International Courts’ Approach to Interpretation of Security Council Resolutions

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<td>the Council</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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1 Introduction

1.1 Object, relevance and knowledge gap

The object of this thesis is interpretation of Security Council resolutions. By Security Council resolution, I mean a formal expression of the opinion or will of the Security Council, as voted over according to article 27 of the UN Charter. By interpretation, I mean the process of assigning meaning to the texts of the resolutions.1

The Security Council is tasked with the primary responsibility for the maintenance of peace and security under the Charter of the United Nations and handles the most politically fraught questions of international law. Its decisions, actions and opinions have enormous consequences for States and individuals, as well as the international community as a whole. It is therefore critically important to properly understand the contents, meaning and effects of its resolutions.

In spite of this fundamental importance, the academic literature on this topic remains limited,2 even though somewhat greater attention has been paid to it in the wake of the 2003 Iraq war,3 and the seminal ICJ Kosovo opinion.4 In tandem with the Council taking a quasi-judicial role5 in adopting targeted sanctions regimes, principles for interpretation of Security Council resolutions have also become increasingly relevant for national courts.6

The most comprehensive scholarly contribution on interpretation of Security Council resolutions is made by Sir Michael Wood, in two articles from 1998 and 2017.7 The former offered views and a few tentative conclusions on interpretation, based on the author’s practical experience as legal advisor in the British Foreign Office. The latter revisited the subject with updated developments in case law, and largely corroborated the tentative conclusions. One of Wood’s main themes was “the need, when interpreting Security Council resolutions, for an

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1 Bianchi (2015) p. 4
3 E.g. Stavridis, (2007)
4 E.g. Murphy (2015)
5 E.g. Fraser (2015)
6 Droubi (2014)
7 Wood (1998/2017)
understanding of the role of the Security Council under the UN Charter”. This thesis expands on that approach, by exploring interpretation of Security Council resolutions in light of other relevant treaty law. Furthermore, it examines in more detail how international courts’ presumptions about the Council’s intent affects interpretation of its resolutions.

1.2 Research questions

There are no sources of international law that authoritatively establishes rules for assigning meaning to the texts of Security Council resolutions. No court has mandate to determine how a Security Council resolution is to be interpreted, nor to exert judicial review over the Council. However, the practice of international courts is an important source for the understanding of international law in general, and for interpretation of Security Council resolutions specifically. This thesis investigates the approaches taken to interpretation of Security Council Resolutions by three such international courts.

The case law of (i) the International Court of Justice is particularly significant, because of its status as the principal judicial organ of the United Nations. The cases from (ii) the European Court of Human Rights deal with important questions of interpretation in the confrontation between the Security Council resolutions and human rights. Finally, the cases from (iii) the International Criminal Court handles currently contested issues of conflict between Security Council resolutions and international customary law and treaty law.

The thesis aims to identify similarities and differences in the courts’ approaches to interpretation of Security Council resolutions, through the lens of two general perspectives:

1) I will examine and discuss what sources the courts found relevant as means for interpretation of Security Council resolutions.

2) I will examine and discuss how the courts interpret Security Council resolutions in light of the treaties they themselves are mandated to interpret and apply. Specifically, how the ICJ interprets in light of the UN Charter, how the ECtHR interprets in light of the ECHR and how the ICC interprets in light of the Rome Statute.

It is important to note that the first, narrower perspective and the second, broader perspective are interrelated.

The focus will be on the method of interpretation rather than the results of the cases, or the law de lege lata or de lege feranda. I will discuss the outcomes of interpretation to the degree that it sheds light on the method used.

1.3 The United Nations Security Council

The Security Council is a principal organ of the United Nations. It consists of 15 members, including five permanent members with veto powers: China, France, Russia, United King-

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8 Wood (2017) p. 4
9 UNC 7
dom, and the United States.\textsuperscript{10} The Council has “primary responsibility for the maintenance of international peace and security”.\textsuperscript{11} In this regard, it determines the existence of any threat to the peace, breach of the peace or act of aggression,\textsuperscript{12} and “enjoys a wide margin of discretion”\textsuperscript{13} to adopt non-/coercive measures to maintain and restore the peace under Chapter VII of the Charter.

If there is a “conflict between the obligations of the member states of the United Nations under [the UN Charter] and their obligations under any other international agreement, their obligations under [the UN Charter] shall prevail” according to Article 103. Member states are obliged to “accept and carry out the decisions of the Security Council in accordance with [the UN Charter]” cf. Article 25. The ICJ held this to mean that member states’ obligation under a Security Council resolution prevails over any other international agreement.\textsuperscript{14}

1.4 Demarcation and overview

Due to the limited scope of this thesis, there are many avenues of investigation that I will not follow. It would for example have been relevant to examine instances of interpretation of Security Council resolutions in the case law of the ICTY,\textsuperscript{15} CJEU,\textsuperscript{16} the Human Rights Committee,\textsuperscript{17} domestic courts,\textsuperscript{18} and in national enquiries into involvement in conflict situations.\textsuperscript{19} There are many questions closely connected to interpretation of Security Council resolutions relating to hierarchy of norms,\textsuperscript{20} fragmentation\textsuperscript{21} and judicial review in international law that I will not discuss, or only mention superficially.

There are five chapters. After this short introduction, I present an analysis the ICJ’s approach to interpretation of Security Council resolutions, which serves as a point of departure. The next two chapters analyses the ECtHR and ICC’s approach, and will show that these courts both build on, and depart from the ICJ’s method of interpretation. The final chapter briefly summarizes and discusses some key similarities and differences between the courts.

2 The International Court of Justice

2.1 Case selection

The ICJ is the “principal judicial organ” of the United Nations, and its Statute “forms an integral part” of the UN Charter.\textsuperscript{22} Therefore, it carries a particular authority in interpreting Secu-

\textsuperscript{10} UNC 23
\textsuperscript{11} UNC 24(1)
\textsuperscript{12} UNC 39
\textsuperscript{13} Prosecutor v. Tadic (1995) (31-32)
\textsuperscript{14} Lockerbie (42)
\textsuperscript{15} Supra n10
\textsuperscript{16} C-402/05P and C-415/05P Kadi v. Commision
\textsuperscript{17} Sayadi v. Belgium (2008)
\textsuperscript{18} E.g. Abdelrazik v. Canada (2009)
\textsuperscript{19} E.g. the official report of the Norwegian Libya Commission on the Norwegian participation in military operations in Libya (2018)
\textsuperscript{20} De Wet (2012)
\textsuperscript{21} Andenæs (2015)
\textsuperscript{22} Article 92 cf. Chapter XIV, UN Charter
rity Council resolutions, which finds it legal basis in the same instrument. Importantly, according to the Court’s own jurisprudence, it does not have the power of judicial review of the Council, but it can consider objections of conformity with the Charter “in the course of its reasoning.”

The Court has handled questions involving Security Council resolutions on many occasions, but the Kosovo opinion stands out because a substantial interpretation of relevant resolutions was needed, and the Court explicitly described its approach in doing so. The Court built on and developed the approach it had taken in the Namibia advisory opinion (1970).

2.2 Kosovo advisory opinion

2.2.1 Background

In the wake of the Yugoslav wars, the Security Council adopted Resolution 1244, which authorized a civil and military presence under the auspices of the United Nations in the Balkans. The resolution, and the measures adopted under it, created the basic framework of the United Nations Interim Administration Mission in Kosovo (UNMIK). In February 2008, the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia. This prompted the General Assembly of the UN to request an advisory opinion from the ICJ on the following question:

“Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”

This required a determination of whether the declaration was in breach of Resolution 1244.

2.2.2 Interpretation of resolution 1244

At the outset, the Court set out what it considered to be relevant factors for interpreting Security Council resolutions:

«While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States [...] irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.»

23 Namibia (89)
24 E.g. Nicaragua, Lockerbie and Namibia
25 Article 96(1), UN Charter
26 Kosovo (94)
Embodied in this passage are two main themes of the ICJ’s approach to interpretation of Security Council resolutions, which I will discuss in the following: (i) the rules for treaty interpretation in the Vienna Convention as a point of departure, and (ii) interpretation in light of the UN Charter.

2.3 Analysis

2.3.1 Relevant sources - VCLT as point of departure

A central premise of the cited passage is that a broader examination of the language of resolutions is required for proper interpretation. In this regard, the rules for treaty interpretation in the VCLT “may provide guidance”. However, according to the Court, the interpreter should be mindful of the significant differences between treaties and Security Council resolutions. I will first compare treaties with Security Council resolutions, before discussing to what extent the Court applies the VCLT-rules in light of that comparison.

2.3.1.1 Similarities and differences between treaties and Security Council resolutions

It may be unsurprising that the Court turned to the rules of interpretation in the VCLT. The ICJ views the rules as declaratory of customary international law, and courts, international lawyers and academics have relied on these rules to the point that they have become “virtually axiomatic”. The rules cannot be used directly on resolutions as the Convention only applies to treaties, cf. VCLT Article 1. It was nevertheless natural for the Court to draw on these rules, as there are many similarities between treaties and resolutions.

The VCLT defines treaties in Article 2 (1)(a):

“Treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;”

A Security Council resolution could also reasonably be called an agreement, in the sense that it is an expression of what the Council members have agreed to. This agreement is between states, and therefore also international. Resolutions are written, usually in a single instrument, but sometimes with annexes (reports of the Secretary-General or a Special Representative, letters from Special Representatives etc.), i.e. two or more related instruments.

However, the Court emphasizes that there are conceptual differences between treaties and Security Council resolutions, requiring other factors than the ones listed in the VCLT to be applied. Three such differences are specifically mentioned.

Firstly, Security Council Resolutions are “issued by a single, collective body”, and the final text “represents the view of the Security Council as a body”. In other words, there are no parties to the resolution, as there is to a treaty, cf. VCLT Article 1(g).

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27 Bianchi (2015) p. 4
28 Gardiner (2015) p. 15
Second, the resolutions “can be binding on all Member States [...] irrespective of whether they played any part in the formulation”. Resolutions confer rights and duties also on the states that voted against that resolution, or even had no part in drafting or adopting it (i.e. states without a seat in the Council at the time, nor involved in the negotiations). In contrast, treaties do not “create either obligations or rights for a third state without its consent”, cf. VCLT Article 34.

Third, The Court notes that resolutions are “drafted through a very different process than that used for the conclusion of a treaty,” mentioning the voting process set forth in Article 27 of the Charter. The strong wording “very different” is emblematic of the sui generis way in which Security Council resolutions are adopted. It is therefore important to have knowledge of what this drafting process is like, when interpreting. How the drafting process plays into the interpretation of Security Council resolutions, is explored in some detail by Wood.\textsuperscript{29} For our purposes, a superficial summary suffices.

In addition to Article 27 on voting, Chapter VII of the UN Charter provides some rules of procedure in Articles 28-32. These form the formal outlines of procedure but give little insight into how drafting is done in practice. Notably, it is a state-driven process – the Secretariat of the United Nations are not heavily involved in drafting or legal input. It is the States’ delegations to the United Nations who perform these tasks, often by diplomatic personnel who are not necessarily lawyers. States take the initiative for new resolutions and provide first drafts. Negotiations over wording take place both in official settings, and “behind the scenes”. It is not before a relatively late stage that the first official documents of drafts appear and are circulated and registered for the public record. In other words, there is little public insight into the drafting process, which can complicate interpretation. For example, individual states’ opinions or understanding that could shed light on a specific wording, may not necessarily available on the public record. Not least, little institutional memory can cause unintended inconsistencies.

Drafting, voting and adoption of resolutions often happen under severe time constraints, in urgent reaction to crisis events. This can result in inconsistencies and language that isn’t necessarily well thought through.

Importantly, the discussions in, and related to Security council processes are (in)famously political. The final product is often the result of the hard-fought negotiations about controversial subjects. Thus, resolutions can take the form of “lowest common denominator” - wordings that are crafted to appease all parties so that either unanimity or an adopting majority can be achieved. The result can often be unclear, general, vague or ambiguous wordings. Not least, controversial wordings or topics may be avoided and left out of the resolutions entirely. In such cases it is crucial for the interpreter to be aware that this may be intentional, and which consequences that could have for the resolution’s meaning.

2.3.1.2 Non/Application of elements of the VCLT

To “provide guidance” is itself an ambiguous phrase. It could mean serve as inspiration, to be used by analogy, to be used in some cases but not in others, etc. The word “may” introduces an element of discretion in the use of the convention rules. It is therefore useful to comment on the central elements of these rules and how the Court made, or didn’t make use of them in

\textsuperscript{29} Wood (1998) p. 80-82, (2017) p. 11-14
Kosovo. Case law, practice and scholarly writing on the rules of treaty interpretation is extensive, but scarce as to how these rules relate to Security Council resolutions.

Article 31(1) of the VCLT reads under the heading “General Rule of Interpretation”:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

At the outset, it is important to keep in mind that Article 31 must be read as a “single, closely integrated rule”. The elements contained within it are interrelated and together form the foundation of an interpretative process.

(i) Terms

Analogous to the Vienna rules, it is the resolution that stands to be interpreted, and the starting point for that interpretation is the ordinary meaning of the terms of that resolution, meaning the words or provisions.

In contrast to treaties, Security Council resolutions are seldom self-contained, but refer to documents and texts produced by other bodies and institutions of the UN. In Kosovo, Resolution 1244 was read in conjunction with two annexes consisting of statements from the Chairman. Furthermore, Security Council resolutions are seldom stand-alone texts, but rather form parts of series of resolutions concerning the same, or related matters. These may refer to, build and comment on other resolutions, and in this way have a combined and cumulative effect. The Court pointed out that Resolution 1244 was the last in the series of resolutions concerning the question of Kosovo and highlighted that the previous resolutions were recalled in the preamble of Resolution 1244.

(ii) Good Faith

The basic injunction that interpretation must be carried out in good faith, might be the closest thing we have to a general applicable rule of interpretation in international law, and it must also apply to Security Council resolutions. The concept is closely connected to, and integral to the fundamental principle of pacta sunt servanda. However, what exactly good faith might entail under the circumstances is not easy to say - it is an elusive term. It is difficult to find instances of case law where it has played an independent part in interpretation, partly

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30 I rely mainly on Gardiner (2015)
31 I rely mainly on Wood (1998/2017)
32 ILC-commentary p. 220
33 Eveno (2011) p. 808
34 Gardiner (2015), p. 164
35 Kosovo (95)
36 Namibia (108)
37 Kosovo (86)
38 Wood (1998) p. 89
39 “Every treaty in force is binding upon the parties to it and must be performed by the in good faith”, cf. VCLT Article 26, ILC-commentary p. 221
because it is a subjective element. Suffice it to say here, that “the concept of good faith strongly implies an element of reasonableness,” and that “at a minimum, the interpreter should approach the task honestly, and not distort the interpretation to reach a predetermined result.” To this effect, the Kosovo opinion posited the question before it could “only be answered through a careful reading” of the resolutions.

A distorting interpretation can happen in any number of ways. Arguably, the rest of the method set forth in the general rule are there to help avoid a bad faith interpretation. As Lauper-pacht wrote in the context of treaty and contract interpretation: “[m]ost of the current rules of interpretation [...] are no more than the elaboration of the fundamental theme that contracts must be interpreted in good faith.”

(iii) Ordinary meaning

The ordinary meaning is arguably the natural starting point for all legal interpretation. As Gardiner puts it, “[g]iven that the starting point is reading the words in the treaty, the act of reading almost axiomatically involves giving them the meaning which the reader takes to be usual (at least initially) or as one of a range of meanings”. For Wood it is “no more than common sense” that this is the starting point, also for Security Council resolutions. Importantly, it is just that; a starting point. The ILC, in its commentary to the general rule, pointed out that it was “considerations of logic, not any obligatory legal hierarchy that, which guided the Commission in arriving at the arrangement proposed in the article.” This goes to show the importance of reading the ordinary meaning as “immediately and intimately linked” with the rest of the rule.

This is also the approach in Kosovo, as per the wording: “the final text of such resolutions represents the view of the Security Council as a body”. The Court carefully examines the text of Resolution 1244, but this examination is never divorced from a broader context.

(iv) Context

In the first paragraph of Article 31, context firstly serves as an immediate qualifier to the ordinary meaning of terms. The second paragraph sets out which sources provide this context. “The text, including its preamble and annexes” form the starting point. Having regard to “the text” as context in interpretation involves noting the immediate, surrounding text, such as punctuation, grammar and phrasing. At the same time, “including its preamble and annexes” suggests a holistic view of the resolution as a whole. Security Council resolutions consist of preambular paragraphs containing background information, which can be useful in determining the object, purpose and motivations of the Council. It was not contested in Kosovo, but it

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40 Gardiner (2015) p. 167
41 Jennings (1992) p. 1272
42 Wood (2017) p. 8
43 Kosovo (113)
44 As quoted in Gardiner p. 167
45 Gardiner (2015) p. 181
46 ILC-commentary p. 220
48 Ibid. p. 197
is worth noting that due to the political nature of the voting process, the preamble can become a “dumping ground for proposals that are not acceptable in the operative paragraphs.” 49 The numbered operative paragraphs contain the Council’s opinions and the actions it has agreed to take.

The additional sources providing context listed in litras a and b are not as transferable to resolutions. 50 Firstly, as we saw in Kosovo, there are no parties to resolutions, and second, the resolution itself is the main output and final product of the Council. It does not in general have recourse to any such “agreement[s]” 51 or “instrument[s]” 52 relating to the [resolution] which was made between all the parties in connexion with the conclusion of the [resolution].

(v) Object and purpose

This is another elusive term that can be defined in many ways, and its precise nature is uncertain. 53 Object and purpose introduces an element of teleology to the general rule, meaning that treaties should be interpreted according to the end result it purports to achieve. 54 This applies to Security Council resolutions as well. To discern the object and purpose of a resolutions it is critical to view it on the background of the political and factual context it was adopted in. This is evidenced in Kosovo, where the Court looked at the language of the resolution as a whole, the broader political background and previous resolutions to discern the underpinning aims of the resolution in this way:

“[..] the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.” 55

The preamble of resolutions, statements of members of the Security Council at the time of adoption, other resolutions of the Council and subsequent practice of relevant UN organs can also be useful in determining a resolution’s object and purpose.

(vi) Paragraph 3

Paragraph 3 of Article 31 specifies three sources to “be taken into account, together with the context” suggesting no hierarchy between paragraphs 2 and 3. 56 All three relate to the actions of the parties so they are not directly transferable to resolutions, but there are important equivalents. 57 In Kosovo the Court turned to contemporaneous and subsequent resolutions, to shed light on resolution 1244. 58 It was also relevant for the interpretation of resolution 1244 that the Council had not placed obligations on the Kosovo Albanian leadership or other actors

49 Wood (1998) p. 86
50 Ibid p. 89
51 Cf. litra a
52 Cf. litra b
53 Gardiner (2015) p. 211
54 Eveno (2015) p. 807
55 Kosovo (100)
56 Ibid.
57 Wood (1998) p.91-93
58 Kosovo (113)
even though it had “not been uncommon for the Security Council to make demands” on such actors.\textsuperscript{59} These factors can be viewed as equivalents to “subsequent agreement between the parties regarding the interpretation of the [resolution] or the application of its provisions” cf. \textit{litra a}, and “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” cf. \textit{litra b}.

The Council’s actions in the form of resolutions or otherwise are an important factor for interpretation, as the Council itself (or a body authorized by the Council itself) is the only body with a mandate to overrule, modify or suppress its own resolutions. Thus, they are the only \textit{authoritative} interpreter of them.\textsuperscript{60} As the Court pointed out, “the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision”.\textsuperscript{61}

The third source to be taken into account is “any relevant rules of international law applicable in the relationship between the parties” cf. \textit{litra c}. On the surface, this creates few problems as applied to Security Council resolutions due to the priority rule in Articles 103 cf. 25 of the UN Charter. Nevertheless, \textit{litra c} raises questions of hierarchy, fragmentation and harmony of norms in international law, when resolutions collide with other international rules. This will be discussed in the next chapters.

\textbf{(vii) Article 32}

\textit{Kosovo} also mentions article 32 of the VCLT, which provides “supplementary means of interpretation”. \textit{Wood} notes that the distinction between the general rule and supplementary means has little significance in regard to treaty interpretation, and even less so as it relates to Security Council resolutions.\textsuperscript{62} As we saw, the Court attempts to discern context, object and purpose from relevant resolutions, letters, reports and documents referred to in the relevant resolutions. These can be viewed as analogous to “preparatory work of the treaty” as per Article 32. Not least, both opinions look to the broader political and factual background of the resolutions, to establish the elements of the general rule, i.e. “the circumstances of [the resolutions] conclusion” as per Article 32.

Article 32 is not exhaustive, cf. the wording “including”. The additional sources outside the VCLT mentioned in \textit{Kosovo} all serve as supplementary means of interpretation.

\textbf{(viii) Text vs. intent}

There is an inherent tension within the general rule of interpretation, between taking as one’s basic approach either a \textit{textual} (“objective”) approach, or instead emphasizing the parties’ \textit{intentions} (“subjective”) approach. A textual approach involves viewing “[t]he text of the treaty as the authentic expression of the intentions of the parties”.\textsuperscript{63} This would mean not accepting an interpretation that doesn’t emerge from the text (unless that result is obviously unreasonable), and rejecting otherwise reasonable results that are tantamount to rephrasing the

\textsuperscript{59} Ibid. (115)
\textsuperscript{60} Wood (1998) p. 82 and 92
\textsuperscript{61} Kosovo (46)
\textsuperscript{62} Ibid. p. 93
\textsuperscript{63} Berglin (1986) p. 44
text. Conversely, searching for the intent of the parties involves emphasizing “the intentions of the parties as a subjective element distinct from the text.”

The general rule gives primacy to the textual approach. This is apparent in the grammar of the first paragraph, in that the factors context and object and purpose serve as measures to be used in finding the ordinary meaning of the terms.

However, the door is open for the other approach. There are ambiguities in the wordings: “terms of the treaty” could refer to the words of the treaty, or the contents of what the parties have agreed to. “Context” is sometimes viewed as the “state of mind in which a certain provision should be envisaged”. The “object and purpose” read “in good faith” can together allow for teleological considerations that necessitate looking for the parties’ intent. Paragraph 4 of Article 31 allows for giving a term a “special meaning [...] if it is established that the parties so indented”. Paragraphs 2 and 3 both serve as tools to determine the intent. In other words, the elements of the general rule can also be used to determine the intentions of the parties as a means to interpretation.

Thus, the Vienna-rules are a compromise. As the ILC-commentary puts it, they emphasize “the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intention of the parties as means of interpretation.”

In Kosovo, the starting point is that “the final text of such resolutions represents the view of the Security Council as a body”, indicating the text is the primary source for the understanding of the meaning. At the same time, it emphasizes that the process towards adoptions of resolutions are “very different” that of treaties. As we saw, this is a process often characterized by political pressure, time constraints, and not necessarily by legal expertise or consideration. Not least, these considerations routinely lead to the use of intentional “constructive ambiguity”. As a consequence, “less importance should attach to the minutiae of language”. This is supported by Boschiero, who posits a “purposive interpretation should be given priority over any literal interpretation of what is said or not said in the text [of a resolution]”. Thus, the priority given to text over intent in the VCLT is arguably reversed for Security Council resolutions.

Kosovo starts at the premise that the text must be carefully read and analysed and goes on to use the factors mentioned to here, to seek the intention of the Council. This approach leads to few problems or controversies as long as the text and apparent intent are in harmony, as in this case. However, the Council deals with the most important and consequential matters of global politics, and their words must of course be taken seriously. The tension between text and intent come to the surface when they pull in different directions. This is central to the

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64 ILC-commentary p. 218
66 Ibid. p. 164
67 Eveno p. 823
68 ILC-commentary p. 218
69 Akande (2015)
70 Wood (1998) p. 95
71 Boschiero (2015) p. 642
conflicts in the cases from the ECtHR and ICC and will be further explored in chapters 3, 4 and 5.

(ix) The principle of effectiveness

Closely related to the subjective approach of searching for the intent of the parties is the principle of effectiveness, which has two elements.\(^{72}\) Firstly, the maxim of *ut res magis valeat quam pereat* dictates that the interpreter give preference to the interpretation that gives a term some meaning rather than none. Second, the interpretation should be chosen that realizes the aims of the treaty, i.e. a teleologic interpretation. The ILC in its commentary to the VCLT, considered that these elements were “embodied” in the general rule as a whole, and that “[w]hen a treaty is open to two interpretations, one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.”\(^{73}\)

This should apply particularly to Security Council resolutions. As the United Nations do not have a standing military force or a dedicated executive branch, the Council is dependent on member states to carry out its will. It is therefore a goal for the interpreter seek the Council’s intent in order to carry out this will in a legitimate manner. Wood’s conclusion is: “The aim of interpretation should be [...] to give effect to the intention of the Council as expressed by the words used by the Council in the light of the circumstances”.\(^{74}\)

2.3.2 Interpretation in light of the UN Charter

Also reflected in the Court’s approach to interpretation of Security Council resolutions is that to discern the meaning and effect of its resolutions, the interpreter should have an understanding of what the Council *is*, what it *does*, and it does *not* do, i.e. its limits.\(^{75}\) In this regard, it is natural for the Court to look to the UN Charter, as both the Court and the Council find their basis in that framework.

In Kosovo, this is evidenced in how the Court emphasizes the differences between resolutions and treaties, as described above. The Court goes on to interpret, mindful of the *sui generis* working methods of the Council, flowing from Article 27 of the Charter.\(^{76}\)

Resolutions are not meant to create rights and obligations on states in the same way a treaty normally does. Nor are they typically meant to have long-term consequences and should not be interpreted in the same way as domestic legislation. Rather, the Council’s role under the Charter is primarily to react to and mitigate instability in politically fraught situations of conflict.\(^{77}\) This makes having a view to the broader political situation at the time of adoption crucial for interpretation. This is particularly relevant in the ECtHR-cases.

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\(^{72}\) Gardiner (2015) p. 179
\(^{73}\) ILC-commentary p. 219
\(^{74}\) Wood (1998) p. 95
\(^{75}\) Wood (1998) p. 77
\(^{76}\) Wood (2017) p. 4
\(^{77}\) Wood (1998) p. 81
In the extension of this: resolutions should also be read, mindful of the power it has under the Charter to adopt measures binding on all states irrespective of whether they played any part in their formulation”78 and “in view of the nature of the powers under article 25.”79 A crucial task for the interpreter is to determine whether this power is enacted, and if so what effect that has.

This was the disputed legal question in Namibia (quoted in Kosovo). According to the Court, whether or not a resolution is binding must be determined “in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”80 Although this relates to the narrower question of whether a resolution is binding, it is transferrable to interpretation of resolutions in general,81 and we recognize some elements from the cited passage in Kosovo.

Crucial in the Namibia opinion was the Court’s interpretation of resolution 267 that the Council had in fact acted in the exercise of its primary role of maintaining peace and security, cf. Article 24(1) of the Charter.82 In doing so, it had not acted outside the limits of its power cf. Article 24(2).

The effect was that Resolution 267 was binding on all states:

«Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.»83

In the last sentence, we see that the principle of effectivity is also relevant in the perspective of interpretation in light of the Charter. The interpretation of the resolution must be chosen that does not leave the Charter provisions meaningless, and that gives effect to those provisions’ object and purpose.

Interpretation in light of the Council’s powers under the Charter is particularly relevant in the ICC-cases.

In summary, interpretation in light of the UN Charter requires an interpretation on a case-by-case basis in light of the Council’s primary role in the maintenance of international peace and security, its functions and ability to impose coercive measures, and its limits under the Charter.

3 The European Court of Human Rights

78 Kosovo (94)
79 Namibia (114)
80 Namibia (114)
81 Al-Jedda v. UK (49)
82 Namibia (109)
83 Namibia (116)
3.1 Case selection

The ECtHR is established to “ensure the observance” of the ECHR by the parties to it and aims to function as guarantor for respect of human rights in Europe. There has been a rise of cases before the Court where states’ execution of Security Council resolutions have come at a potential cost of human rights, particularly in conflict situations and enforcement of sanctions regimes. This raises questions about the relationship between human rights law and Security Council resolutions, which has had consequences for interpretation. I will analyse three cases that have been important in defining the Court’s approach in this regard.

I will first present background and brief comments on each case. The analysis section discusses all three cases jointly.

3.2 Al-Jedda v. UK

3.2.1 Background

Al-Jedda was interned without charge in a British detention facility in Iraq from 2004-2007, suspected by British intelligence of activities relating to terrorism. He held that his detention was in breach of Article 5 § 1 of the European Convention on Human Rights (ECHR)

There were two overarching questions. (i) Was the internment attributable to United Kingdom (UK)? If so, (ii) was the internment carried out in pursuance with an obligation put on the UK by Resolution 1546?

3.2.2 Interpretation of relevant resolutions for jurisdiction

The UK held that British forces in Iraq were merely part of a Multinational Force which was subject to UN’s control. This required an interpretation of resolutions 1483, 1511 and 1546 which formed the framework for the security regime in Iraq at the time. The Court set out its approach for interpretation:

“The principles underlying the [ECHR] cannot be interpreted and applied in a vacuum and the Court must take into account relevant rules of international law [...]. It relies for guidance in this exercise on the statement of the International Court of Justice in paragraph 114 of [the Namibia-opinion] indicating that a United Nations Security Council resolution should be interpreted in the light not only of the language used but also the context in which it was adopted.”

From this starting point, the Court had a wide scope in examining the UK’s and UN’s roles in Iraq seen through the lens of the relevant resolutions. The Court considered thoroughly the wordings of the resolutions as a whole, the Charter provisions invoked, and the annexed correspondence between the Council and the US Secretary of State. It compared the resolutions to the Kosovo security presence in Resolution 1244, discussed above. Crucially, the language was considered on the background of the political and factual circumstances in Iraq at the

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84 ECHR Article 19
85 Al-Jedda (9-15)
86 Al-Jedda v. UK (76)
time. The Secretary General and the UN Assistance Mission for Iraq had been severely criti-
cal of the security internment practices, and it was “difficult to conceive” that Al-Jedda’s de-
tainment was attributable to the UN when its own organs, operating under Resolution 1546, did not approve of that practice.\textsuperscript{87} The Court concluded the internment was attributable to the UK, who therefore had jurisdiction.

3.2.3 Interpretation of Resolution 1546

Given UK’s jurisdiction, Al-Jedda’s right to liberty cf. ECHR 5(1) had clearly been breached. The question was if there were legitimate grounds for derogation. The UK held their obliga-
tions to uphold Convention rights were superseded by Resolution 1546.

The Court expanded on their approach to interpretation of the resolution:

“In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first sub-paragraph of Article 1 of the Charter of the United Nations, the third sub-paragraph provides that the United Nations was established to “achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms”. Article 24 § 2 of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to “act in ac-
cordance with the Purposes and Principles of the United Nations”. Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to in-
tend States to take particular measures which would conflict with their obligations under international human rights law.”\textsuperscript{88}

The Court found no such “clear explicit language” in the resolution to the effect that the Council intended to derogate from human rights norms and concluded:

“In the absence of clear provision to the contrary, the presumption must be that the Security Council intended States within the Multinational Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law.”\textsuperscript{89}

3.3 Nada v. Switzerland

3.3.1 Background

In the wake of the September 11th attacks, the Council amped up its efforts to combat terror-
ism. A series of Chapter VII-resolutions formed the so-called “1267 sanctions regime”. Reso-
lution 1333 tasked the “1267-committee” with maintaining a list of suspected associates of Bin Laden, Al-Qaida and the Taliban, who would be subject of the sanctions. Paragraph 2(b) of Resolution 1390 created an obligation for all states to implement an entry-and-transit ban

\textsuperscript{87} Ibid. (82)
\textsuperscript{88} Al-Jedda v. UK (102)
\textsuperscript{89} Ibid. (105)
for the individuals, groups and entities on the sanctions list. There was an exception “where entry or transit is necessary for the fulfilment of a judicial process or the Committee determines on case by case basis only that entry or transit is justified.” Paragraph 8 “Urge[d] all States to take immediate steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating on their territory”

Nada was on the list from 2001 to 2009. His assets were frozen, and as he lived in a small swiss enclave in Italy, the entry-and-transit ban was in practical terms “tantamount to a house arrest and thus present[ed] a serious restriction to liberty”.

3.3.2 Interpretation of Resolution 1390

The majority determined Nada’s rights to private life had been breached, before asking whether this interference was justified. Switzerland held the obligation to uphold Nada’s rights were superseded by the obligation put upon them by the 1267-regime.

The majority confirmed the principles from Al-Jedda quoted above, and added to it:

“When creating new international obligations, States are assumed not to derogate from their previous obligations. Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law».

The majority found that the Al-Jedda presumption had been rebutted:

“[the Al-Jedda presumption] is rebutted in the present case, having regard to the clear and explicit language, imposing an obligation to take measures capable of breaching human rights, that was used in [Resolution 1390].”

However, the majority found that the duty to harmonize obligations also extended to the implementation of the resolutions in domestic law. After examining the wordings of the exceptions cited above, the majority concluded:

“[..] Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the United Nations Security Council.”

This latitude could be used by states to harmonize their seemingly contradictory obligations, and the Court found that Switzerland had breached the ECHR in failing to do so.

3.4 Al-Dulimi v. Switzerland

3.4.1 Background

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90 Nada v. Switzerland (52)
91 Ibid. (170)
92 Ibid. (172)
A targeted sanctions regime was set up to target Saddam Hussein’s immediate circle of senior officials, in the wake of the Iraq war. Resolution 1483 targeted funds stemming from Hussein’s Government located outside of Iraq. Paragraph 23(b) decided that Member States “shall freeze without delay” such monies, and “immediately” transfer them to the Development Fund for Iraq. Resolution 1518 created a committee tasked with listing individuals and entities subject to the sanctions.

Al-Dulimi was the former head of the Iraqi Secret Service under Hussein’s regime. He was added to the sanctions-list and his funds located in Switzerland were frozen. He alleged the procedure governing the confiscation of his assets were in breach of his right to a fair hearing cf. ECHR 6(1). Switzerland held the obligation from the sanctions regime superseded the Convention obligation. This required an interpretation of the resolution.

3.4.2 Interpretation of resolution 1483

The majority once again took its point of departure in the Al-Jedda and reiterated the obligation to harmonise obligations from Nada:

«In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law. Accordingly, where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention. In other words, in such cases, in a spirit of systemic harmonisation, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter.»

However, the majority found that the case was “notably different” from Al-Jedda and Nada, in that those cases concerned the “essence of the substantive rights affected by the impugned measures or the compatibility of those measures with the requirements of the Convention.” The present case had the narrower scope of whether appropriate judicial supervision was available to Al-Dulimi. The majority found nothing in the resolutions “understood according to the ordinary meaning of the language used therein – that explicitly prevented the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level”.

A domestic judicial review was therefore allowed. In determining the scope of this review, the majority emphasized firstly the “extremely serious” practical consequences of being placed on the sanctions list. Furthermore, the ECHR functions as a “constitutional instrument of European public order” and at the very least, State Parties are required “to ensure a level of scrutiny of Convention compliance which […] preserves the foundations of that public order.” The court noted that one of the central elements of this public order, is the principle of rule of law; and “arbitrariness constitutes the negation of that principle.” The majority concludes:

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93 Al-dulimi v. Switzerland. (81)
94 Ibid. (140)
95 Ibid. (143)
96 Ibid.
“As a result, in view of the seriousness of the consequences for the Convention rights of those persons, where a resolution such as that in the present case, namely Resolution 1483, does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided.” [Emphasis added].

The majority found that Switzerland had failed to live up to this duty to provide sufficient judicial oversight as to avoid arbitrariness and found in favor of Al-Dulimi.

3.5 Analysis

3.5.1 Relevant sources

The starting point for interpretation of Security Council resolutions in Al-Jedda, and reiterated in Nada and Al-Dulimi, is that the Court relies on guidance from the ICJ. This is testament to ICJ’s authority as the primary judicial organ of the UN.

The Court cites Namibia to say that the “resolution should be interpreted in the light not only of the language used but also the context which it was adopted.” In this short distillment, the ECtHR has made available for itself a broad range of sources. It does not comment on the use or non-use of the VCLT nor the Kosovo-approach to its use. But as regards which sources the Court found relevant for interpretation, there are no great departures from the ICJ-approach in any of the cases.

The broader political background to each relevant resolution plays a significant part in all cases. In this regard, there is use of the factors outside the VCLT mentioned in Kosovo to mitigate for differences between resolutions and treaties: “statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.”

3.5.1.1 Text vs. intent and the Al-Jedda presumption

The cases are a good illustration of the inherent tension in the VCLT-rules between text and intention, as applied to Security Council resolutions.

As discussed in 2.2.3.2(viii), the VCLT-rules provide for a primarily textual approach to treaty interpretation, but when interpreting Security Council resolutions, there are convincing arguments for giving priority to searching for the Council’s intent. It is apparent from the three cases that the ECtHR chooses this path.

In Al-Jedda, the Court makes an ex ante assumption about the Council’s intentions, namely that the Council does not intend to impose obligations on states that are capable of breaching fundamental human rights. This is based firstly in a teleological viewpoint. The Court looks to the purposes for which the United Nations itself was created, one fundamental pillar of which is to promote and encourage respect for human rights. The Court presumes that the texts of Security Council resolutions by default seek to achieve this aim. It is also a reflection on the

97 Ibid. (146)
98 Kosovo (94)
limits of the Council’s abilities under the Charter, as the Court notes the Council is bound by Article 24(2) to act “in accordance” with the purposes and principles of the UN.

The presumption leads to a rule of interpretation: if the text of a Security Council resolution is ambiguous, the alternative must be chosen that is “most in harmony with the requirements of the Convention and which avoids any conflict of obligations.” Finally, the Court sets the bar for rebutting this presumption: “it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.”

(i) As applied in Al-Jedda

In the Namibia- and Kosovo opinions, there was little tension between the text and the intentions of the Council. The same is arguably the case in Al-Jedda. Resolution 1511 authorised the Multinational Force to take “all necessary measures” in contributing to the maintenance of security, in accordance with an annexed letter from the United States Secretary of State. The letter stated that the Multinational Force was ready to carry out “internment where this is necessary for imperative measures of security”. The phrase “all necessary measures” suggests that this internment could have a form that would amount to derogation from human rights, when necessary for security reasons.

However, internment was “not explicitly referred to in the Resolution”, indicating that even though annexed documents are an integrated part of the terms of resolutions, the operative part of the resolution itself weighs heavier (see 2.2.3.2(iv)). Furthermore, internment was mentioned in the letter as a part of a “broad range of tasks”. This suggested to the Court that the choice of means to achieve the aim of the Resolution was left to the member states. Moreover, the preamble noted “the commitment of all forces […] to act in accordance with international law”, suggesting that this choice of means should be in compliance with the ECtHR. Importantly, the UN Secretary General and his special representative in Iraq had been severely critical of the internment practice, making it unlikely that the resolution was the basis for this practice. Thus, the Court considered that the language of the Resolution did not “un ambiguously […] intend […]” to place member states under obligation to derogate from human rights provisions. In the “absence of a clear provision to the contrary”, the presumption held true.

If one accepts the premise the Court set at the outset, this is a fairly unproblematic conclusion. The presumption is very strong, and the bar for rebutting it is high. The Court did not depart in a meaningful way from the ordinary meaning given to the terms of the resolution. In light of the purposes of the United Nations, and the object and purposes deduced from the broader political and factual background to the resolutions, it was highly relevant what the resolution did not say, namely any language that would explicitly or implicitly require the UK to intern a suspect indefinitely without charge.

(ii) As applied in Nada

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99 Al-Jedda v. UK (105)
100 Ibid. (103)
101 Ibid. (105)
102 Sicilianos (2017) p. 789. Indeed, Milanovic (2012) p. 38 describes it as “very, very strong”
In Nada the majority opinion relied on and developed the Al-Jedda presumption. It further emphasized states’ obligation to harmonise diverging commitments “as far as possible,” based on the ECHR’s case law, and statements from the ILC.103 Also relevant in this regard was to interpret the Convention in “harmony with the general principles of international law” cf. VCLT Article 31(3)(c), which illustrates the independent meaning of that provision (see 2.2.3.3(vi)) as applied to Security Council resolutions.

The majority concluded the presumption was rebutted, without much deliberation. This was criticized by some commentators, who argued that the presumption was not as strictly adhered to in this instance.104 Paragraph 2(b) of Resolution 1390 merely imposed an obligation to implement a transit-ban, and there is no mention of how the measures relate to human rights law. The majority highlighted paragraph 7 of Resolution 1267 which “calls upon member states to act strictly in accordance with the sanctions regime notwithstanding the existence of any [...] obligations [...] imposed by any international agreement [...]” Hollenberg notes that Resolution 1267 was from several years earlier, and that the paragraph was a “very general statement”, that used the merely encouraging form “called upon”.105 The rebuttal of the presumption of harmony could thus be viewed as merely implicit, a lower bar than Al-Jedda puts forth.

That said, paragraph 2(b) does contain an explicit obligation to implement a transit-and-entry ban on the individuals on the sanctions list, indicating a clear directive from the Council. And even though paragraph 7, Resolution 1267 merely calls upon - it is an explicit formulation of the Council’s intention that the sanctions supersede “any international agreement”. Moreover, Resolution 1390 is based on Resolution 1267 and the latter is therefore crucial to the understanding of the former. This suggests, as the majority points out, that paragraph 7 is “even more explicit in setting aside any other international obligations that might be incompatible with the resolution”.106

The majority found that the duty to harmonize obligations also extended to the implementation of the resolutions in domestic law and examined whether the relevant resolutions left any leeway to implement these measures in accordance with human rights obligations. It singled out two specific wordings in exceptions to coercive measures, to establish a “admittedly limited but nevertheless real” latitude in implementation.

At this point there was arguably greater tension between text and intent than in Al-Jedda.

Notably, the majority offered little to explain their understanding of the wordings of these exceptions, other that the following: The term “necessary” in paragraph 2(b) was understood to be “construed on a case-by-case basis.” The term “where appropriate” had in the majority’s view the effect of “affording the national authorities a certain flexibility in the mode of implementation of the Resolution.”107

103 Report of the Study Group of the ILC: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law
104 Hollenberg (2015) p. 451
105 Ibid.
106 Separate opinion of Bratza (2)
107 Nada v. Switzerland (177-180)
Applying the standard of a good faith interpretation in accordance with the ordinary meaning of the terms in their context and in light of their object and purpose, this is arguably stretching the text too far. The exception in paragraph 2(b) is a fairly narrow one, for the specific circumstance of “fulfilment of a judicial process”. And even though an exception can be made under certain circumstances, this does not negate the fact that the rest of the article 2(b), imposes the clear obligation to implement an entry and transit ban which is capable of breaching convention rights.

There were sharp separate opinions to this effect. Three judges took issue with the conclusion that Switzerland enjoyed latitude in their implementation, partly because it was in their view “not borne out by the terms of the resolutions themselves, or by the provisions of the United Nations Charter under which they were issued”.108 According to this minority, the resolutions “allowed no flexibility or discretion to the States” in spite of the exception in 2(b), and the words “where appropriate” in paragraph 8 “certainly do not suggest that any latitude was granted so far as concerned the obligations on States to give full effect to the terms of paragraph 2 of the Resolutions”.109

Judge Malinverni pointed to the immediate context of the wordings of the exceptions (see 2.2.3.2(iv)). In his opinion, the exception in 2(b) had the character of “an exception to the general rule set out in that same provision, far more than being an acknowledgement of any room for maneuver[. . .]” and that apart from the case of judicial proceedings, this latitude was granted to the Sanctions Committee, not to the states themselves.110 He also meant the majority’s reading of paragraph 8 was misconstrued in that the wording “where appropriate” relates to the words immediately before it, meaning that “depending on the legal order of the various States, and in the particular circumstances, the State will either have to make legislative enactments or to take administrative measures”.111

(iii) As applied in Al-Dulimi

The tension between a textual approach and giving primacy to the intent of the parties was even greater in Al-Dulimi. A majority of 15 votes to 2 found that there had been a violation of article 6. However, the majority for the reasoning was a marginal 9 votes to 8, casting some doubt over how far the interpretational presumption of harmony goes.112

The majority relied on both the Al-Jedda presumption and the “limited but nevertheless real” Nada latitude. The presumption was that the Council intended for the measures to be implemented in a way affording appropriate judicial supervision. Member states were afforded the latitude to let domestic courts always scrutinize the implementation measures against arbitrariness.

Notable in the reasoning was that even though the majority set out to “examine the wording and scope of the text”113 it did not discuss the actual wordings of the provisions, other than simply stating that it did not find “clear and explicit” language within the “ordinary meaning”

108 Separate opinion of judges Bratza, Noelaou and Yudkivska (1)
109 Ibid. (6)
110 Separate opinion of judge Malinverni (3)
111 Ibid. (4)
112 Milanovic (2016)
113 Al-Dulimi v. Switzerland (139)
of the terms of the resolutions, that would counter the presumption.\textsuperscript{114} Thus, the majority drew far-reaching conclusions from the Council’s silence after only a superficial discussion of the wordings. In other words, the majority relied entirely on the \textit{presumed} intentions of the Council, pushing the \textit{Al-Jedda} presumption to its very limits.\textsuperscript{115}

Taking an approach more aligned with the \textit{Kosovo} opinion, one could argue the majority stretched the text \textit{too} far. An \textit{ordinary meaning} of the paragraph 23(b) wording that the Council “decides” that member states “shall freeze without delay” the funds, and “immediately” transfer them to the Development Fund for Iraq, could just as well as suggest that there was \textit{no} latitude for any judicial supervision in domestic implementation. Judicial consideration will necessarily take longer time than the unambiguous notions of “immediately” and “without delay” allow for.\textsuperscript{116} The broader political context of the 1267-regime could suggest the \textit{object and purpose} of the resolution was for the Council to have its disposal a measure to counter terrorism quickly and effectively. Arguably, (any) judicial consideration would run counter to that object and purpose.

There were several separate opinions to this effect, the common thread being the majority had found room to maneuver for Switzerland in Resolution 1483 was there was none.\textsuperscript{117} This was true even for Judges who welcomed the \textit{Al-Jedda} presumption being stretched “as far as possible”,\textsuperscript{118} which is indicative of the positive effects the presumption of harmony can have. Mainly, it can be used to foster accountability and encourage human rights compliance of the Council. As Milanovic wrote in response to \textit{Al-Jedda}: “If the Council now truly wishes to release states from their human rights obligations, it will have to do so through clear and unambiguous language – language that does not get used very often in its chambers – and its members will have to take political responsibility for their actions.”\textsuperscript{119}

But as these separate opinions point out, this presumption cannot be stretched further than the text allows. If the Court relies too heavily on a presumption of an intent, also in the face of textual evidence to the contrary, it could function as a distortion of the interpretation in order to reach a predetermined result. This would be contrary to a \textit{good faith} interpretation,\textsuperscript{120} and could undermine the credibility of the Court.

3.5.2 \textit{Interpretation in light of ECHR}

The priority the Court gives to the intention of the Council is closely connected to interpretation \textit{in light of} the ECHR.

As was the case with the ICJ, the ECtHR also seek an understanding of the Council’s role, functions and limits to properly understand its resolutions. Similarly, it looked to the UN Charter, and to the purpose of the United Nations to “achieve international cooperation in [...] promoting and encouraging respect for human rights […]” cf. Article 1(3). Importantly, human rights also serve as a \textit{limit} on Council’s powers, in that it must “act in accordance with the

\begin{itemize}
  \item \textsuperscript{114} Ibid. (143)
  \item \textsuperscript{115} \textit{Supra} n92
  \item \textsuperscript{116} Separate opinion of Judge Nussberger
  \item \textsuperscript{117} Peters (2016)
  \item \textsuperscript{118} Separate opinion of Judge Nussberger
  \item \textsuperscript{119} Milanovic (2012) p. 138
  \item \textsuperscript{120} See 2.2.3.2(ii)
\end{itemize}
Purposes and Principles of the United Nations”. It is on this basis Al-Jedda first constructs the presumption about the Council’s intention.

Over the course of the three cases, this concept of harmonisation between human rights norms and the norms stemming from the Security Council is developed. Al-Jedda sets out the basic premise that the interpretation “most in harmony and avoids conflict with” with human rights norms must be chosen. Nada further expands on the concept with support of VCLT Article 31(3)(c), ECHR case law and the ILC study group’s report. Citing the same sources, Al-Dulimi establishes an interpretation of the Security Council resolutions in a “spirit of systemic harmonisation”.

We saw that the ICJ endeavored to understand the Council’s role under the Charter to properly interpret its resolutions. In this way, the ECtHR has a wider lens. It seeks to not only understand the Council’s functions and limits within the UN system, but also its role in the wider geopolitical framework of international law as a whole, including the Council’s relationship to the Court itself.121

The primary effect of the “spirit of harmonisation” is that the Court can avoid declaring a conflict of norms. When the ECtHR is faced by a confrontation of norms between the rules of the ECHR on one side and the provisions of a Security Council resolution on the other, it can at the outset choose between two results with arguably equally detrimental effects. The first would be to defer to the Council and give primacy to its resolutions as per Articles 103 and 25 of the UN charter, which would undermine the Court’s role as guarantor of respect for human rights. On the other hand, declaring a breach of the ECHR-rule in spite of Article 103 and in defiance of the Council, would undermine the Council’s effectiveness as the world’s primary political organ, and upset the presumed hierarchy of norms in international law.

Not least, the second path would be tantamount to exerting judicial review over the Council. This is not a power the Court has, although there is a certain precedence in the CJEU Kadi-case.122 Here, the European Court viewed the domestic measures implementing a Security Council resolution as EU-law, allowing them the competence to give precedence for those measures over UN law. In contrast, the ECtHR is somewhat hesitant to tackle the resolutions head on, and expressly emphasize that it is “not its role to seek to define authoritatively the meaning of provisions of the Charter of the United Nations”123 and “not its role to pass judgement on the legality of the acts of the UN Security Council”.124

It is therefore maybe unsurprising that the ECtHR in these cases chose the third path in interpreting the resolutions in the light of, and in harmony with human rights obligations. One could argue it is an elegant solution in a difficult dilemma, as it enables the Court to (i) protect the individual’s human rights in the given case, (ii) provides domestic courts with a path to doing the same and (iii) works as a counterweight to the Council’s virtually unchecked powers and a needed incentive for political accountability.125

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121 Sicilianos (2017) p. 784
122 Supra n17
123 Al-Jedda v. UK (76)
124 Al-Dulimi v. Switzerland (139)
125 Supra n 98
However, as we saw above, the harmonisation can undermine the credibility of the Court if it is stretched too far beyond what the text of Security Council resolutions provides. This is also a main theme in the separate opinions of Al-Dulimi. Judge Nussberger calls the method “convincing in Al-Jedda, and arguable in Nada, [but] it goes beyond what is acceptable in the present case”, and that “in the present case the majority […] have tried to resolve a conflict by denying its very existence”.126

The separate opinion of Judge Malinverni in Nada makes a convincing case that the Council were “well aware of the conflict that would inevitably arise between its own resolutions and the obligations [of the ECHR],” and that Articles 25 and 103 of the UN Charter allows for the Council to act in that manner nonetheless. In this vein, Judge Nussberger also makes the point that “the very idea of chapter VII of the UN Charter is that the Security Council should be the one which has the last word in deciding on the necessity of the measures taken in order to maintain peace and security,” not member states.

These sentiments suggest that the interpretation rule of presumption of harmony between resolutions and human rights norms, can only go so far. The council has the power to derogate from the most fundamental norms of international law (bar jus cogens-norms), and the Court should be hesitant to undermine this power. As Wood put it, in regard to the similar presumption of harmony put forward in Sayadi v. Belgium before the Human Rights Committee: “[the presumption] ignores the fact that, by definition, the Council is acting in an emergency situation, where there is a threat to the peace, a breach of the peace, or an act of aggression. And depending on what it takes to rebut it, this first presumption could deprive Art. 103, a cornerstone of the Charter, of virtually all practical effect.”

4 The International Criminal Court

4.1 Case selection

The ICC has jurisdiction over so-called international crimes: genocide, crimes against humanity, war crimes and the crime of aggression.127 According to Article 13(1)(b) of the Rome Statute, the Security Council can initiate (“trigger”) an investigation into such crimes by referring a situation to the ICC. The Court can exercise jurisdiction if:

A situation in which one or more of [the international crimes] appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

The ICC’s approach to interpretation of Security Council resolutions triggering jurisdiction is of particular interest, because it is currently contested. This chapter discusses two decisions with similar fact patterns, but that nonetheless interpreted the same resolution differently. A decision based on the reasoning in the South Africa-decision is currently pending before the Appeals Chamber.128

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126 Separate opinion of Judge Nussberger, first paragraph
127 Rome Statute, Article 5
128 See 5.2
I will first present background and brief comments on each decision, before analysing them jointly.

4.2 Background to both cases

In March 2005, the Security Council referred the situation in Sudan to the ICC by way of Resolution 1593. Operative paragraphs 1 and 2 provides under the heading “The Security Council, [acting under Chapter VII of the Charter of the United Nations”:

“1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;”

In March 2009, Sudanese president Omar al-Bashir became the first sitting head of state to be indicted by the ICC, when the Pre-Trial Chamber issued a warrant for his arrest. As a consequence, member states of the ICC have a duty to arrest and surrender al-Bashir to the Court.129

However, it is an undisputed rule of customary international law that sitting Heads of State enjoy personal immunity from criminal jurisdiction and inviolability before national courts of foreign States.130 This applies even when a Head of State is suspected of committing international crimes.131 A cornerstone of the Rome Statute, is that it derogates from this rule. Article 27(2) provides under the heading “Irrelevance of official capacity”:

“Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

This does not apply to Sudan, as they are not a state party to the Rome Statute. In such cases, Article 98(1) of the Statute says that “[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person […] of a third State.” There is an exception to this rule if the Court can “first obtain the cooperation of that third State for the waiver of the immunity”. Sudan has not provided such a waiver.

At the outset therefore, al-Bashir enjoyed immunity from arrest and extradition when he travelled outside of Sudan, which he did frequently.

There is in other words a potential confrontation between the norms stemming from the Security Council via the ICC, and a rule of customary international law. This is a knot the ICC has attempted to untie in different ways. In the 2011 Chad and Malawi-decisions it constructed a customary international law exception to the immunity rules for international courts. This approach was abandoned in the following decisions for the so-called “Security Council-

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129 Rome Statute Article 89(1) cf. 86
130 DRC-decision (25)
131 Democratic Republic of Congo v. Belgium (53-59)
route” whereby the Pre-Trial Chamber II instead relied on two differing interpretations of Resolution 1593 to lift Al Bashir’s immunity.

## 4.3 Democratic Republic of Congo (DRC)-decision

### 4.3.1 Interpretation of Resolution 1593

Al-Bashir visited the Democratic Republic of Congo (DRC), a party to the Rome Statute, in 2014. The ICC requested the DRC to immediately arrest and surrender him to the Court, but DRC failed to do so.

The DRC submitted that since there was no waiver by Sudan of Al Bashir’s immunity, the ICC’s request would require them to act “inconsistently with its obligation under international law” as per Article 98(1). The DRC also held that they were further bound to respect Al Bashir’s immunity by a decision of the African Union (AU) holding that “[…] no serving AU Head of State or Government […], shall be required to appear before any international court or tribunal during their term of office”.

The Chamber rejected this position. The key passage provides:

“[…] by issuing Resolution 1593(2005) the [Council] decided that the “Government of Sudan […] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”. Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan “cooperate fully” and “provide any necessary assistance to the Court” senseless. Accordingly, the “cooperation of that third State [Sudan] for the waiver of the immunity”, as required under the last sentence of Article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the [Council] implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards the execution of the 2009 and 2010 Requests.”

In other words, the Chamber held that there was no need to obtain a waiver. Sudan’s cooperation was already ensured - not by Sudan’s consent, but by Security Council resolution 1593.

As there was no impediment for DRC to act on the requests to arrest and extradite Al-Bashir, the conflict of obligations for DRC was not between the Court and the AU. Rather, the conflict was between the decision of the AU to “retain the immunity of Omar Al Bashir and [Resolution 1593] which removed such immunity for the purpose of proceedings before the Court.” The Chamber found that this conflict was resolved by articles 25 and 103 of the UN Charter, giving priority to the resolution.

The DRC had failed to comply with its obligation under the Statute.

## 4.4 South Africa-decision

132 Akande (2009)
133 DRC-decision (19)
134 Ibid. (29)
4.4.1 Interpretation of Resolution 1593

Al-Bashir travelled to South Africa, a party to the Rome Statute, in 2015. The Court made clear its position ahead of the visit, that South Africa were obliged to arrest him, yet no arrest was made. South Africa’s reasoning went along the same lines as DRC’s. The overarching question was whether South Africa were entitled to not comply with the Court’s requests for arrest.

The Chamber began by clarifying its view on Article 27(2) of the Statute. When States accede to the Statute, it accepts the irrelevance of immunities based on official capacity. The Court held that the same applies in the horizontal relationship between member states:

“[..] a State Party cannot refuse to arrest and surrender an individual on the grounds that the individual benefits from immunities based on official capacity belonging to another State Party to the Statute.”

However, this has no bearing on Sudan, which is not a member state. The Chamber once again turned to Resolution 1593 to resolve this impasse, but this time in a different way. The resolution placed an obligation on Sudan to “cooperate fully”. The question is what that cooperation entails. The Chamber held that “the terms of such cooperation are set by the Rome Statute” because “the only legal regime in which this Court may exercise the triggered jurisdiction is the on which is generally applicable to it, its Statute in primis.”

The effect of a resolution triggering the Court’s jurisdiction under article 13(b) of the Statute, was therefore that the legal framework of the Statute applied, in its entirety, to Sudan. When 27(2) applied to Sudan, there was no impediment in the horizontal relationship between Sudan and South Africa to carry out an arrest.

South Africa had therefore failed to comply with the Statute.

4.5 Analysis

In the following, I highlight some of the commonalities and contrasts in the two decisions’ approach to interpretation of resolution 1593. South Africa’s submissions serves as a rebuttal of the interpretation of the DRC-decision. The minority opinion in the South Africa-decision provides yet another view on the resolution. Both make valid arguments, and I will cite them where the alternative interpretation can shed light.

In the South Africa-decision, it was interpretation in light of the Statute that provided an explanation for the priority given between text and intent. I will discuss this under that heading.

4.5.1 Relevant sources

135 South Africa-decision (79)
136 Ibid. (88)
137 Ibid. (85)
139 Available here: https://www.icc-cpi.int/RelatedRecords/CR2017_04403.PDF
4.5.1.1 Common starting points from the ICJ approach

Neither decision provided an explicit explanation of their approach to interpreting Security Council resolutions. The DRC-decision mentioned the result of the interpretation in Namibia, but did not comment on the method used in that decision. It does nonetheless suggest that ICJ’s approach was relevant for the Chamber. In the South Africa-decision, the minority opinion expressly used the method and relevant sources prescribed in Kosovo, serving almost as a case study of how ICJ’s method could be implemented in another Court. South Africa’s submissions used a more formulaic application of the general rule of the VCLT. As these options for method of interpretation were discussed at hearings before the Court, it is notable the majority chose neither.

That said, neither decision deviates far from the ICJ’s approach. We see this reflected in that both interpret Resolution 1593 in light of not only the language, but also in the context in which it was adopted, and in the light of is object and purpose.

Moreover, both decisions highlighted the same wording, namely operative paragraph 2 in which the Council “decided” that the Government of Sudan “shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.” In different ways, the core of both decisions’ reasoning is this compulsory form of the language, seen in connection with the Council’s ability to impose coercive measures and obligations on states. In other words, “in view of the nature of the powers under Article 25” and that “resolutions can be binding on all states [...] irrespective of whether they played any part in their formulation”, as per Namibia and Kosovo.

Both seek to determine the contents of the obligation the Council has put on Sudan with this wording. In the DRC-decision the passage has the effect of implicitly waiving al-Bashir’s immunity in the context of Article 98(1) of the Rome Statute. In the South Africa-decision it has the effect of applying the Rome Statute equally to the non-member Sudan. These are different conclusions, but with the same result: al-Bashir did not enjoy immunity. The fact that both decisions in this way result in a lifting of al-Bashir’s immunity, in spite of immunity not being mentioned in the resolution, could indicate that the Chamber is mindful of the differences in interpretation between treaties and resolutions, as per Kosovo (see 2.2.3.2(viii)).

4.5.1.2 Principle of effectiveness in the DRC-decision

As discussed in 2.2.3.2(ix), the principle of effectiveness says that the interpreter should give preference to the interpretation that gives a term some meaning rather than none (the ut-res principle), and that is most suited to realize the aim of the object of interpretation (a teleological interpretation). The principle is embodied in the general rule in VCLT and can be applied to resolutions as well. Both elements are reflected in the DRC-decision.

We see the ut-res element in that “any other interpretation” than the passage implying a waiver of immunities “would render the decision requiring that Sudan “cooperate fully” and “provide any necessary assistance to the Court” senseless” [emphasis added].

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140 DRC-decision (30)
141 Minority opinion of Judge Brichambaut (64-84)
142 DRC-decision (29)
As for teleologic interpretation, the chamber pointed out that the ultimate goal underpinning Resolution 1593, and indeed to “any such referral” is to bring the perpetrators of international crimes in Sudan to justice and “put an end to impunity”.\textsuperscript{143} Holding the individual perpetrators of international crimes responsible is also the fundamental aim of the Court itself. Furthermore, this was discussed in connection with the Council’s primary responsibility to maintain international peace and security under Chapter VII of the UN Charter.

The Chamber thus uses the objects and purpose of the resolution, the Rome Statute, and the UN Charter as measures in finding the ordinary meaning of the terms “cooperate fully” and “provide any necessary assistance”. Underlying this reasoning is that the interpretation of Resolution 1593 must be chosen that helps achieve these objectives, and that to choose an interpretation that does \textit{not} achieve these aims would render the resolution moot.

Some commentators say this inference goes too far, arguing it is not \textit{senseless} that Sudan could be under obligation to cooperate while \textit{still} recognizing al-Bashir is protected by immunities under international law.\textsuperscript{144} The passage could for example be interpreted as an obligation to cooperate with any specific request the Court or Prosecutor may have.\textsuperscript{145}

South Africa also took issue with the teleologic interpretation in its submissions in the \textit{South Africa}-decision, arguing that that a consideration of the ordinary meaning of operative paragraph 2 “suggests that it is not at all concerned with immunities”.\textsuperscript{146} Furthermore, even though the Chamber considered “the cooperation envisaged in [resolution 1593] was meant to eliminate any impediment to the proceedings before the Court” it did not comment on any other wordings than paragraph 2 to this effect. In contrast, South Africa held as regards the object and purpose of the resolution that “a holistic reading of the resolution is that the resolution is multifaceted, and that the jurisdiction of the ICC is but a cog in the strategy of the Council. If you look at the resolution as a whole, you get the sense that jurisdiction is not be achieved at all costs”\textsuperscript{147} (see also 2.2.3.2(iv)).

The minority opinion in the \textit{South Africa}-decision could not determine “a clear indication of the object and purpose” of Resolution 1593. One the one hand, the Council’s referral to the Court, was only one element in a “loosely worded patchwork of measures seeking to establish a durable solution for the situation in Darfur,” which could suggest that the removal of immunities for al-Bashir was not necessarily contemplated by the Council. At the same time, the immediate textual context for these different measures were not the same: The Council decided to refer the situation to the Court, but \textit{invited, encouraged, emphasized} the other measures. This is a “construction of the object and purpose of the resolution” that suggested the other measures were additional to the referral, and thus supported the interpretation of “cooperate fully” as removing immunities.

The majority opinion in the \textit{South Africa}-decision did not rely on the principle of effectiveness to reach its conclusion.

\textsuperscript{143} \textit{Ibid.} (33)
\textsuperscript{144} Gaeta (2014)
\textsuperscript{145} Amicus curiae of O’Keefe in Jordan appeal-case (12)
\textsuperscript{146} South Africa-decision (34)
\textsuperscript{147} South Africa-decision (36)
4.5.1.3 Text vs. intent in the DRC-decision

In the extension of the teleological interpretation, the Chamber reiterated in an obiter that unlike domestic courts, the ICC lacks an enforcement mechanism and is fundamentally dependent on the cooperation of its member states to function in a meaningful way.\(^{148}\) As discussed in 2.2.3.2(ix), the same is true of the Council. The United Nations has no standing army or entity to carry out its instructions and is therefore dependent on member states to do so. A general goal for interpretation of Security Council resolutions is therefore to discern and the Council’s intentions in order to properly, meaningfully and legitimately carry out its will.\(^{149}\) This applies even more so to the ICC, as it in this way is doubly dependent on cooperation when its cases are triggered by Article 13(1)(b) of the Rome Statute. Neither the Court, nor the Council that provides it with jurisdiction, has an executive branch to enforce its decisions.

Thus, it can be validated to weigh expressions of the Council’s intent heavily in interpretation, which is reflected in the DRC-decision. In explaining why the Council had intended to waiver al-Bashir’s immunity, the Chamber held:

“When the [Council], acting under Chapter VII of the UN Charter, refers a situation to the Court constituting a threat to international peace and security, it must be expected that the Council would respond by way of taking such measures which are considered appropriate if there is an apparent failure on the part of States Parties to the Statute or Sudan to cooperate in fulfilling the Court’s mandate as entrusted to them by the Council. Otherwise, if there is no follow up action on the part of the [Council], any referral by the Council to the ICC under Chapter VII of the UN Charter would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile. It\(^{150}\) [Emphasis added].

Not unlike Al-Jedda, the Chamber has here arguably constructed a presumption about the Court’s intentions, as per the wording “it must be expected”. We can recognize in the elements of that presumption the sources for interpretation described above. The Chamber emphasizes (i) the Council’s ability to take coercive measures in the reference to Chapter VII. It concerns (ii) a teleological element: the object and purpose of the resolution and by extension the Rome Statute and the UN Charter (“the ultimate goal” is “to put an end to impunity”, intertwined with the maintenance of peace and security). Finally, there is (iii) the element of the ut res-principle: if the Council had not followed up its referral to the Court with an obligation to fully cooperate and thereby waiving al-Bashir’s immunity, the referral itself would have been meaningless.

These elements taken together allowed the Chamber to conclude that the Council by instructing Sudan to “cooperate fully”, intended to remove all procedural barriers from prosecution and thereby implicitly waiving al-Bashir’s immunity. In other words, the Chamber found that the Council need not be explicit when they derogate from immunity rules.

This was controversial. Even though it is widely accepted that the Council has power to derogate from customary international law,\(^ {151}\) one could argue that the Council must do so ex-

\(^{148}\) DRC-decision (33)

\(^{149}\) Wood (1998) p. 95

\(^{150}\) DRC-decision (33)

\(^{151}\) Krisch (2012) p. 1262
plicitly. The minority opinion in the South Africa-decision, who did not conclude either way on the matter, put it this way:

«In view of the importance of the rules on immunities in international law, the absence of any [reference to the lifting of Al-Bashir`s immunities] may be interpreted as a desire on the part of the UN Security Council not to address such matters. In light of the delicate nature of the question of immunities of a sitting Head of State, the UN Security Council may have been expected to express itself explicitly on this matter, had it intended to remove the immunities Omar Al-Bashir enjoys.»

On the other hand, the minority cautioned a textual interpretation like this may not be applicable to Council resolutions, with reference to Kosovo. It quoted De Wet, who argues on the basis of this position that “[t]he reference to ‘full cooperation’ in Resolution 1593 should be taken to denote all required measures under domestic and international law, including lifting immunities”.

South Africa argued in their submissions that there was nothing in the ordinary meaning, context or object and purpose of the resolution that suggested the Council had intended a waiver of immunity. To the degree the Council wanted to depart from the law, they had done so explicitly, namely in paragraph 6 which dealt with immunity from jurisdiction of non-nationals. Furthermore, they pointed to VCLT Article 31(3)(c) (see 2.3.3.2(vi)), to say the interpretation should be consistent with VCDR Article 32(2), which holds that waivers for diplomatic immunity must be express. Not least, they held that subsequent practice indicated that the resolution could not have waivered immunity for al-Bashir: “if the [Council] intended to remove immunity, it could have clarified the situation by adopting another resolution.” Moreover, member states of the Statute had not expressed this view and had also hosted al-Bashir without arresting him.

We see here some of the same tendencies in argument, and interpretive questions arise as in the ECtHR-cases. I will compare these two courts’ approach to intent and text in 5.2.

4.5.2 Interpretation in light of the Rome Statute

Resolution 1593 had its legal basis not only in Chapter VII of the UN Charter, but also in Article 13(1)(b) of the Rome Statute. Security Council resolutions triggering jurisdictions are therefore an integral part of the system of the Rome Statute. In both decisions, the interpretation of Resolution 1593 happens within the framework of the Statute in that both seek to establish what consequences the resolution has for Sudan, and member states, according to the Statute.

The resolution was in other words interpreted in light of the function it served in the Statute, but the decisions part ways in what exactly that function was. In both decisions, this was a matter of figuring out the interconnected relationships between the Statute and the UN Charter, the Court and the Council, the Court and non/member states and finally between non/member states.

152 Amicus curiae of O’Keefe in Jordan appeal-case (13)
153 Minority opinion of Judge Brichambaut (67)
154 Ibid. (68)
155 South Africa-decision (35-37)
4.5.2.1 *In the DRC-decision*

In the *DRC*-decision the legal question is both framed and answered within the context of the Statute in the following way: The Chamber found that the “cooperation envisaged” in the resolution was meant to remove any procedural bars to prosecution. Immunity is one such procedural bar. The Chamber turns to “the solution provided for *in the Statute*” [emphasis added], namely article 98(1) which “directs the Court to secure the cooperation of [Sudan] for the waiver or lifting of immunity of its Head of State.”156 This waiver “was already ensured by the language used in paragraph 2” of the resolution, and the Council had “implicitly waived the immunities granted to Omar Al Bashir under international law [..]”.

In other words, the Chamber interpreted the resolution in light of the Rome Statute and determined that the meaning of the wording “cooperate fully” and “provide any necessary assistance” corresponded to the contents of a specific article in the Statute.

As described above, this was also due to a teleological reading of the resolution in light of the object and purpose of *the Statute*. If the resolution is an integral part of the system of the Statute, cf. 13(1)(b), it should be read as aimed at achieving the objectives of that Statute. The Chamber thus found the “ultimate goal” of Resolution 1593 was “to end impunity”.

4.5.2.2 *In the South-Africa decision*

Similarly, the *South Africa*-decision also interpreted the resolution in light of the Statute, but this time took a different route to get to the same result. The legal question was both framed answered within the context of the Statute, in three stages.

(i) Firstly, the Court interprets Article 27(2) of the Statute. By accepting this provision, member states relinquish the immunity of its Head of State, as regards jurisdiction, in the vertical relationship between member states and the Court. The Chamber found that this provision *also* excludes the immunity of Heads of State from arrest in the horizontal relationship between member states.

(ii) The court then turns to the first of the two legal bases of the resolutions, and interprets Article 13(1)(b):

«A Security Council referral under article 13(b) of the Statute is the conferring of jurisdiction in a particular situation within defined parameters on a permanent, independent court. The ordinary meaning of the term “refer”, the context of a referral (*i.e.* the entirety of the Court’s legal regime), and its object and purpose all confirm that the effect of a referral is to enable the Court to act in the referred situation, and to do so under the rules according to which it has been designed to act. In other words, the only legal regime in which this Court may exercise the triggered jurisdiction is the one which is generally applicable to it, its Statute *in primis.* »157

This leads to the conclusion that the “effect of a Security Council resolution triggering the Court’s jurisdiction under article 13(b) of the Statute is that the legal framework of the Statute applies, in its entirety, with respect to the situation referred”.158

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156 DRC-decision (27)
157 South Africa-decision (86)
158 Ibid. (88)
(iii) It is not enough with just a referral. States cannot impose an obligation on other states, and therefore cannot delegate to the Council that power in a treaty (cf. Article 34 VCLT, see 2.2.3.1). Rather, the Council must act of its own accord to impose this obligation. The third stage is an interpretation of the resolution, in light of both the Statute and the UN Charter:

“by deciding that Sudan shall cooperate fully with the Court, the Security Council, in addition to triggering the jurisdiction of the Court, has also imposed on Sudan – acting under Chapter VII of the Charter of the United Nations – an obligation vis-à-vis the Court (to cooperate fully and provide any necessary assistance) which Sudan would not otherwise have as it has not ratified the Statute."\(^\text{159}\) [emphasis added].

The Article 13(1)(b)-referral in paragraph 1 of the resolution is therefore understood in connection with the Chapter VII-obligation to cooperate in paragraph 2.

The Chamber underlined the connection to the Charter, the second legal basis of the resolution, in an obiter:

“It is acknowledged that this is an expansion of the applicability of an international treaty to State which has not voluntarily accepted it as such. Nonetheless, the finding of the majority of the Chamber in this respect is in line with the Charter of the United Nations, which permits the Security Council to impose obligations on States".\(^\text{160}\)

Thus, the Rome Statute applied to Sudan, including both the horizontal and vertical effects of Article 27(2).

In this way, the content of the obligation has its origin in the Rome Statute, but the origin of the obligation itself is from the UN Charter.\(^\text{161}\) We see in these interpretations an interplay between the UN Charter and the Rome Statute, and the implications go both ways. The Court interprets the resolution in the context of the Statute, but it also understands the Statute on the background of the Council’s role, powers and functions under the UN Charter. The resolution is understood as one piece of the larger puzzle, namely the “sui generis-regime”\(^\text{162}\) of an Article 13(1)(b) Security Council referral.

4.5.2.3 Text vs. intent in the South Africa-decision

The South Africa-decision rebuked the interpretation in the DRC-decision. It rejected the relevance of an implicit waiver of immunities cf. Article 98(1) of the Statute, As Article 27(2) applied to Sudan:

“The majority of the Chamber clarifies that indeed, it sees no such “waiver” in the Security Council resolution, and that, in any case, no such waiver – whether “explicit” or “implicit” – would be necessary”\(^\text{163}\)

Although the Chamber in this way dismissed any further discussion of both the text and intent of the resolution, the decision still amounted to an implicit derogation of the immunity rules. Al-Bashir’s immunity had still been (indirectly) removed without an explicit mention in the resolution of either immunity, or of treating Sudan like a State Party to the Rome Statute. Giv-

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\(^{159}\) Ibid. (87)  
\(^{160}\) Ibid. (89)  
\(^{161}\) Amicus Curiae of Robinson (5)  
\(^{162}\) South Africa-decision (83)  
\(^{163}\) Ibid. (96)
en how crucial the intent of the Council was in coming to a similar conclusion in the DRC-decision, it is striking that the opposite is true in the South Africa-decision:

«[i]t is opportune to emphasize that for this conclusion it is immaterial whether the Security Council intended – or even anticipated – that, by virtue of article 27(2) of the Statute, Omar Al-Bashir’s immunity as Head of State of Sudan would not operate to prevent his arrest sought by the Court in relation to the proceedings in the situation in Darfur referred to the Prosecutor of the Court in Resolution 1593 (2005). As explained, this is a necessary, un-severable, effect of the informed choice by the Security Council to trigger the jurisdiction of this Court and impose on Sudan the obligation to cooperate with it»[95]

In the DRC-decision, the allowance of an implicit derogation was based largely on the Council’s intent. Here, it is an unavoidable consequence of the Council’s referral combined with the imposed obligation to cooperate, as described above.

5 Comparative analysis

5.1 Overview

In the following, I will briefly summarize, and comment on some similarities, common themes, differences and tensions in the Courts’ approach to interpretation.

At the outset, it should be noted that in the case law analysed above involve interpretation of different kinds of Security Council resolutions. The ICJ opinions dealt with State-specific, post-colonialism and post-conflict issues of peace and security. The ECtHR cases concerned the human rights of individuals. The ICC decisions concerned a resolution with the very specific function of referring a situation to the Court. This is a very narrow selection, compared to the many types of resolutions that exist. Indeed, Wood cautions one should not look for a single approach to interpretation of Security Council resolutions, given their variety.[96] Furthermore, discussed here are three very different Courts with widely different mandates.

5.2 Relevant sources

There is no great deviation across the span of the three Courts as to what sources they find relevant as means for interpretation of Security Council resolutions. The ICJ approach leads the way in this regard, which is emblematic of the authority it has as the United Nation’s own court and primary judicial organ. Namibia, which was developed in Kosovo, is cited as a point of departure in Al-jedda, and then reiterated in Nada and Al-Dulimi. The DRC-decision cites Namibia, but not as a starting point for interpretation. The majority opinion in the South Africa-decision does not outright provide an explanation before interpreting, whereas the extensive minority opinion uses Kosovo as a methodical guide.

The summation in Al-Jedda of the ICJ approach is succinct: Security Council resolutions “should be interpreted in the light not only of the language used but also the context in which it was adopted”. However, “context” is a very broad and general description, and Kosovo serves to provide more detail in this regard. The approach of looking to the VCLT for guidance, is one that appears to be common to the three Courts, even if this is not posited explicit-

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164 Ibid. (95)
165 Wood (2017) p. 10
ly as the method used. We can recognize to some degree in all cases a good faith interpretation of the ordinary meaning of the terms of the resolution in their context and in light of their object and purpose, as well as the use of factors analogous to the ones mentioned in Articles 31 and 32 of the VCLT. That said, one could argue this approach was stretched to its limits in Nada and Al-Dulimi.

Particularly for the ECtHR and ICC there is important use of the principle of effectiveness, and teleological interpretation, which can be viewed as embodied in the general rule of interpretation, subsumed under good faith and object and purpose.

The recognition in Kosovo that the differences between treaties and resolutions may require other sources of interpretation, is also present in the other courts’ approach. For the ICJ, and ECtHR, a special importance is placed on the Council’s own practice in light of their standing as authoritative interpreters, and that the resolutions themselves are not self-contained, but rather have a combined and cumulative effect. Connected to this common thread is a view to the broader factual and political background at the time of, and after adoption. In this regard, attention is paid to statements by members of the Security Council, and by other relevant bodies of the UN, such as the General Assembly in Kosovo, and the Secretary-General in Al-Jedda. Subsequent practice of the States affected by the resolutions is crucial to all the ECtHR-cases.

The most significant difference from treaty interpretation for our purposes, is that the primacy given to text over intent of the parties in the VCLT is arguably reversed when interpreting Security Council resolutions. This was especially the case for ECtHR and ICC. Even in the South Africa-decision where the Chamber held that the Council’s intentions were irrelevant, the result was still an implicit derogation from immunity rules.

In the perspective of relevant sources for interpretation, this was explained by the texts of resolutions often being ambiguous and terse, as the result of political bargaining and other factors described in 2.2.3.1. And as the Council is dependent on the States to act out its instructions, it should be a priority of the interpreter to discern the intent of the Council over a strict adherence to the text.

In addition, the priority and tension between text and intent is also closely connected to the perspective of interpretation in the light of relevant treaty law.

5.3 Interpretation in light of relevant treaty law

An important common theme for the three Courts, is that they all seek to understand the Council’s role, functions and limits. To understand its resolutions, one should understand what the Council is and does. In this regard, there are nuances and differences in the Courts’ approach. Each Court interprets the resolutions within its own ecosystem, so to speak: the ICJ looks to the UN Charter and the Council’s working methods. The ECtHR and ICC do the same, but in addition, they interpret resolutions in light of the instruments for which they themselves are the primary guardian. This plays into the weighing of text against the Council’s intent.

The ECtHR looked to the UN Charter, to establish a presumption that the Council’s intent was not to breach the norms of the ECtHR. The ICC relied in the DRC-decision on an expectation that the Council intended to waive immunity, as this was be a road block for prosecu-
tion under the Statute. In the *South Africa*-decision, derogation from immunity rules was a necessary consequence of the resolution read in light of the Statute.

These points of departure are not unlike each other. Nevertheless, they lead to a stark contrast in results.

The consequence of the *Al-Jedda* presumption was a very high bar to determine that there had been a conflict of norms, and that the Council had intended to derogate from the ECtHR. Unless the Council uses clear and explicit language to that effect, the Court would interpret the resolution as in harmony with the ECHR. When this high bar was met in *Nada*, the Court stretched the presumption further, to allow for a leeway in the implication of the resolutions in accordance with the ECHR. *Al-Dulimi* used both the high bar and the leeway from the previous cases to allow for domestic judicial scrutiny of the resolution measures, against the standard of arbitrariness.

In this way, the ECtHR used interpretation in light of the ECHR to go progressively further to avoid declaring a conflict of norms.

By contrast, the ICC decisions set a low bar to determine that there had been a conflict of norms, and that the Council had intended to derogate from immunity rules. It was enough to derogate that the Council used implicit language to that effect.

In this way, the ICC used interpretation in light of the Rome Statute to determine that there had been a conflict of norms.

This may be explained by the outcomes of the decisions. The ECtHR interprets in the light of the ECHR, and the primary purpose of that convention is to protect human rights. It is natural that the Court should set a high bar to derogate from those norms, and the outcome is better protection. As we saw, this had the added benefit of not defying the Council, which could paradoxically have undermined the Council’s power to protect the very values and norms the ECHR and the ECtHR seek to protect.

Similarly, it is understandable that the ICC would set a low bar to exempt from norms that are detrimental to achieving the objects and purposes of the Rome Statute.

Also notable is that both Courts interpret in light of the UN Charter, as per the ICJ-approach, but do so in different ways. Where the Council’s actions come at the potential expense of human rights it becomes the role of the ECtHR to function as a check on the Council’s power. Hence, they looked to the limit human rights places on the Council’s powers under the Charter, in interpreting resolutions. Conversely, the ICC has no executive branch to enforce its decisions. The ICC may therefore be eager to enlist the Security Council’s help in this endeavor. In both decisions the Chamber therefore interpreted Resolution 1593 with an emphasis on the Council’s ability to impose coercive measures under Chapter VII.

Thus, it seems the interpretational rule of a strong presumption of harmony applies only to human rights, because of the limits human rights places on Council’s powers under the Charter. It has been pointed out that the rules of immunity are grounded in *state sovereignty*, which
is also a foundational element of the Charter. However, the limitation of that state sovereignty is the very purpose of Chapter VII resolutions.\textsuperscript{166}

That said, it is perhaps problematic that there are separate standards for how explicit the Council must be in order to derogate from rules of international law.\textsuperscript{167} The issue of how to interpret Resolution 1593 was a strongly contested topic in the arguments before the Appeals Court of the ICC this fall, in the case relating to al-Bashir’s visit to Jordan. The Pre-Trial Chamber II’s decision was based on the reasoning of the \textit{South Africa-decision}. Oral arguments went along many of the same lines as discussed in this thesis.\textsuperscript{168} Indeed, both Jordan in their submissions,\textsuperscript{169} and O’Keefe in an \textit{amicus curiae},\textsuperscript{170} argued based on \textit{Al-Jedda} and \textit{Al-Dulimi}, that any resolution to the effect of removing immunity would have to be explicit. Conversely, it was held that a clear enough expression of the intent of the Council was enough to derogate from immunity rules.\textsuperscript{171}

The Appeals Court will deliver its highly anticipated judgement on May 6, 2019.

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\textsuperscript{166} D\textit{\textsuperscript{i}as (2018)}
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\textsuperscript{167} \textit{Ibid.}
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\textsuperscript{168} Court records available here: \url{https://www.icc-cpi.int/Pages/crm-refined.aspx?case=ICC-02/05-01/09}
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\textsuperscript{169} Submissions of Jordan (70)
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\textsuperscript{170} \textit{Amicus Curiae} of O’\textit{Keefe} (13)
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