintenance" (2000) 11 EJIL 361, 371. However, Guglielmo Verdirame "The Divided West: International Lawyers in Europe and America" (2007) 18 EJIL 553, especially at 561–566, has identified the concentration on state practice — how states behave, rather than how they ought to behave — as a particularly American view of international law, undermining the normative role (and so calling in question the reality) of international law.

¹⁰⁷ *Bilbija*, above n 101, paras 65–67.

¹⁰⁸ *Ibid*, paras 68–76.

The Court did not grant any remedy, monetary or coercive, to Mr Bilbija. Its decision was declaratory only.¹⁰⁹ Nevertheless, the decision is significant for roundly asserting the primacy of national constitutional law over international law for national courts (except so far as the constitution gives to the relevant international law a status equal to or higher than that of the national constitution), even where constitutional and international law are closely bound together, as in Bosnia and Herzegovina.

The response of the High Representative to the decision illustrates the weakness of respect for the rule of law in some international institutions. The High Representative made an Order which, in the preamble, referred to the reasons for removing the appellants from their positions, to articles 25 and 103 of the UN Charter, and to the obligations of Bosnia and Herzegovina to comply with the Charter; it also recalled that individuals could already make representations to the High Representative to have bans lifted as had happened in 50 cases to that date.¹¹⁰ Article 1 struck a positive note, requiring the State Presidency to address to the High Representative all matters raised in the Court's decision which ought to be considered by the international authorities mentioned in the decision.¹¹¹ But article 2 was less encouraging. It provided that any step taken to establish any domestic mechanism to review decisions of the High Representative would be treated as an attempt to undermine the implementation of the Dayton Agreement. There was a clear implication that those responsible would be subject to the same fate as Mr Bilbija. By article 3, any court proceedings challenging or taking issue in any way with a decision of the High Representative were to be declared inadmissible unless the High Representative had expressly given prior consent, and:¹¹²

... no liability is capable of being incurred on the part of the Institutions of Bosnia and Herzegovina, and/or any of its subdivisions, and/or ... any other authority in Bosnia and Herzegovina, in respect of any loss or damage allegedly flowing, either directly or indirectly, from such Decision of the High Representative made pursuant to his or her international mandate, or at all.

Article 4 declared the provisions of the Order not to be justiciable by the domestic courts; no proceedings may be brought in respect of duties in respect of the Order before any court whatsoever at any time thereafter.

109 The significance of this seems to have escaped the notice of the High Representative, and of the ECtHR in *Berić*, above n 77, para 19 which wrongly describes the Constitutional Court's decision as "ordering the domestic authorities to secure an effective remedy in respect of removals from office by the High Representative".

110 High Representative Decision of 23 March 2007: *Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al* 23 March 2007 AP-953/05.

111 *Ibid*, art 1.

112 *Ibid*, art 3.

The Order, described by the ECtHR as a "vigorous response ... which took from the impugned decision of the Constitutional Court any practical effect",¹¹³ is notable for its apparent disregard for rule of law principles and for the integrity of national constitutional law. Yet it comes from an institution which regularly refers to the importance of establishing the rule of law, democracy and human rights in Bosnia and Herzegovina. Using such values purely for rhetorical effect without considering oneself bound by them may not be entirely unproductive: it may help to popularise them in the interests of good government.¹¹⁴ Nevertheless, when there is a clear disjunction between the standards that the institution demands of others and those that guide its own behaviour, and a refusal to accept any form of external constraint on or scrutiny of its behaviour, such cavalier treatment of the rule of law (and also democracy, since elected office-holders were dismissed summarily) by the primary local representative of the "international community" tends to undermine the credibility of the rhetoric and of the values themselves.

It might be said that stern measures are needed where the UN Security Council continues to consider that the region represents a threat to international peace and security. However, there was no immediate prospect of war or even widespread civil unrest in Bosnia and Herzegovina at the time, and the extent of the disregard for due process and the rule of law seems disproportionate to the threat.

Alternatively the High Representative might be said to be adequately accountable to the UN Security Council and to the European Union. But as Dr Jeremy Farrall points out in relation to United Nations Chapter VII sanctions regimes, the operation of the UN Security Council lacks transparency, and action to uphold rule of law values is slow and unreliable.¹¹⁵ Despite the recommendation of the Venice Commission that a panel of experts should be established to review the High Representative's individual dismissal decisions,¹¹⁶ and despite the lacunae in protection for rights identified by both the Venice Commission¹¹⁷ and the Constitutional Court, neither the UN Security Council nor the European Union has yet established any mechanism to review the High Representative's individual decisions in relation to elective or governmental offices (although

113 *Berić*, above n 77, para 19. This is not strictly correct, as the decision was only declaratory (see above n 109 and associated text), and its purpose was to encourage dialogue on the matter between the High Representative and the State Presidency.

114 This point is made by John Elster "Introduction" in John Elster (ed) *Deliberative Democracy* (Cambridge University Press, Cambridge, 1998) 14.

115 Farrall, above n 12, chapter 9.

116 Venice Commission, above n 87 para 98. See also, on the need for mechanisms to review decisions affecting human rights in Kosovo where the United Nations mission has wide powers under UN Security Council resolutions, Opinion of the Venice Commission *Opinion on Human Rights in Kosovo: Possible Review Mechanisms* (CDL-AD(2004)033, Venice).

117 See text at nn 83–86.

responsibility for removing judges and certifying police officers has now passed to independent national bodies).

The weakness of scrutiny and accountability deprives the High Representative of an opportunity to ensure and enhance the quality of the decision-making process. It has been suggested that the process and the evidence and documentation supporting the High Representative's disqualification decisions are unstructured and likely to be unreliable,¹¹⁸ and the lack of transparency in United Nations sanctions committees' work affecting individuals might indicate a similar problem there.¹¹⁹ As we have seen, the judicial system of the European Union is developing a more principled approach, but we cannot be fully confident that the political and executive institutions of the European Union have embraced this, or that other international organisations are observing standards of what Professor Neil Walker has called "the ethic of responsible self-government which lies at the heart of all publicly defensible constitutional discourse".¹²⁰ There seem to be two models of the rule of law in play. The first involves procedural propriety and respect for rights, imposed on states by international institutions. The other requires that suspected war criminals or terrorists be arrested or their activities constrained by whatever means necessary, even if they involve disregarding the demands of procedural propriety and rights and harm to third parties. The High Representative, like some other agencies, attempts to embrace both models, applying the former to others and the latter to itself.

The second illustration of a national constitutional approach is England and Wales, exemplified by the decision of the House of Lords in *R (Al-Jedda) v Secretary of State for Defence (Al-Jedda)*.¹²¹ The legal context arose from the invasion of Iraq by the multinational force dispatched by the United States–United Kingdom coalition in 2003. After the invasion, UN Security Council Resolution 1483¹²² called on all parties to comply with their obligations under international law. The United Nations Secretary General appointed a Special Representative for Iraq and established a United Nations Assistance Mission for Iraq to advance humanitarian objectives and monitor the situation in Iraq. Resolution 1511, made pursuant to Chapter VII of the Charter, authorised the multi-national force to take "all necessary measures to contribute to the maintenance of security and

118 Matthew Parish "The Demise of the Dayton Protectorate" (2007) 1 Intervention and State Building (Special On-Line Supplement) 11, 15–16 www.wmin.ac.uk/sshl (accessed 1 August 2008). Mr Parish was an official in the Legal Department of the Office of the High Representative in Bosnia and Herzegovina from 2005 until 2007.

119 See Farrall, above n 12, 202–205.

120 Walker, above n 9, 32. This rigorous analysis of problems involved in translating the language of constitutionalism from national to supranational organisations repays careful study.

121 *Al-Jedda*, above n 75. For the judgments of the lower courts, see *R (Al-Jedda) v Secretary of State for Defence* [2006] 3 WLR 954 (HC); *R (Al-Jedda) v Secretary of State for Defence* [2007] QB 621 (CA).

122 UNSC Resolution 1483 (22 May 2003) S/RES/1483/2003.

stability in Iraq".¹²³ The preamble referred to Resolutions 1373 and 1483.¹²⁴ Paragraph 5 of the latter called on states to comply fully with their obligations in international law including the Geneva Conventions and Hague Regulations and in paragraph 8 requested the UN Secretary General to appoint a Special Representative for Iraq who was to promote the protection of human rights.

In 2004, the start of a transition to Iraqi civilian government was marked by letters to the President of the UN Security Council from the Prime Minister of the Interim Iraqi Government and the United States Secretary of State. The latter referred to activities "necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence", including "internment where this is necessary for imperative reasons of security".¹²⁵ By Resolution 1546 (also made under Chapter VII) the UN Security Council inter alia renewed the authorisation given to the multinational force, having regard to the letters and decided that:¹²⁶

... the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism.

On 8 March 2004 the Coalition Provisional Authority promulgated a law which made provision for fundamental rights, including what Brooke LJ called "provision for personal liberty comparable to that contained in ECHR article 5 (see article 15) and the entrenchment in Iraqi law of the rights contained in the International Covenant for Civil and Political Rights (ICCPR) (article 23)".¹²⁷ On 27 June 2004, the Coalition Provincial Authority amended Memo 3 to include a review process in the multi-national force security internee process. It also gave members of the multi-national force general immunity from Iraqi legal proceedings, providing instead that they were to be subject to the exclusive jurisdiction of the states sending them.

Mr Al-Jedda, who has dual Iraqi-British citizenship, was arrested in Iraq in October 2004 by members of the multinational force on suspicion of involvement in terrorist-related activities, and detained indefinitely without charge by United Kingdom troops asserting imperative reasons of security. He claimed that he was entitled to be released and returned to the United Kingdom either on the basis that his detention violated his right to liberty under article 5 of the ECHR and section 6

¹²³ UNSC Resolution 1511 (16 October 2003) S/RES/1511/2003 para 13.

¹²⁴ UNSC Resolution 1373 (28 September 2001) S/RES/1373/2001; UNSC Resolution 1483 (22 May 2003) S/RES/1483/2003.

¹²⁵ UNSC Resolution 1546 (2004) S/RES/1546/2004 Annex.

¹²⁶ *Al-Jedda*, above n 75, paras 9–10 Lord Bingham.

¹²⁷ *R (Al-Jedda) v Secretary of State for Defence* [2007] QB 621 (CA), para 31 Brooke LJ.

of the Human Rights Act 1998 (UK) (Human Rights Act (UK)), or by virtue of common law. Since Convention rights under the Human Rights Act (UK) are held to be those under the ECHR,¹²⁸ Mr Al-Jedda's rights in English law under the Human Rights Act (UK) could not be more extensive than they would be in international law.¹²⁹

When the case reached the House of Lords there were three issues: whether the detention by United Kingdom forces was attributable to the United Kingdom or to the United Nations; whether UN Security Council Resolution 1546 displaced or qualified obligations under the ECHR; and whether English common law or Iraqi law should be applied to the non-human rights claim in tort. On the last issue, all five Law Lords agreed that Iraqi law was applicable, not English common law. This issue will not be considered further here.¹³⁰

On the first issue, four Law Lords, applying the test in *Behrami and another v France*,¹³¹ held that the UN Security Council had not dispatched the multi-national force to Iraq or exercised effective control over it, so acts of the multi-national force were not attributable to the United Nations.¹³² It was vitally important to establish this, because the United Nations would certainly not have regarded itself as bound to provide relief to victims such as Mr Al-Jedda. The assessment made by the House of Lords is more realistic than that made by the ECtHR of responsibility for the detention of suspects by French personnel in *Behrami and another v France*.¹³³

On the second issue, their Lordships considered that the resolution authorising action to maintain security, while it did not bind the United Kingdom to detain the particular suspect, bound it "to exercise its power of detention where this was necessary for imperative reasons of security".¹³⁴ This forced the United Kingdom to find a way of reconciling its obligations under the resolution with its obligations under article 5 of the ECHR. That could be done only:¹³⁵

¹²⁸ See *R (Greenfield) v Secretary of State for the Home Department* [2005] All ER 240, para 19 (HL) Lord Bingham of Cornhill; *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529 (HL).

¹²⁹ *Al-Jedda* above n 75, para 98 Lord Bingham.

¹³⁰ *Ibid.*

¹³¹ *Behrami v France*, above n 74.

¹³² *Al-Jedda*, above n 75, paras 23–24 Lord Bingham; para 124 Baroness Hale; para 131 Lord Carswell; paras 147–149 Lord Brown. Lord Rodger dissented on this point.

¹³³ *Behrami v France*, above n 74. See also Verdirame, above n 76.

¹³⁴ *Al-Jedda*, above n 75, para 34 Lord Bingham, with whom the other Law Lords agreed. The English Court of Appeal had also considered that the resolution had explicitly authorised internment to maintain security. This had enabled them to distinguish the decision of the Human Rights Chamber for Bosnia and Herzegovina in *Boudellaa*, above n 100.

¹³⁵ *Al-Jedda*, above n 75, para 39 Lord Bingham.

... by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain ... , but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention.

However, it is not clear how this is to be achieved. The detention itself clearly breached article 5.1, and a violation of the right to liberty might be regarded as an all-or-nothing affair, not admitting questions of degree.¹³⁶ One possibility would be to interpret the requirements of the resolution as restrictively as possible. Baroness Hale considered that the right was not displaced, but:¹³⁷

... qualified only to the extent required or authorised by the resolution. What remains of it thereafter must be observed. This may have both substantive and procedural consequences.

Substantively, it would be for courts to decide how far the requirements of the resolution went, and whether it applied to the facts of the case.¹³⁸ Procedurally, Lord Carswell considered that, as a matter of legal principle, internment must be accompanied by safeguards: compilation of accurate and reliable intelligence; regular review of the continuing need for detention; and a system allowing the detainee's representatives to check and challenge the evidence as far as possible.¹³⁹

Despite (or perhaps because of) its uncertainties, the decision represents a welcome refusal to surrender rule of law values in the face of Chapter VII resolutions. The House was right to reject the government's argument that the acts of its forces were attributable to the United Nations. On the relationship between Chapter VII resolutions and human rights obligations, Lord Bingham, Baroness Hale and Lord Carswell accepted that there had to be limits to the extent to which rights were qualified (although this did not directly help Mr Al-Jedda), and upheld the principle that the place of international law in municipal law depends exclusively on the state's constitution. The House had to decide on the authority and scope of the UN Security Council resolutions because English law treats Convention rights under the Human Rights Act (UK) as the same as the rights under the ECHR as interpreted by the ECtHR. This was a matter of English constitutional law, a public law problem in the conflict of laws.

This approach has been taken forward more recently by Collins J in the Administrative Court for England and Wales in *A v HM Treasury*.¹⁴⁰ He held that orders made by HM Treasury to freeze the assets of terrorist suspects pursuant to Chapter VII resolutions, under statutory power but without parliamentary oversight or express provision for judicial review, were ultra vires as they failed to

¹³⁶ Ibid, para 37 Lord Bingham.

¹³⁷ Ibid, para 126 Baroness Hale.

¹³⁸ Ibid, paras 124–129 Baroness Hale.

¹³⁹ Ibid, paras 130 and 136 Lord Carswell. Lord Rodger and Lord Brown did not consider either the distinction between displacing and qualifying a right or the extent of the qualification.

¹⁴⁰ *A v HM Treasury* [2008] 2 CMLR 44.

give adequate protection to the procedural rights of those subject to the orders and created criminal offences unauthorised by Act of Parliament. Collins J followed dicta of the House of Lords in *Al-Jedda* to the effect that action to give effect to Chapter VII resolutions should interfere as little with, and give as much protection to, Convention rights as possible.¹⁴¹ The orders challenged in that case had failed to meet those standards.

At national and supranational levels, we are thus seeing the early stages of the development of a practical, case-by-case approach to bringing constitutional principles to bear through European Union and national institutions on international institutions for the good of all.

IV CONCLUSION

Whether viewed from the perspective of global international law, that of supranational or regional bodies such as the European Union and the ECtHR, or that of municipal constitutional law, international bodies including the UN Security Council which claim power to commit or authorise acts which would be unlawful under municipal law must be prepared to show that they are acting *intra vires*. At present, accountability by reference to accepted norms of legality and respect for rights is underdeveloped at the international level, despite signs of enhanced respect for legality and fairness in some international organisations which, if pursued consistently, would improve the quality of decisions of international bodies and the respect in which they are held. Until respect for the principle of legality becomes a normal part of international practice one cannot properly speak of an "international community" governed by constitutional values.

One possible cause for optimism is the response of the ECJ and Court of First Instance to growing concern, exemplified in the work of the Venice Commission, at the unaccountability of international organisations. Acceptance that states have positive obligations to take reasonable steps to protect the fundamental rights of those affected by states' conduct in implementing decisions of international organisations may be a sign that prescriptive standards for international organisations are being developed. European Union law is beginning to impose obligations on states to use diplomatic means to advance the values of legality, procedural fairness and human dignity in the work of institutions such as the United Nations. One tool for achieving this, suggested by Advocate General Maduro in *Kadi v Council of the European Union and Commission of the European Communities*,¹⁴² would be to distance European Union law from international law, relying on the ECJ's self-image as guardian of a legal order with fundamental rights independent of both municipal law and international law, and so immune to interference by the UN Security Council, but capable of imposing obligations on national authorities.

¹⁴¹ Ibid, para 34.

¹⁴² *Kadi v Council of the European Union and Commission of the European Communities*, above n 72.

As a result there is growing tension, if not yet actual conflict, between United Nations agencies, member states and regional organisations over constitutional standards, and that tension is increasingly reflected and to some extent resolved through the case law of national and regional judicial bodies. Unless the United Nations and its agencies adopt the standards in their own work, the tension is likely to be increasingly damaging to all parties.¹⁴³ But there are signs that what Allott called the "ideal" and "legal" constitutions in international law are beginning to converge and to influence the "real" constitution in a beneficial way.

At the level of municipal constitutional law, we see the green shoots of recognition by some municipal courts of good reasons for protecting municipal legal and constitutional standards against attack by international organisations and their agents. The decisions of the House of Lords in *Al-Jedda* and of Collins J in *A v HM Treasury* show that the primary obligation of national courts is to enforce national, not international, law when the latter collides with people's rights. The decision of the Constitutional Court of Bosnia and Herzegovina in *Bilbija* shows that national courts can reinforce from a municipal angle the positive obligations on their states already developing in international law. The approach of Advocate General Maduro is an example at the supranational level of the principle that the first obligation of constitutional institutions is to uphold their own constitutions, and explains the strength of the ECJ in comparison to the ECtHR which is embedded in public international law and has no autonomous constitutions on which to rely. In different ways, constitutionalism is either flowing into international law or insulating states and supranational organisations from international law. That some governments (including the United Kingdom's) and international organisations object strongly to this shows how vulnerable respect for constitutional values remains at the international level, and underlines the importance of municipal and regional courts reasserting fidelity to their own constitutional values for the good of all.

¹⁴³ See Iain Cameron *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions* (report prepared for the Council of Europe, 6 February 2006) www.coe.int (accessed 26 June 2008); Andrea Bianchi "UN Security Council's Anti-Terror Resolutions and Their Implementation by Member States: An Overview" [2006] J Int Crim Law 1044.