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SECURITY COUNCIL TREATY ACTION

STEFAN TALMON*

It is well established that the United Nations can conclude treaties¹ and that the Security Council can instruct the Secretary-General to conclude treaties on the UN's behalf with States and other international organizations.² It is less clear whether and to what extent the Security Council has the power to take other treaty action, i.e. whether it may amend, alter, modify, rewrite or interpret existing treaties, or interfere in any other way in the ordinary treaty-making and treaty-reviewing processes. In recent years, several member States have expressed concern at the Council's increasing tendency to take treaty action on behalf of the international community.³ For example, in a debate on what was to become resolution 1422 (2002), Cuba's representative to the Security Council said:

The proposals being made [...] are in a few words, an armed assault on the law of treaties. The ultimate aim is to expand the powers of the Security Council even further in order to give it the capacity to amend international treaties, a right that belongs solely to the States parties to a given treaty. The Council has no power to amend the legal regime established by a treaty. Nor can the Council be given the power to extract norms from treaties that have been agreed to by sovereign States parties – and which generate rights and obligations solely for those parties – and make them binding on all States Members of the United Nations by invoking Chapter VII of the Charter.⁴

Canada questioned whether the Security Council “could change the negotiated terms of any treaty it wished – for example, the Nuclear Non-Proliferation Treaty – through a Security Council resolution” thereby undermining the treaty-making process.⁵ Brazil was of the view that the Council could not “alter international agreements that have been duly negotiated and freely entered into by States parties” and that “Council is not vested with treaty-making and treaty-reviewing powers”.⁶ Guinea took the position that “no Security Council resolution could therefore modify a provision of an international treaty”.⁷

Since the early 1990s, the Security Council has been fairly active and innovative in using its powers under the UN Charter. This paper examines the way in which the Security Council has used these powers to take certain treaty actions. In particular, it asks whether there are any legal limits to the Security Council adapting existing treaties to a particular situation, and whether it can prescribe pre-existing treaty provisions to non-State parties. It also examines the consequences if the Security Council formally endorses a certain treaty, and the role it plays in the enforcement and interpretation of treaties.

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¹ See *Prosecutor v. Fofana*, Decision of the Appeals Chamber of the Special Court for Sierra Leone (SCSL) on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Powers by the United Nations, Case No. SCSL 2004-14-AR72(E), 25 May 2004, para. 18.

² See e.g. S/RES/1664 (2006) of 29 March 2006, para. 1; S/RES/1626 (2005) of 19 September 2005, para. 9; S/RE/1545 (2004) of 21 May 2004, paras. 9, 10; S/RES/1315 (2000) of 14 August 2000, para. 1.

³ See e.g. UN Docs. S/PV.5635, 23 February 2007, 16 (South Africa); S/2004/329, 28 April 2004 (India); S/PV.4950 (Resumption 1), 22 April 2004, 14 (Nepal); S/PV.4772, 12 June 2003, 21 (Pakistan); S/PV.4568, 10 July 2002, 15 (Iran).

⁴ UN Doc S/PV.4568 (Resumption 1), 10 July 2002, 14. For similar statements of Cuba, see also UN Docs. A/57/PV.27, 14 October 2002, 14; A/58/PV.29, 13 October 2003, 9.

⁵ UN Doc S/PV.4568, 10 July 2002, 3.

⁶ UN Doc S/PV.4568, 10 July 2002, 22; UN Doc S/PV.4772, 12 June 2003, 13.

⁷ UN Doc. S/PV.4568 (Resumption 1), 10 July 2002, 5.

I. ADAPTATION OF TREATIES

A. *The meaning of “adaptation” of treaties*

The Security Council has recently adopted the practice of adapting binding treaty law to a particular situation on an *ad hoc* basis. At a conference in San Remo in September 2005, John B. Bellinger III, the Legal Adviser to the United States State Department, described this new technique as follows:

[T]he Council has invoked its Chapter VII authorities to create specific legal frameworks to address threats to international peace and security. While these frameworks typically incorporate specialized bodies of law as part of the legal foundation of the Council’s response, there are cases in which the Council has adapted these bodies of law in order to meet the threat. This is a significant development. [...] Council action can have the effect of tailoring a specialized body of international law to better work in a specific set of circumstances.⁸

What is here euphemistically referred to as an “adaptation” of applicable treaty law to a specific set of circumstances in effect amounts to an *ad hoc* “alteration” or even “abrogation” of certain binding treaty provisions with regard to a specific case or specific actors. The Security Council tailors treaty law to suit the needs of international peace and security or, adopting perhaps a more sober outlook, the political needs of individual Council members, thereby contributing to a culture of exceptionalism.

B. *Legal basis and limits of treaty adaptation*

It has been said that resolutions under Chapter VII provide the Security Council with a convenient and helpful “legislative device to deal with anomalous cases, to be able to amend the general rules to accommodate them or to provide an expressly exceptional solution”.⁹ The legal basis of the Security Council’s new practice of treaty adaptation can thus be found in Chapter VII and, in particular, articles 39 and 41 of the UN Charter. As the Security Council enjoys a wide margin of discretion not only with regard to the determination of what constitutes a “threat to the peace” but also with regard to the “measures” that are to be employed to maintain or restore international peace and security,¹⁰ it will be difficult to establish that the *ad hoc* adaptation of a treaty (or the prescribing of certain provisions of a treaty) is generally outside the Council’s Chapter VII powers.

When adapting existing treaty provisions to a particular situation, the Council is first and foremost constrained by the Charter itself. As the International Court of Justice (ICJ) held in the *Admissions* case, “the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment”.¹¹ Thus, only decisions which are *intra vires* the Charter acquire binding force in terms of article 25 which speaks of “decisions of the Security Council *in accordance with the present Charter*”. Any treaty adaptation is limited by the jurisdiction of the United Nations at large as well as by the attribution and

⁸ Remarks of John B. Bellinger, III, Legal Adviser, U.S. Department of State, ‘United Nations Security Council Resolutions and the Application of International Humanitarian Law, Human Rights and Refugee Law’, International Conference, San Remo, Italy, 9 September 2005, at <<http://www.state.gov/s/l/c8183.htm>>.

⁹ See C. Warbrick, Kosovo: The Declaration of Independence (2008) 57 *ICLQ* 675-690 at 690.

¹⁰ See e.g. N. Jain, A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court (2005) 16 *EJIL* 239-254 at 242-243.

¹¹ *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, ICJ Rep. 1948, 57 at 64.

division of competences within the Organization.¹² In addition, any treaty action of the Security Council must be in accordance with the purposes and principles of the Charter.¹³ None of these limits to the powers of the Security Council seems to create an insurmountable obstacle to treaty adaptation, especially if such adaptation is expressly undertaken in response to a threat to international peace and security.

While the Security Council, when acting under Chapter VII, is not bound to respect international law apart from the Charter and norms of *jus cogens*,¹⁴ the Charter itself indicates that the Council's actions are subject to the principle of proportionality. This means that adaptation of existing treaties must be *necessary* in order to maintain international peace and security; that is to say, the usual ways to modify treaty obligations must be inadequate to achieve that aim. The principle of proportionality will in practice, however, have very little limiting effect on Council treaty action as the UN Charter allows the Council a broad margin of appreciation when deciding on the necessity of its actions, and on their scope. The adaptation of treaty provisions would therefore violate the Charter only if the impact on the member States was manifestly out of proportion to the objective pursued, namely the maintenance of international peace and security.

It has been argued that the adaptation of treaties by the Security Council is inconsistent with the principle of *pacta sunt servanda* which is "a fundamental norm of international law in the nature of *jus cogens*".¹⁵ There are two objections to this argument. First, it is by no means accepted that the principle amounts to a "norm from which no derogation is possible".¹⁶ Secondly, the principle encapsulates the idea that treaties cannot be unilaterally terminated or denounced by a party. Of course, if all the parties involved agree, any treaty can be amended, rescinded or abrogated.¹⁷ It could be argued that, by joining the Organization, UN member States agreed in advance to amendment of their treaties by the Security Council.¹⁸ A better argument is that adaptation of treaties by the Security Council is not inconsistent with the principle of *pacta sunt servanda*, since such adaptation does not concern any unilateral action by one of the parties but a decision of the Security Council that equally applies to all parties.

Several States have taken the view that, under Chapter VII, the Security Council does not have the power to take binding decisions to amend international treaties.¹⁹ For example,

¹² For a more detailed view of the legal basis and limitations to Security Council law-making, see S. Talmon, *The Security Council as World Legislature* (2005) 99 *AJIL* 175-193 at 179-186.

¹³ See art. 24(2) of the UN Charter. See also the statement of the Mexican representative in the Security Council debate on the rule of law: "[T]he Council is bound by the purposes and principles set out in Articles 1 and 2" (UN Doc. S/PV.5474, 22 June 2006, at 29).

¹⁴ Although this seems to become a minority view in the international legal literature, it is still maintained; see Talmon, *supra* note 12, at 184. For the same view, see H. Kelsen, *The Law of the United Nations* (New York: Praeger, 1950), at 294-295; and *Kadi v. Council and Commission*, Case T-315/01, [2005] ECR II-3649, paras. 226-230. *Contra* Jain, *supra* note 10, at 243-244; D. Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of the Decisions of the Political Organs of the United Nations?* (1997) 46 *ICLQ* 309-343 at 317-321 (arguing that the powers of the Security Council are limited by general international law).

¹⁵ Jain, *supra* note 10, at 251.

¹⁶ See M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009), at 366, para. 6.

¹⁷ See C. Tomuschat, *Pacta sunt servanda*, in: A. Fischer-Lescano et al. (eds.), *Frieden in Freiheit: Festschrift für Michael Bothe zum 70. Geburtstag* (Baden-Baden: Nomos, 2008), 1047-1065 at 1047.

¹⁸ See arts. 25, 103 of the UN Charter.

¹⁹ See UN Docs. S/PV.4772, 12 June 2003, 10 (Iran), 13 (Brazil), 25 (Germany); A/58/PV.29, 13 October 2003, 9 (Cuba); S/PV.4568, 10 July 2002, 3 (Canada), 5-6 (New Zealand), 11 (France), 15 (Costa Rica on behalf of the 19 Member States of the Rio Group), 15 (Iran), 18 (Ireland), 22 (Brazil), 23 (Switzerland), 26 (Mexico), 30 (Venezuela); S/PV.4568 (Resumption 1), 10 July 2002, 2 (Fiji), 5 (Guinea), 8 (Malaysia), 10 (Syria), 14 (Cuba):

Pakistan's representative declared in the Security Council that: "Pakistan strongly adheres to the position that the Security Council, despite its wide authority and responsibilities, is not empowered to unilaterally amend or abrogate international treaties and agreements freely entered into by sovereign States."²⁰ Some 40 years earlier, the representative of the United States made a similar statement with regard to the 1960 Treaty of Guarantee for Cyprus, declaring that "[t]his Treaty or any international treaty cannot be abrogated, cannot be nullified, cannot be modified either in fact or in effect by the Security Council of the United Nations".²¹ While the Security Council may not be able *formally* to abrogate or amend an existing treaty, it can impose binding obligations upon the member States which, in case of conflict, will prevail over existing treaty obligations, including obligations under human rights treaties (and hence even the non-derogable rights contained therein, with the exception of those that have attained the status of *jus cogens*).²² As explained by John B. Bellinger III:

The Council has authority under Chapter VII, when necessary for the maintenance of international peace and security, to authorize measures that may be inconsistent with otherwise applicable treaties. Under Article 103 of the UN Charter, "[i]n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail."²³

The obligation of UN member States under article 25 of the Charter to "accept and carry out the decisions of the Security Council" is an "obligation [...] under the present Charter" within the meaning of article 103. Member States of the United Nations are therefore bound by article 103 to give obligations arising from binding Chapter VII resolutions priority over any other (treaty) obligation. This view is shared by the ICJ which held in the *Lockerbie* case that "obligations" imposed by the Security Council under Chapter VII take precedence over obligations under international treaties.²⁴ However, there is an important distinction between an obligation and an authorisation in the UN legal system.²⁵ Unlike obligations, authorisations do not command States to act; instead they empower States to act. Therefore, it could be argued that, since an authorisation does not compel member States to take action but merely confers upon them a discretionary power to do so, there is no relevant obligation to which article 103 could apply. A better view, which is now widely accepted, is that article 103 also applies to authorizations by the Security Council.²⁶ The House of Lords held in the *Al-Jedda* case that the term "'obligations' in article 103 should not in any event be given a narrow, contract-based, meaning" but should also include authorizations by the Security Council, as States were bound to exercise their power under a Security Council resolution where this was necessary to give effect to the decisions of the Council.²⁷ It may thus be

A/57/PV.22, 4 October 2002, 6 (Liechtenstein).

²⁰ UN Doc. S/PV.4772, 12 June 2003, 21.

²¹ SCOR, 19th Year, 1096th Meeting, 19 February 1964, 13, para. 74.

²² For the same view, see C. Stahn, *The Ambiguities of Security Council Resolution 1422 (2002) (2003)* 14 *EJIL* 85-104 at 99. *Contra* Jain, *supra* note 10, at 250-251

²³ See *supra* note 7.

²⁴ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK)*, Order of 14 April 1992, ICJ Reports 1992, 3 at 15, para. 39.

²⁵ See O. Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991), at 395.

²⁶ See e.g. D. Sarooshi, *The United Nations and the Development of Collective Security* (Oxford: OUP, 1999), at 149-151; R. Kolb, *Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council* (2004) 64 *ZaöRV* 21-35.

²⁷ *R. (Al-Jedda) v. Secretary of State for Defence*, [2008] 1 A.C. 332 at 352-353 and, in particular, para. 34 (*per* Lord Bingham). See also Lord Justice Brooke: "SCR 1546 (2004) qualified any obligation contained in human rights conventions in so far as it was in conflict with them" ([2006] 3 W.L.R. 954 at 980, para. 80 (CA)). But,

argued that any provision in a binding Security Council resolution which modifies an applicable treaty provision has the effect of a temporary or even permanent *de facto* amendment to the treaty, that is to say an alteration to the treaty without alteration to its text.

The power of the Security Council to adapt treaties has been questioned with regard to treaties that create separate international legal persons such as the International Criminal Court (ICC). It is argued that article 103 of the Charter merely binds the “Members of the United Nations” and not international courts which are not party to the UN Charter. Any change to the Rome Statute of the International Criminal Court (Rome Statute)²⁸ thus would not be binding on the ICC.²⁹ It is true that the Security Council cannot impose binding obligations on an international tribunal, organization or institution with separate legal personality from the UN member States, but this is not what the Council intends to do when, acting under Chapter VII, it adapts treaties to a particular situation. Rather than imposing obligations on the legal person itself, the Security Council makes changes to the underlying treaty constituting the legal person and defining its functions and powers. For example, the Rome Statute provides that the “jurisdiction and functioning of the Court shall be governed by the provisions of this Statute” and that the Court “shall apply [...] in the first place this Statute”.³⁰ The Council imposes its will on the Court indirectly through modifying the Statute by which it is created and bound. In *Prosecutor v. Fofana*, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) held that the Security Council, acting under Chapter VII, could amend or terminate the treaty establishing the Special Court for Sierra Leone, an “autonomous and independent institution vested with juridical capacity”.³¹ The Court had been established on the basis of a treaty between the United Nations and Sierra Leone, which provided that it could be amended only by consent of the parties. The Court held:

The fact that the Security Council entered into an agreement in order to exercise its power in terms of maintenance of international peace and security does not mean that the Security Council cannot act within its powers under the Charter if it believes that international peace and security are in any way threatened, even if this threat arose as a consequence of the Government of Sierra Leone not consenting to the amendment of the Statute of the Special Court or to the Special Court’s termination.³²

The SCSL thus confirmed that the Security Council could change the treaty establishing the Court with binding legal effect for the Court itself. There is also a practical argument that the Security Council must be able to adapt member States’ treaties establishing a separate international legal person. If this were not the case, member States would be able to avoid

for a critical assessment of this judgment see C. Tomuschat, *supra* note 17 (on the application of Al-Jedda) v Secretary of State for Defence: Human Rights in a Multi-level System of Governance and the Internment of Suspected Terrorists (2008) 9 *Melbourne Journal of International Law* 391-404 at 400-403.

²⁸ Rome Statute of the International Criminal Court, 17 July 1998 (2187 UNTS 3).

²⁹ See e.g. R. Cryer, Sudan, Resolution 1593, and International Criminal Justice (2006) 19 *Leiden JIL* 195-222 at 213-214; D. Sarooshi, The Peace and Justice Paradox: The International Criminal Court and the UN Security Council, in: D. McGoldrick et al. (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart, 2004), 95-120 at 105-108; Stahn, *supra* note 22, at 88, 101-102; Jain, *supra* note 10, 253.

³⁰ See arts. 1, 31(1)(a) of the Rome Statute.

³¹ See SCSL, *Prosecutor v. Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Case No. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), 13 March 2004, para. 14. See also *Prosecutor v. Gbao*, Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Case No. SCSL-2004-15-AR72(E), 25 May 2004, para. 85 (holding that the Court “assumed an independent existence and is not an agency of either of the parties which executed the Agreement establishing the Court”).

³² *Prosecutor v. Fofana*, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Powers by the United Nations, Case No. SCSL 2004-14-AR72(E), 25 May 2004, para. 27. See also the separate opinion of Justice Robertson, *ibid.*, para. 6.

their obligations under the Charter and escape the trumping effect of article 103 simply by concluding treaties establishing separate legal persons.³³ The European Court of Human Rights held that, while States party to a treaty may transfer powers to a separate legal person, their responsibility under the treaty continues even after such a transfer.³⁴ This is also confirmed by the operation of the maxim *nemo plus juris transferre potest quam ipse habet*: if States are bound by article 103, they cannot escape that obligation by creating by treaty a separate international legal person which is not bound by it. The Court of First Instance (CFI) of the European Community went one step further in its *Kadi* decision, holding that:

unlike its Member States, the Community as such is not directly bound by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter. The reason is that the Community is not a member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law. Nevertheless, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, *by virtue of the Treaty establishing it*. In that regard, it is not in dispute that at the time when they concluded the Treaty establishing the European Economic Community the Member States were bound by their obligations under the Charter of the United Nations. By concluding a treaty between them they could not transfer to the Community more powers than they possessed or withdraw from their obligations to third countries under that Charter.³⁵

As this passage from the judgment shows, obligations under the Charter are imposed on a separate international legal person established by the UN member States “by virtue of the Treaty establishing it”. It is this establishing treaty that the Security Council adapts to the needs of international peace and security.

It has been suggested that States that are both members of the Security Council and parties to a treaty may violate their obligations under the treaty when voting in favour of a resolution amending it. It is argued that “the primacy of the Charter over other international agreements under article 103 is limited to ‘obligations’ of UN Members under the Charter and does not extend to the exercise of their rights, such as voting in the Council”.³⁶ However, this view does not take two important points into account. First, the members of the Security Council do not act in their State capacity but as members of an organ of the United Nations acting on behalf of the Organization as a whole.³⁷ Secondly, Council members are obliged under the Charter to take “prompt and effective action” for the maintenance of international peace and security, and this prevails over their obligations under conflicting treaties.³⁸ The

³³ See Jain, *supra* note 10, at 252-253.

³⁴ See *Matthews v. United Kingdom*, Application No. 24833/94, Judgment of 18 February 1999, para. 32; *Bosphorus Hava Yollari Turizm v. Ireland*, Application No. 45036/98, Judgment of 30 June 2005, paras. 152-154.

³⁵ *Kadi v. Council and Commission*, Case T-315/01, Judgment of the Court of First Instance (Second Chamber, Extended Composition) of 21 September 2005, [2005] ECR II-3649, paras. 192-195 (italics added). The European Court of Justice subsequently overruled the CFI, relying however on a strict separation between the UN and EC legal orders; see *Kadi v. Council and Commission*, C-402/05 P, Judgment of the Court (Grand Chamber) of 3 September 2008, [2008] ECR I-0000, paras. 278-308.

³⁶ Stahn, *supra* note 22, at 100-101.

³⁷ See J. Delbrück, Article 24, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edn., Oxford: OUP, 2002), 442-452 at 451-452. See also the statement of the representative of Egypt in the Security Council: “the members present are the representatives of their governments. But the governments of those members, the States which are the members of the Security Council, represent not themselves, but the United Nations” (SCOR, 9th year, 662nd meeting, 23 March 1954, at 13, para. 46).

³⁸ See art. 24(1) of the UN Charter associates power with responsibility, both of the Security Council as a whole and of its members. See also L.M. Goodrich/E. Hambro/A.P. Simons, *Charter of the United Nations*:

fact that the Security Council (and thus its members) enjoys wide discretion when discharging its duties does not mean that there is no such obligation.³⁹

C. Security Council practice of adapting treaties to a particular situation

Several years before the Security Council started making law for the international community,⁴⁰ it engaged in the practice of adapting existing treaty provisions to a particular situation. In March 1992, the Security Council, acting under Chapter VII of the Charter, adopted resolution 748 (1992) in connection with the bombing of a US passenger plane over the Scottish town of Lockerbie. In that resolution, the Council decided, *inter alia*, that Libya must surrender two of its nationals charged with the bombing to either the United States or the United Kingdom for trial, disclose information, and allow full access to witnesses and evidence.⁴¹ This was contrary to article 7 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation which allows each contracting State in whose territory a person suspected of an aircraft bombing is present to prosecute that person before its competent authorities.⁴² The Security Council thus overruled a treaty provision in force between the three States.

More recently, the invasion and occupation of Iraq have given rise to further examples of Security Council treaty adaptation. The 1907 Hague Regulations on Land Warfare (Hague Regulations), which are reflective of customary international law, define when a territory is under occupation. The test applied is one of fact: “territory is considered occupied when it is actually placed under the authority of the hostile army”.⁴³ A State thus becomes an “occupying power” if there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question.⁴⁴ In resolution 1483 (2003), the Security Council discarded this fact-based test of the Hague Regulations with regard to Iraq and determined that only the United States of America and the United Kingdom were “occupying powers under unified command”. All other States with a considerable number of troops in Iraq, such as Australia, Poland, and Spain, were “not occupying powers”, irrespective of whether they had established and exercised authority over Iraqi territory.⁴⁵ It is suggested that the Security Council limited the number of occupying powers in order to encourage other States to contribute troops to the stabilization of Iraq without the stigma of being labelled “occupants”.⁴⁶ For domestic political reasons, this was of great importance to several troop-contributing States. Thus, in a statement issued on 11 August 2003, the New Zealand Prime Minister Helen Clark indicated that resolution 1483 (2003) provided the necessary multilateral cover for the deployment of troops in Iraq. She

Commentary and Documents (3rd edn., New York: Columbia University Press, 1969), at 203.

³⁹ But, see Stahn, *supra* note 22, at 101, n. 66.

⁴⁰ On the Security Council’s law-making activities, see e.g. Talmon, *supra* note 12, at 175-193.

⁴¹ S/RES/748 (1992) of 31 March 1992, para. 1. This paragraph must be read in conjunction with S/RES/731 (1992) of 21 January 1992, para. 3, and the requests addressed to Libya by the USA and the United Kingdom.

⁴² For the text of the Montreal Convention, see 974 UNTS 177.

⁴³ See article 42 of the Regulations Respecting the Laws and Customs of War on Land, Annex to the Hague Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907, (1908) 2 *AJIL Suppl.* 90. For the view that the determination of an occupation is a question of fact, see also G.T. Harris, *The Era of Multilateral Occupation* (2006) 24 *Berkeley Journal of Int’l Law* 1-78 at 59.

⁴⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 Dec 2005, ICJ Reports 2005, para. 173.

⁴⁵ See S/RES/1483 (2003) of 22 May 2003, preambular paras. 14, 15.

⁴⁶ See A. Roberts, *The End of Occupation: Iraq 2004* (2005) 54 *ICLQ* 27-48 at 33; M. Zwanenburg, *Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation* (2004) 86/856 *International Review of the Red Cross* 745-769 at 765.

stated that: “Under resolution 1483, we can make a useful contribution without in any way becoming an occupying power.”⁴⁷ It is interesting to note that the Security Council, while exonerating other States from being occupying powers, at the same time called upon “all concerned” to comply fully with their obligations under international law, including the Geneva Conventions of 1949 and the Hague Regulations of 1907.⁴⁸ Obligations under these instruments with regard to foreign (occupied) territory, however, arise only for occupying powers. The Security Council’s action may thus be interpreted either as extending the obligations of occupying powers to non-occupying powers or, more likely, as restoring the original legal position of the States concerned, which would have qualified as occupying powers under the Hague Regulations but for the abrogation of the relevant treaty provision by the Security Council in the case of the occupation of Iraq.

The Fourth Geneva Convention and the Hague Regulations would also have constrained the authority of the occupying powers to carry out political and economic reforms in Iraq and to engage in the large-scale sale of Iraqi oil.⁴⁹ It has been suggested that, in resolution 1483 (2003),⁵⁰ the Security Council lifted these constraints and created a special legal regime for the occupying powers in Iraq.⁵¹ According to John B. Bellinger III, the resolution allowed the occupying powers to use oil proceeds to fund long-term economic reconstruction projects and to undertake the political transformation of Iraq, activities “that would at least arguably be outside the scope of authorities provided by the Hague Regulations”.⁵² This view was shared by the other occupying power. In March 2004, the British Secretary of State for Foreign and Commonwealth Affairs wrote:

The various measures of economic reform undertaken by the Coalition Provisional Authority have been undertaken within occupation law, *as supplemented by Security Council Resolution 1483 of 22 May 2003*. Occupation law does indeed constrain the capacity of an Occupying Power to carry out economic reform. Article 43 of the Hague Regulations sets out the general obligation to respect the laws in force in the occupied country, and the second paragraph of Article 64 of Geneva Convention IV expands upon the circumstances in which an Occupying Power may legislate; that is, where necessary to fulfil the Occupying Power’s obligations under Geneva Convention IV (which would broadly cover humanitarian purposes), for security purposes, or to maintain orderly government of the territory. Legislation to achieve economic reform is permissible under occupation law within these limits. *That position is supplemented by Security Council Resolution 1483*, and in particular paragraph 8(e) which envisages assistance to the people of Iraq for the promotion of economic reconstruction.⁵³

⁴⁷ NZDF deployment to Iraq, New Zealand Government Press Release, 11 August 2003, available at <<http://www.beehive.govt.nz/node/17532>>. See also Norway, Ministry of Foreign Affairs, Report No. 34 (2003_2004) to the Storting, 23 April 2004, available at <<http://www.regjeringen.no/>>.

⁴⁸ S/RES/1483 (2003) of 22 May 2003, para. 5.

⁴⁹ See, in particular, article 64 of the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (75 UNTS 287) and article 43 of the 1907 Hague Regulations (*supra* note 24).

⁵⁰ See S/RES/1483 (2003) of 22 May 2003, paras. 4, 8(c), 8(e), 9, 13, 14.

⁵¹ See e.g. M. Zwanenburg, *supra* note 27, at 759-763; M. Sassòli, Legislation and Maintenance of Public Order and Civil Life by Occupying Powers (2005) 4 *EJIL* 661-694 at 680, 681; M.J. Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War* (Washington, D.C.: US Institute of Peace, 2006), at 118; G.T. Harris, The Era of Multilateral Occupation (2006) 24 *Berkeley Journal of International Law* 1-78 at 76.

⁵² See *supra* note 18. See also the statement of an Attorney-Adviser, Office of the Legal Adviser, US State Department: “As a Chapter VII resolution, Resolution 1483 provided authorities that supervene any inconsistent limitations that may be contained in other bodies of international law, including occupation law.” (J.L. Dorosin, *Jus in Bello: Occupation Law and the War in Iraq* (2004) 98 *ASIL Proceedings* 117-120 at 119).

⁵³ Second Report from the Foreign Affairs Committee, Foreign Policy Aspects of the War Against Terrorism, Session 2003-2004, Response of the Secretary of State for Foreign and Commonwealth Affairs, March 2004, Cm. 6162, at 8 (emphasis added). See also the statement of the Parliamentary Under-Secretary, Foreign and Commonwealth Office, Bill Rammell, House of Commons, Parliamentary Debates, vol. 413, col 359W: 12

That the relevant treaty provisions were supplanted or, at least, supplemented by resolution 1483 (2003) also becomes clear from the fact that the occupation authorities in Iraq based their executive, legislative, and judicial authority not only on the laws and usages of war but also on “relevant UN Security Council resolutions including resolution 1483 (2003)”.⁵⁴

The end of occupation, according to article 42 of the 1907 Hague Regulations, is also a question of fact and requires that the State’s territory is no longer under the authority of the hostile army.⁵⁵ In resolution 1546 (2004), the Security Council departed from this standard tenet of international humanitarian law and determined that the occupation of Iraq would end by 30 June 2004, without making this determination dependent upon any factual change on the ground.⁵⁶ In the end, the Security Council’s date coincided neither with the early formal handover of authority by the occupying powers to the Iraqi Interim Government on 28 June 2004 nor the facts on the ground or other States’ perception of the situation in Iraq. For example, as late as 28 March 2007, King Abdullah of Saudi Arabia referred to Iraq as a country “under an illegal foreign occupation”.⁵⁷ Considering that the nascent governing ability of the Iraqi Interim Government was extremely limited as, for the time being, it could not change any of the occupying powers’ previous legislative or other decisions, and that some 160,000 foreign troops which were not subject to its authority and control remained in the country, a good case could be made that Iraq in fact continued to be under occupation, and that the determination of the end of occupation in resolution 1546 (2004) must be seen as another example of the Security Council overriding applicable treaty (and customary) law.

In resolution 1546 (2004), the Security Council also authorized the Multi-National Force (MNF) to take all necessary means to contribute to the maintenance of security and stability in Iraq, including “internment where this is necessary for imperative reasons of security”.⁵⁸ Between 28 June 2004 and 31 December 2008, British forces in southern Iraq, which formed a contingent of the MNF, interned several people under this authority. Internment (i.e. detention without charge or trial), on the ground that it is necessary for imperative reasons of security, violates the right to liberty guaranteed by article 5(1) of the European Convention on Human Rights (ECHR) which has been found to be applicable in principle to persons detained by British forces in Iraq.⁵⁹ The same is true of the largely coextensive right in article 9 of the International Covenant on Civil and Political Rights.⁶⁰ By authorizing such detentions for imperative reasons of security, the Security Council

November 2003.

⁵⁴ For the legislative acts of the occupying powers in Iraq, see S. Talmon, *The Occupation of Iraq: The Official Documents of the Coalition Provisional Authority* (Oxford: Hart, forthcoming).

⁵⁵ On the termination of occupation, see UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: OUP, 2004), at 277.

⁵⁶ S/RES/1546 (2004) of 8 June 2004, para. 2.

⁵⁷ *The Saudi Gazette*, internet edition, 29 March 2007, at < <http://www.saudigazette.com.sa> > (no longer available).

⁵⁸ S/RES/1546 (2004) of 8 June 2004, para. 10, and the letters annexed to the resolution. See also S/RES/1637 (2005) of 11 November 2005, para. 1; S/RES/1723 (2006) of 28 November 2006, para. 1; S/RES/1790 (2007) of 18 December 2007, para. 1, and the letters annexed to these resolutions.

⁵⁹ See *R. (Al-Skeini and others) v. Secretary of State for Defence*, [2008] 1 A.C. 153 (HL). But see also *R. (Al-Saadoon and Mufdhi) v. Secretary of State for Defence*, [2009] EWCA Civ 7 at paras. 23-40 where the Court of Appeal held that persons detained by British forces in Iraq were not within the “jurisdiction” of the UK in the sense of article 1 ECHR. The European Court of Human Rights saw this differently and on 30 December 2008 indicated interim measures in that case (Application no. 61498/08).

⁶⁰ The International Covenant on Civil and Political Rights, 16 December 1966 (999 UNTS 171) was, in principle, also applicable to British troops in Iraq; see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, 136, para. 111.

“qualified” these treaties,⁶¹ and in fact exempted the United Kingdom from its treaty obligations with regard to the internment actions of its forces in Iraq, a view put forward by the UK Secretary of State and ultimately upheld by the highest British court in December 2007.⁶²

Another example of treaty adaptation is the exemption from the jurisdiction of the ICC of current or former officials or personnel from States contributing to peacekeeping operations which are not parties to the Rome Statute – a price the United States as a non-State party to the Statute and strident opponent of the ICC exacted for voting in favour of such operations with US involvement. According to article 12(2) of the Rome Statute, the ICC may exercise its jurisdiction *ratione personae* either if (a) the crime occurred in the territory of a State party of the Rome Statute, or (b) the person accused of the crime is a national of such a State. In resolution 1497 (2003), the Security Council limited the jurisdiction of the ICC with regard to the multinational force (and later United Nations stabilization force) in Liberia. On 22 September 2004, Liberia became the 96th State Party to the Rome Statute which means that crimes referred to in article 5 of the Rome Statute committed in the territory of Liberia after 1 December 2004 are, in principle, subject to the Court’s jurisdiction.⁶³ In addition, the ICC may exercise jurisdiction over all nationals of a State party to the Rome Statute who are accused of committing any of the statutory crimes in Liberia. However, only seven weeks before Liberia ratified the Rome Statute, at a time when it had already indicated its intention to ratify, the Security Council decided that:

current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the *exclusive jurisdiction* of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State.⁶⁴

Unlike in resolutions 1422 (2002) and 1487 (2003),⁶⁵ in resolution 1497 (2003) the Security Council did not just exercise its right of temporary “deferral or investigation or prosecution” under article 16 of the Rome Statute,⁶⁶ but permanently removed all “current or former officials or personnel from a contributing State which is not a party to the Rome Statute” from the jurisdiction of the Court, thereby modifying article 12(2) of the Statute.⁶⁷ As the provision on exclusive jurisdiction was phrased in general terms, it did not remove only nationals of non-States parties from the ICC’s jurisdiction (as it was intended) but also nationals of States parties who were acting as officials or personnel of a non-State party and who would normally have fallen within the Court’s jurisdiction under article 12(2)(b). By providing for the exclusive jurisdiction of the contributing State, the Security Council also

⁶¹ *R. (Al-Jedda) v. Secretary of State for Defence*, [2006] 3 W.L.R. 954 at 980 (CA).

⁶² *R. (Al-Jedda) v. Secretary of State for Defence*, [2008] 1 A.C. 332 (HL). Hilal Al-Jedda was released in late December 2007, shortly after the ruling of the House of Lords, after the Divisional Internment Review Committee – a body made up of officers and staff of the UK armed forces – determined, in the course of a periodic review, that his internment was no longer necessary for the security purposes.

⁶³ See Articles 11(2) and 126(2) of the Rome Statute.

⁶⁴ See S/RES/1497 (2003) of 1 August 2003, para. 7 (italics added). See also S/RES/1509 (2003) of 19 September 2003, para. 1. The exemption at first covered the Multinational Force in Liberia which on 1 October 2003 was replaced by United Nations Mission in Liberia (UNMIL). Resolution 1497 (2003) was adopted with 12 votes in favour, none against, and three abstentions (France, Germany and Mexico).

⁶⁵ For resolutions 1422 (2002) and 1487 (2003), see *infra* at note 86.

⁶⁶ See the text at *supra* notes 29-32.

⁶⁷ The exemption from the Court’s jurisdiction was, however, limited to “acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia”.

removed the Court's territory based jurisdiction under article 12(2)(a) with regard to crimes committed by such officials and personnel in Liberia.⁶⁸

In resolution 1593 (2005), the Security Council adopted the same approach when, again at the instigation of the United States,⁶⁹ it decided "that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the *exclusive jurisdiction* of that contributing State".⁷⁰ As Sudan is not a State party to the Rome Statute, the Council only limited the ICC's nationality-based jurisdiction. Although the United States was again mainly concerned to protect its own nationals,⁷¹ the exemption was phrased in wide enough terms to cover also nationals of States parties to the Rome Statute employed by the United States as foreign private military and security contractors, and foreign nationals enlisted in the US armed forces who would normally have come within the Court's jurisdiction under article 12(2)(b). With some 29,000 foreign citizens currently serving in the United States' armed forces alone, this is not a negligible group.⁷² The case of Sudan differs from that of Liberia in that the Council, acting under Chapter VII of the Charter of the United Nations, had decided to "refer the situation in Darfur since 1 July 2002" to the Prosecutor of the ICC,⁷³ thereby establishing the jurisdiction of the Court under article 13(b). By deciding, at the same time, that contributing States which are not parties to the Rome Statute shall have "exclusive jurisdiction" over their nationals, officials, and personnel, the Security Council took away with one hand what it had given with the other, and thus limited the Court's treaty-based jurisdiction which would otherwise have existed under the Rome Statute.⁷⁴

More recently, the fight against piracy and armed robbery at sea off the coast of Somalia has given rise to yet another example of treaty adaptation. The United Nations Convention on the Law of the Sea (UNCLOS) sets out the legal framework applicable to combating piracy. On "the high seas, or in any other place outside the jurisdiction of any State",⁷⁵ every State may board, search and seize ships engaged in or suspected of engaging in acts of piracy and arrest persons engaged in such acts with a view to such persons being prosecuted.⁷⁶ UNCLOS does not say anything about "armed robbery against ships", a term usually employed to describe illegal acts of violence against or aboard ships committed

⁶⁸ It is true that the Security Council abrogated article 12(2)(a) of the Rome Statute, as it were, 'pre-emptively' before it actually became applicable with regard to Liberia. However, the effect is the same, as the exemption was not subsequently revoked or cancelled. See S/RES/1561 (2004) of 17 September 2004, para. 1; S/RES/1712 (2006) of 29 September 2006, para. 1; S/RES/1750 (2007) of 30 March 2007, para. 1; S/RES/1777 (2007) of 20 September 2007, para. 1; S/RES/1836 (2008) of 29 September 2008, para. 1.

⁶⁹ See the statement of the US representative: "In the Darfur case, the Council included, at our request, a provision that exempts persons of non-party States in the Sudan from ICC prosecution." (UN Doc. S/PV.5158, 31 March 2005, 4). See also *ibid.*, at 3-4.

⁷⁰ S/RES/1593 (2005) of 31 March 2005, para. 6 (italics added).

⁷¹ See UN Doc. S/PV.5158, 31 March 2005, 3 ("United States nationals"), 4 ("American citizens").

⁷² See Julia Preston, U.S. Military Will Offer Path to Citizenship, *New York Times*, 14 February 2009, A1.

⁷³ See S/RES/1593 (2005) of 31 March 2005, para. 1.

⁷⁴ See the statement of the representative of the Philippines: "We may ask whether the Security Council has the prerogative to mandate the limitation of the jurisdiction of the ICC under the Rome Statute once the exercise of its jurisdiction has advanced." (UN Doc. S/PV.5158, 31 March 2005, at 6). The delegate of Argentina said: "[W]e regret that we had to adopt a text that establishes an exception to the jurisdiction of the Court." (*ibid.*, at 7). See also Cryer, *supra* note 29, at 208-221.

⁷⁵ "Any other place outside the jurisdiction of any State" includes the Exclusive Economic Zone.

⁷⁶ See arts. 105, 110 of the United Nations Convention on the Law of the Sea, 10 December 1982 (1833 UNTS 397). These articles repeat almost literally arts. 19, 22 of the Convention on the High Seas, 29 April 1958 (450 UNTS 82). Somalia ratified UNCLOS on 24 July 1989 and the Convention entered into force on 16 November 1994.

exclusively in a State's "internal waters, archipelagic waters and territorial sea".⁷⁷ As these sea areas, which are sometimes jointly referred to as "territorial waters", are subject to the sovereignty of the coastal State,⁷⁸ any action against armed robbers or pirates there is reserved to the coastal State's law enforcement authorities. Under UNCLOS, foreign warships are not allowed to pursue pirates from the high seas into the territorial waters of Somalia, or combat armed robbery in those waters. The complete failure of the State of Somalia and the lack of capacity of the Somali Transitional Federal Government (TFG) to patrol and secure either the international sea lanes off the country's coast or its territorial waters have led to a dramatic increase in piracy and armed robbery off the Somali coast and to a situation where there is no competent authority capable of fighting these illegal acts inside Somali territorial waters. The Security Council first addressed this situation in resolution 1816 (2008), deciding that States cooperating with the TFG and which have been notified by the TFG to the UN Secretary-General may temporarily:

- (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
- (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.⁷⁹

The resolution allowed States which had first been cleared by the TFG⁸⁰ to enter Somali territorial waters and board, search and seize vessels engaged in or suspected of engaging in acts of piracy or armed robbery. All law enforcement in Somali territorial waters was to be carried out "in a manner consistent with such action permitted on the high seas with respect to piracy". The Security Council essentially decided that cooperating States could treat Somalia's territorial waters as if they were the high seas for the purpose of repressing acts of piracy and armed robbery at sea.⁸¹ It thereby extended the UNCLOS provisions on the

⁷⁷ For a definition of "armed robbery against ships", see e.g. article 2(2) of the Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, done in Djibouti, 29 January 2009 (IMO Doc. C 102/14, 3 April 2009, Attachment I, Annex). For the definition of piracy, see article 101 UNCLOS.

⁷⁸ See article 1(1) UNCLOS.

⁷⁹ S/RES/1816 (2008) of 2 June 2008, para. 7. On this resolution, see e.g. D. Guilfoyle, Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts (2008) 57 *ICLQ* 690-699. The authorization in resolution 1816 (2008) concerning Somalia's territorial waters was extended for 12 months by S/RES/1846 (2008) of 2 December 2008, para. 10. See also S/RES/1851 (2008) of 16 December 2008, para. 6, where the Security Council went one step further, authorizing States to take "all necessary measures that are appropriate *in Somalia*, for the purpose of suppressing acts of piracy and armed robbery at sea" (emphasis added).

⁸⁰ The Security Council also expressly emphasized that the authorization had been provided only following receipt of a letter from the TFG conveying its consent (S/RES/1816 (2008) of 2 June 2008, para. 9; see also UN Doc. S/2008/323, 14 May 2008; IMO Doc. C 100/7/1, 6 June 2008, annex II, para. 2). One may wonder why the anti-piracy action in Somali territorial waters needed to be authorized by the Council if the TFG had consented to it. There are at least two reasons for the adoption of a Chapter VII resolution. First, several States may not have recognized the TFG as the Government of Somalia due to the fact that its control over Somali territory was limited. For those States the TFG's consent was immaterial and could not justify a violation of Somalia's territorial sovereignty. Second, other States may have required Council authorization for domestic political and constitutional reasons. For other reasons, see T. Treves, Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia (2009) 20 *EJIL* 399-414 at 407.

⁸¹ J.G. Dalton, J.A. Roach and J. Daley, Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea – Resolutions 1816, 1846 & 1851 (2009) 48 *ILM* 129-132 at 130. See also UN urged to toughen up on pirates in Gulf of Aden; International legal jurisdiction needed to bring pirates to trial, Lloyd's

repression of piracy to Somali territorial waters and, by analogy, made them applicable to armed robbery there.⁸² Although Indonesia insisted that the resolution should not “lead to modifying, rewriting or redefining UNCLOS”,⁸³ it is argued that the resolution amounted to a modification of UNCLOS as regards anti-piracy action off the coast of Somalia. The Russian representative in the Security Council referred to resolution 1816 as providing “a legislative basis for action to ensure the security of shipping in the region”,⁸⁴ and the Security Council itself makes clear that the resolution creates a different legal situation from the one that exists under UNCLOS when it affirms that:

the authorization provided in *this resolution* applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations *under the Convention, with respect to any other situation*, and underscores in particular that it shall not be considered as establishing customary international law.⁸⁵

While the resolution may not affect rights, obligations and responsibilities under UNCLOS “with respect to any other situation”, it does affect such rights, obligations and responsibilities under UNCLOS with respect to the situation in Somalia. The resolution in fact authorizes action that is inconsistent with the treaty to which it otherwise defers.

D. Exercise of treaty rights distinguished

The *ad hoc* adaptation of treaties must not be confused with the Security Council’s exercise of its rights under a treaty allowing for the special treatment of certain cases. It is argued that resolutions 1422 (2002) and 1487 (2003), which temporarily exempted UN peacekeepers from States not party to the Rome Statute from the jurisdiction of the ICC, fall into this category.⁸⁶ Although these resolutions sparked much controversy at the time,⁸⁷ it is argued that the Security Council did not create any special law for peacekeepers from non-State parties to the Rome Statute and, in particular, for United States officials and service personnel engaged in UN peacekeeping missions. Instead, although this is a broad interpretation, it could be argued that it exercised its right under article 16 of the Rome Statute to halt investigations and prosecutions for a renewable period of 12 months.⁸⁸ In fact, the Council expressly issued its “request” to the ICC, “consistent with the provisions of

List, 2 October 2008, at 3 (“Resolution 1816 effectively provides that the rules that apply to the high seas also apply in Somali waters”).

⁸² For a similar view, see Treves, *supra* note 80, at 404, 405. *Contra* Guilfoyle, *supra* note 63, at 696.

⁸³ See UN Doc. S/PV.5902, 2 June 2008, 2. See also *ibid.*, at 3.

⁸⁴ See UN Doc. S/PV.6046, 16 December 2008, 3. See also *ibid.*, at 7 (Costa Rica stating that the Security Council’s resolutions do “not only have international legal grounding, but they are themselves international law”).

⁸⁵ S/RES/1816 (2008) of 2 June 2008, para. 9 (italics added). See also S/RES/1846 (2008) of 2 December 2008, para. 11.

⁸⁶ See S/RES/1422 (2002) of 12 July 2002, para.1 (adopted unanimously), and S/RES/1487 (2003) of 12 June 2003, para. 1 (adopted with 3 abstentions – France, Germany and Syria).

⁸⁷ See e.g. C. Fritzsche, Security Council Resolution 1422: Peacekeeping and the International Criminal Court, in: Jochen Abr. Frowein et al. (eds.), *Verhandeln für den Frieden – Negotiating for Peace. Liber Amicorum Tono Eitel* (Berlin: Springer, 2003), at 107-120; A. Zimmermann, “Acting Under Chapter VII (...)”—Resolution 1422 and Possible Limits of the Powers of the Security Council, *ibid.*, at 253-278; R. Cryer and N.D. White, The Security Council and the International Criminal Court: Who’s Feeling Threatened? (2002) 8 *International Peacekeeping: The Yearbook of International Peace Operations* 143-170.

⁸⁸ For the same view, see B. Fassbender, Reflections on the International Legality of the Special Tribunal for Lebanon (2007) 5 *Journal of International Criminal Justice* 1091-1105 at 1100, n. 35. *Contra* Stahn, *supra* note 22, at 88-93; Jain, *supra* note 10, at 247.

Article 16 of the Rome Statute”.

The Security Council’s referral of the situation in Darfur to the Prosecutor of the ICC in March 2005 similarly did not constitute a modification of the Rome Statute with regard to Sudan but a valid exercise of the Council’s powers under article 13(b) of the Statute. This provides that “a situation in which one or more of such crimes [within the jurisdiction of the Court] 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”.⁸⁹

The fact that the Security Council has been vested with certain (limited) rights under a treaty does not limit its powers under Chapter VII of the Charter of the United Nations to adapt that treaty, if this is required in the interest of the maintenance or restoration of international peace and security. Article 30(1) of the 1969 Vienna Convention on the Law of Treaties (VCLT) on the application of successive treaties relating to the same subject matter acknowledges the compelling force of article 103 of the UN Charter.⁹⁰ The European Court of First Instance, making reference to the judgment of the ICJ in the *Nicaragua* case,⁹¹ stated:

In accordance with Article 30 of the Vienna Convention on the Law of Treaties, and contrary to the rules usually applicable to successive treaties, that rule [that in case of conflict obligations under the present Charter shall prevail] holds good in respect of Treaties made earlier as well as later than the Charter of the United Nations. According to the International Court of Justice, all regional, bilateral, and even multilateral, arrangements that the parties may have made must be made always subject to the provisions of Article 103 of the Charter of the United Nations.⁹²

Thus, the provisions of a treaty cannot act as a limitation on the powers of the Security Council under Chapter VII.⁹³ In addition, any limitation of the powers of the Security Council under Chapter VII, or of articles 25 and 103 of the Charter, would amount to an amendment of the Charter which could become effective only in accordance with article 108 of the Charter. Thus, even if the parties to the UN Charter and the Rome Statute were identical (and they are not), the parties could not curtail the power of the Security Council to adapt the Rome Statute by way of a binding decision, unless they complied with the requirements for Charter amendments.⁹⁴

⁸⁹ See S/RES/1593 (2005) of 31 March 2005, para. 1. The resolution was adopted with 11 votes in favour, none against and 4 abstentions (Algeria, Brazil, China, United States of America).

⁹⁰ See *R. (Al-Jedda) v. Secretary of State for Defence*, [2006] 3 W.L.R. 954 at 978 (CA).

⁹¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Rep. 1984, 392 at 440, para. 107.

⁹² *Kadi v. Council and Commission*, Case T-315/01, Judgment of the Court of First Instance (Second Chamber, Extended Composition) of 21 September 2005, [2005] ECR II-3649, para. 183.

⁹³ For the same conclusion, see F. Berman, The Relationship between the International Criminal Court and the Security Council, in H.A.M. von Hebel et al. (eds.), *Reflections on the International Criminal Court* (The Hague: T.M.C. Asser, 1999), 173-180 at 176; V. Gowlland-Debbas, The Functions of the United Nations Security Council in the International Legal System, in: M. Byers (ed.), *The Role of International Law in International Politics* (Oxford: OUP, 2000), 277-313 at 298; Jain, *supra* note 10, at 251, 253.

⁹⁴ *Contra* A. Zimmermann, The Creation of a Permanent International Criminal Court (1998) 2 *Max Planck Yearbook of United Nations Law* 169-237 at 236 (“It is worth noting that the powers of the Security Council to act under Chapter VII of the Charter have thereby for the first time been limited in an international instrument since the Security Council would eventually by virtue of article 16 of the Statute of the ICC be forced to renew any such request for deferral but could not provide for such a referral *sine die*”); P. Arnold, *Der UNO-Sicherheitsrat und die strafrechtliche Verfolgung von Individuen* (Basel: Helbing & Lichtenhahn, 1999), at 176.

E. Justification of breach of treaty distinguished

The *ad hoc* adaptation of treaties must also be distinguished from the breach of treaties as a consequence of binding Security Council resolutions which impose a sanctions regime upon a State or non-State actor. For example, in the early 1990s the Security Council imposed a comprehensive trade and communications embargo on the Federal Republic of Yugoslavia (Serbia and Montenegro). This embargo contravened article 1 of the Danube Navigation Convention which provides that “navigation on the Danube shall be free and open for the nationals, vessels of commerce and goods of all States”.⁹⁵ In resolution 820 (1993), the Security Council, acting under Chapter VII of the UN Charter, in effect closed the River Danube for Yugoslav vessels and “reaffirmed the responsibility of the riparian States to take necessary measures to ensure that shipping on the Danube is in accordance with resolutions 713 (1991), 757 (1992), 787 (1992), and the present resolution”.⁹⁶ The resolution thus required the parties to the Danube Navigation Convention to violate their obligations under the Convention.

In paragraph 11 of resolution 1333 (2000), the Security Council, acting under Chapter VII of the UN Charter,⁹⁷ decided “that all States are required to deny any aircraft permission to take off from, land in or over-fly their territories if that aircraft has taken off from, or is destined to land at, a place in the territory of Afghanistan designated by the Committee as being under Taliban control”.⁹⁸ In the same resolution, the Council called upon:

all States and all international and regional organizations, including the United Nations and its specialized agencies, to act strictly in accordance with the provisions of this resolution, *notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement* or any contract entered into or any licence or permit granted prior to the date of coming into force of the measures imposed by paragraphs 5, 8, 10 and 11 above.⁹⁹

The passage indicates the Security Council’s determination to ensure that its flight embargo on the Taliban in Afghanistan was not evaded by reliance on existing aviation agreements. This was necessary as the obligations set out in paragraph 11 of resolution 1333 (2000) were in direct conflict with States’ obligations under the Convention on International Civil Aviation,¹⁰⁰ the International Air Services Transit Agreement,¹⁰¹ and bilateral Air Service Agreements with Afghanistan which provide that all aircraft of contracting States have

⁹⁵ Convention Concerning the Regime of Navigation on the Danube, done at Belgrade on 18 August 1948, 33 UNTS 181 at 197.

⁹⁶ See S/RES/820 (1993) of 17 April 1993, paras. 15-17; S/RES/787 (1992) of 16 November 1992, paras. 10, 12; S/RES/757 (1992) of 20 May 1992, paras. 4, 5; S/RES/713 (1991) of 25 September 1991, para. 6.

⁹⁷ See art. 41 of the UN Charter which expressly provides for the “complete or partial interruption of [...] air [...] communication”.

⁹⁸ S/RES/1333 (2000) of 19 December 2000, para. 11. For similar flight bans, see S/RES/1267 (1999) of 15 October 1999, para. 4(a); S/RES/1127 (1997) of 28 August 1997, para. 4(d)(i); S/RES/1070 (1996) of 16 August 1996, para. 3; S/RES/917 (1994) of 6 May 1994, para. 2; S/RES/757 (1992) of 30 May 1992, para. 7(a).

⁹⁹ *Ibid.*, para. 17 (italics added). Similar provisions may be found in S/RES/1306 (2000) of 5 July 2000, para. 9; S/RES/1298 (2000) of 17 May 2000, para. 9; S/RES/1267 (1999) of 15 October 1999, para. 7; S/RES/1173 (1998) of 12 June 1998, para. 17; S/RES/1160 (1998) of 31 March 1998, para. 10; S/RES/1132 (1997) of 8 October 1997, para. 11; S/RES/1127 (1997) of 28 August 1997, para. 10; S/RES/917 (1994) of 6 May 1994, para. 12; S/RES/864 (1993) of 15 September 1993, para. 20; S/RES/841 (1993) of 16 June 1993, para. 9; S/RES/687 (1991) of 3 April 1991, para. 25; S/RES/670 (1990) of 25 September 1990, para. 3.

¹⁰⁰ See Arts. 5, 6 of the Convention on International Civil Aviation, signed at Chicago, on 7 December 1944 (Chicago Convention), 15 UNTS 295.

¹⁰¹ See art. I, section 1 of the International Air Services Transit Agreement, signed at Chicago, on 7 December 1944 (Chicago Agreement), 84 UNTS 389.

certain “freedoms of the air”, including the right to fly across or land in the territory of other contracting States. These treaties, as a rule, can be denounced only by giving one year’s notice.¹⁰² A similar conflict arises with regard to Security Council imposed trade embargoes and bilateral and multilateral trade agreements. It is worth noting that the Security Council does not just create these “treaty conflicts” for member States but addresses its conflicting obligations to “all States, including States not members of the United Nations”, as well as to international organizations.¹⁰³ Article 103 of the UN Charter, which deals only with conflicting obligations of “Members of the United Nations”, thus cannot provide a legal basis for Security Council action with regard to non-member States. It is suggested that this is why the Security Council made reference to article 103 only once when calling upon States to act strictly in accordance with the provisions of its resolutions, notwithstanding conflicting treaty obligations.¹⁰⁴

It is argued that in these situations the Security Council does not adapt, still less suspend or terminate, existing treaty obligations; instead, its decisions justify breaching them. The international wrongfulness of the conduct in question is precluded because the conduct is mandated by the Security Council, which means that the addressee of the Security Council sanctions regime is not legally permitted to take countermeasures against the States breaching their treaty obligations.¹⁰⁵ This view is also shared by the United States. In a statement to the International Law Commission (ILC) on the question of State responsibility, its representative declared that “an act of State, properly undertaken pursuant to a Chapter VII decision of the Security Council cannot be characterized as an internationally wrongful act”.¹⁰⁶ It has been shown elsewhere that, by virtue of a rule of customary international law, decisions of the Security Council can operate as an *objective* justification of an otherwise internationally wrongful act, irrespective of who is implementing these decisions or to whom they are addressed.¹⁰⁷

F. Modification of customary international law rules

As treaties and customary international law frequently overlap, the Security Council has not only adapted or abrogated treaty law but also rules of customary international law. While article 103 of the UN Charter speaks only of “obligations under any other international agreement”, it is today widely accepted that, in case of conflict, obligations imposed by a binding Security Council resolution also prevail over customary international law

¹⁰² See e.g. art. 95(b) of the Chicago Convention; art. III of the Chicago Agreement.

¹⁰³ See e.g. S/RES/1054 (1996) of 26 April 1996, para. 5; S/RES/918 (1994) of 17 May 1994, para. 15; S/RES/917 (1994) of 6 May 1994, para. 12; S/RES/883 (1993) of 11 November 1993, para. 12; S/RES/757 (1992) of 30 May 1992, para. 11; S/RES/748 (1992) of 31 March 1992, para. 7.

¹⁰⁴ See S/RES/670 (1990) of 25 September 1990, preambular para. 13, where the Security Council “recall[ed] the provisions of Article 103 of the Charter”. Resolution 670 (1990) is also the only example where the Council did not just “call upon” all States but “decided” that all States, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement [...] shall deny permission to any aircraft to take off from their territory (*ibid.*, para. 3).

¹⁰⁵ See art. 59 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts of August 2001 which provides that “these articles are without prejudice to the Charter of the United Nations” (UN Doc. A/56/10 (2001), at 43-59) and the ILC commentary to that article (UN Doc. A/56/10, 2001, at 365). With regard to UN member States one could also argue that they have consented to the Security Council mandated breach of treaty in advance when becoming a member of the United Nations; see art. 20 of the ILC Articles.

¹⁰⁶ UN Doc. A/CN.4/488, 25 March 1998, at 95.

¹⁰⁷ S. Talmon, *The Constitutive versus the Declaratory Theory of Recognition: Tertium non Datur?* (2004) 75 *British Year Book of International Law* 101-181 at 154-159.

obligations.¹⁰⁸ Thus, Judge Oda stated in his declaration in the *Lockerbie* case that “under the positive law of the United Nations Charter a resolution of the Security Council may have binding force, irrespective of the question whether it is consonant with international law derived from other sources”.¹⁰⁹

In May 1994, NATO/WEU forces took control of a foreign flagged vessel on the high seas in implementation of a comprehensive sanctions regime imposed by the Security Council upon the Federal Republic of Yugoslavia (Serbia and Montenegro). In resolution 787 (1992),¹¹⁰ the Security Council, acting under Chapters VII and VIII, had called “upon States, acting nationally or through regional agencies or arrangements, to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping” in order to ensure strict implementation of a trade embargo imposed in its earlier resolutions.¹¹¹ In proceedings before the European Court of Justice (ECJ), the question arose as to whether the arrest of the ship on the high seas was illegal because it violated principles and (customary) rules of the law of the sea. Based on article 103 of the UN Charter, Advocate-General Jacobs argued that:

Since the sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) contained in the resolutions were clearly intended to be applied as broadly as possible, their implementation must prevail over the principles of the freedom of the high seas [expressed in articles 87 and 92 of the UN Convention on the Law of the Sea].¹¹²

Thus, Advocate-General Jacobs was also of the view that Security Council resolutions could override conflicting customary international law principles.

Under customary international law, as reflected in articles 10 and 19(c) of the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property,¹¹³ State property used for commercial purposes does not enjoy immunity. The Security Council overruled this tenet on several occasions when it decided that Iraqi petroleum and petroleum products should be immune from legal proceedings and not subject to any form of attachment,

¹⁰⁸ See e.g. D. Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (The Hague: Kluwer, 2001), at 195-196, 302; R. Bernhardt, Article 103, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edn., Oxford: OUP, 2002), 1292-1302 at 1298-1299; J. E. Alvarez, The Security Council’s War on Terrorism: Problems and Policy Options, in: Erica de Wet/André Nollkaemper (eds.), *Review of the Security Council by Member States* (Antwerp: Intersentia, 2003), 119-145 at 132-133; M. Koskeniemi, Fragmentation of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, para. 345. The Charter prevails in any case over previously established custom by virtue of the principle of *lex posterior derogat lex priori*. *Contra* R. Liivoja, The Supremacy Clause of the United Nations Charter (2008) 57 *ICLQ* 583-612 at 602-612.

¹⁰⁹ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK)*, Order of 14 April 1992, ICJ Reports 1992, 3 at 18 (Declaration of Acting President Oda). See also *Prosecutor v. Tadić*, Case No IT-94-1-A, Appeals Chamber, Judgment of 15 July 1999, (1999) 38 *ILM* 1518, para. 296 (“it is open to the Security Council – subject to respect for peremptory norms of international law (*jus cogens*) – to adopt definitions of crimes in the Statute which deviate from customary international law”).

¹¹⁰ S/RES/787 (1992) of 16 November 1992, para. 12. For similar provisions, see S/RES/221 (1966) of 9 April 1966, para. 5; S/RES/665 (1990) of 25 August 1990, para. 1.

¹¹¹ See S/RES/713 (1991) of 25 September 1991, para. 6; S/RES/757 (1992) of 30 May 1992, para. 4.

¹¹² *Ebony Maritime SA and Loten Navigation Co. Ltd v. Prefetto della Provincia di Brindisi and others*, Case C-177/95, Opinion of AF Jacobs delivered on 19 November 1996, [1997] ECR I-1111 at 1124, para. 27. The ECJ itself did not deal with the question. See also the submission of the Council and the Commission in *Kadi v. Council and Commission*, Case T-315/01, [2005] ECR II-3649, para. 156 (“Article 103 of the Charter makes it possible to disregard any other provision of international law, whether customary or laid down by convention, in order to apply the resolutions of the Security Council”).

¹¹³ The Convention is not yet in force. For the text, see A/RES/59/38 (2004) of 2 December 2004, Annex.

and that all States should take any necessary steps under their respective domestic legal systems to assure this protection.¹¹⁴

The decision of the Security Council in resolutions 1497 (2003) and 1593 (2005) that nationals, current or former officials or personnel from a contributing State to a peacekeeping operation which is not a party to the Rome Statute should be subject to the exclusive jurisdiction of that contributing State not only modifies provisions of the Rome Statute,¹¹⁵ but also impacts upon customary international law to the extent that it limits other States' jurisdiction over such persons on the basis of the passive personality and universality principles. This is why several States abstained from voting on these resolutions. Explaining his country's vote on resolution 1497 (2003), the German representative in the Security Council stated:

Paragraph 7 [of resolution 1497 (2003)] not only limits the jurisdiction of the International Criminal Court (ICC), it goes beyond that. It limits national jurisdiction of third countries with respect to crimes committed by members of the multinational force or a United Nations stabilization force if that member is the national of a State not party to the Rome Statute of the ICC. Therefore, it is our view that the proposed paragraph would prevent prosecutors in States that may have to exercise jurisdiction over crimes committed against their nationals abroad from investigating and prosecuting those crimes. In practical terms, for our legal system that would mean that if a German were killed in Liberia, no German court could prosecute the perpetrator. The second point is that prosecuting what we consider to be international crimes, such as trafficking in human beings — trafficking in women — piracy or other international crimes, under Germany law by any German court, regardless of where the crimes are committed and by whom, would not be possible. We feel that the purpose of that paragraph could have been met by concluding a bilateral status of forces agreement, as has been done in previous instances and in other peacekeeping operations. There is no precedent for that. There is no reason to limit the national jurisdiction of third countries. There is no justification for discriminating against peacekeepers from countries that are members of the Rome Statute of the ICC. Therefore, we feel that that paragraph is not in accordance with international and German law, and we regret not being able to accept it.¹¹⁶

The fact that the provision on exclusive jurisdiction was considered by several States as being incompatible, inconsistent or not in accordance with principles of international law shows that the Security Council in fact modified customary international law.

Another example of the Security Council adapting the customary international law rules on State jurisdiction can be found in resolution 1688 (2006) which paved the way for the trial of former Liberian President Charles Taylor before a Trial Chamber of the Special Court for Sierra Leone sitting in the Netherlands. Charles Taylor had been indicted for crimes against humanity, war crimes and other serious violations of international humanitarian law.¹¹⁷ It was not considered feasible to hold the trial at the seat of the SCSL in Freetown, Sierra Leone, for security reasons. In order to facilitate the trial in The Hague, the Security Council, acting under Chapter VII of the Charter, decided “that the Special Court shall retain exclusive jurisdiction over former President Taylor during his transfer to and presence in the Netherlands in respect of matters within the Statute of the Special Court”.¹¹⁸ The Security Council thereby precluded the Netherlands from exercising its jurisdiction over Charles Taylor, which it could have done once he was in its territory, on the basis of the passive

¹¹⁴ See e.g. S/RES/712 (1991) of 19 September 1991, para. 5; S/RES/986 (1995) of 14 April 1995, para. 14; S/RES/1483 (2003) of 22 May 2003, para. 22; S/RES/1546 (2004) of 8 June 2004, para. 27.

¹¹⁵ See the text at *supra* notes 63-74.

¹¹⁶ UN Doc. S/PV.4803, 1 August 2003, 4. See also the statements of the Mexican and French representatives, *ibid.*, at 2-3 and 7, respectively. With regard to resolution 1593 (2005), see UN Doc. S/PV.5158, 31 March 2005, at 6 (Denmark), at 11 (Brazil).

¹¹⁷ See *Prosecutor v. Charles Taylor*, SCSL-03-01-I-75, Amended Indictment, 16 March 2006.

¹¹⁸ S/RES/1688 (2006) of 16 June 2006, para. 7.

personality and universality principles.

It is also suggested that authorizations of the use of force by the Security Council under Chapter VII, while leaving the status of neutrality intact, automatically modify the substantive customary international law rights and duties of neutrals,¹¹⁹ as reflected in the 1907 Hague Conventions on the Rights and Duties of Neutral Powers.¹²⁰ This view finds expression in article 2(5) of the UN Charter. The obligation not to assist a State, which is the object of UN preventive or enforcement action, entails an obligation to prevent certain types of assistance which neutral States would be entitled to permit under customary international law. In paragraph 2 of resolution 678, the Security Council, acting under Chapter VII of the Charter, “authorize[d] Member States co-operating with the Government of Kuwait [...] to use all necessary means” to effect the withdrawal of Iraq from occupied Kuwait and to restore international peace and security in the area. In addition, the Council requested “all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2 above”.¹²¹ Neutral States acting upon this request would, as a matter of principle, have violated their customary duty of impartiality.¹²² Both Switzerland and Austria, two permanently neutral States, decided in the light of the Security Council request in resolution 678 (1991) that over-flights by United States military transport aircraft during the hostilities were not inconsistent with their obligations as neutral powers.¹²³ It is difficult to imagine that a neutral State could treat forces acting pursuant to a UN mandate and the forces of the State against which the Security Council has authorized enforcement action with equal impartiality. While the neutral State would be obliged, according to the traditional rights and duties of neutrality, to intern belligerent forces that crossed into its territory for the duration of hostilities, it could not seriously be suggested that it would also be obliged to intern UN-authorized forces that crossed its borders.¹²⁴

G. Treaty adaptation and the rule of law

The Security Council’s *ad hoc* adaptation – or rather abrogation – of otherwise applicable treaty law, that is the creation of special legal regimes for “special cases”, raises concerns from the point of view of the rule of law.¹²⁵ The concept of the rule of law is part of the endeavour of establishing limits to the potentially arbitrary exercise of absolute power by

¹¹⁹ See United States, Department of Defence, Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War (1992) 31 *ILM* 612-644 at 637 (“traditional concepts of neutral rights and duties are substantially modified when [...] the United Nations authorizes collective action against an aggressor nation”).

¹²⁰ See Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, done at The Hague, 18 October 1907, (1908) 2 *AJIL Suppl.* 117-127; Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, done at The Hague, 18 October 1907, *ibid.*, at 202-216.

¹²¹ S/RES/678 (1991) of 29 November 1991, para. 3. The rights and duties of neutral States were further modified by S/RES/661 (1990) of 16 August 1990, para. 3 and S/RES/665 (1990) of 25 August 1990, paras. 1, 3.

¹²² A number of States adopted prominent positions of neutrality during the Second Gulf War in 1990-1991, notably Iran, India, Jordan, Austria and Switzerland. See United States, Department of Defence, *supra* note 119, at 637, 638.

¹²³ *Ibid.*, at 640.

¹²⁴ See *ibid.*, at 639 (stating that “the United States advised Iran that, in light of UNSC Resolution 678, Iran would be obligated to return downed Coalition aircraft and aircrew, rather than intern them. This illustrates the modified nature of neutrality in these circumstances”). For a detailed treatment of the relationship between neutrality and the UN Charter, see J. Upcher, *The Status of the Law of Neutrality in Contemporary International Law* (forthcoming), chapter 3.

¹²⁵ For rule of law concerns, see also Sassòli, *supra* note 51, at 693-694.

the Security Council in the area of international peace and security.¹²⁶ At the United Nations World Summit in September 2005, member States recognized the need for “universal adherence to and implementation of the rule of law at both the national and international levels” and reaffirmed their commitment to “an international order based on the rule of law”.¹²⁷ While there is no universally agreed definition of “the rule of law” and no readily identifiable content (even at the domestic level),¹²⁸ a number of formal principles are usually associated with the concept, such as supremacy of law, equality before the law, legal certainty (including clarity and predictability), avoidance of arbitrariness, and procedural and legal transparency.¹²⁹ The ICJ held in the *ELSI* case that “arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law”.¹³⁰ The principle of equality, which is also reflected in article 2(1) of the UN Charter, requires that all States which come within the scope of a rule of law must be treated equally in the application of that rule to them. There must, in other words, be uniformity and consistency of application of international law, and no discrimination between States in their subjection to rules of law which in principle apply to them.¹³¹ The Security Council’s “*ad-hocism*”,¹³² whereby it customizes on an *ad hoc* basis the law that applies to a particular situation, thus poses a serious danger to the rule of law.

However, equality is not absolute. Derogations from legal rules are generally possible, but call for close consideration and clear justification. Only objective differences can justify differentiation.¹³³ An arbitrary and politically motivated approach to the adaptation of existing treaty provisions will call into question the general applicability and predictability of international legal rules, and may give rise to criticism on the grounds of selectivity and double standards in the application of these rules. Thus, the Chinese representative stated in the Sixth Committee of the General Assembly:

International law should be applied uniformly. If, in international relations, States applied international law selectively or interpreted it unilaterally to their own advantage, or employed double standards when applying it, international law would be reduced to a tool of power politics and would not be able to play its role in maintaining international order.¹³⁴

These rule of law concerns are exacerbated if the adaptation or abrogation of existing treaty law seems merely to benefit the interests of one or more members of the Security Council. Such self-serving action may even constitute an abuse of right on the part of the Security Council (or its members).

There is also the added complication that, as in the case of resolution 1483 (2003), the

¹²⁶ See A. Watts, *The International Rule of Law* (1993) 36 *German Yearbook of International Law* 15-45 at 23; J.M. Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge: CUP, 2007), at 31.

¹²⁷ A/RES/60/1 (2005) of 16 September 2005, para. 134.

¹²⁸ See UN Doc. A/C.6/63/SR.6, 29 October 2008, at 5, para. 18 (Kenya). See also Watts, *supra* note 126, at 15, 25.

¹²⁹ See *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, UN Doc. S/2004/616, 23 August 2004, 5, para. 6. See also Watts, *supra* note 126, at 26-35; Farrall, *supra* note 126, at 40-42.

¹³⁰ *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, ICJ Rep. 1989, 15 at 76, para. 128.

¹³¹ Watts, *supra* note 126, at 31.

¹³² See A. Bianchi, *Ad-hocism and the Rule of Law* (2002) 13 *EJIL* 263-272 at 270.

¹³³ See T. Bingham, *The Rule of Law* (2007) 66 *Cambridge Law Journal* 67-85 at 69, 73.

¹³⁴ UN Doc. A/C.6/63/SR.6, 29 October 2008, at 9, para. 56. For further concerns about double standards, see *ibid.*, at 5, para. 20 (Kenya); UN Doc. A/C.6/63/SR.7, 11 November 2008, at 9, para. 48 (Iran); at 10, para. 56 (Kazakhstan); at 11, para. 69 (Viet Nam); at 12, para. 73 (Qatar); UN Doc. S/PV.5158, 31 March 2005, at 5 (Algeria).

Security Council does not always seem to set out clearly and expressly whether and to what extent it intends to adapt existing treaty law. The rule of law, however, requires that the law be clear and predictable.¹³⁵ In the interest of legal certainty, any treaty adaptation must be explicit and clearly indicate which treaty provisions are superseded, the rules that take their place, and how these modified rules relate to provisions of the existing law not expressly addressed in the resolution.¹³⁶

II. PRESCRIPTION OF TREATY PROVISIONS

The Security Council has not only adapted existing bilateral or multilateral treaties to a particular situation on an *ad hoc* basis, it has also, by way of Chapter VII resolutions, prescribed individual treaty provisions, and even whole treaties, for non-State parties. This practice short circuits an often long and arduous treaty-making process. The treaty provisions so prescribed take immediate effect and, depending on the addressee of the resolution, are binding on one, some, or all member States.

A. Invitation, imposition and prescription distinguished

It is first necessary to distinguish between the Security Council inviting States to become party to a treaty and the Council imposing a treaty upon States by way of a decision under Chapter VII of the Charter of the United Nations. The Security Council has invited, called upon, appealed and urged either all States or a particular State to sign, ratify, accede to or join multilateral treaties, particularly in the areas of terrorism, arms control, disarmament, non-proliferation, human rights, international humanitarian law and drug trafficking.¹³⁷ In resolution 687 (1991), for example, the Security Council, acting under Chapter VII of the Charter, invited Iraq “to ratify the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction”.¹³⁸ Although the Security Council acted under Chapter VII and threatened Iraq with a resumption of hostilities if it did not officially accept the provisions of the resolution,¹³⁹ it did not formally impose an obligation upon Iraq to ratify the Convention; this is shown by the use of the term “invite” in contrast to “decide”, “require” and “demand” used in other paragraphs of the same resolution. The Security Council, both in form and substance, respected Iraq’s freedom to conclude treaties.¹⁴⁰

While the Security Council has invited States to become party to treaties, it has not (yet) obliged them to do so or imposed treaties as a whole upon States by using its Chapter VII powers. Several writers have advocated such a practice,¹⁴¹ and the Organization of

¹³⁵ See Bingham, *supra* note 133, at 69.

¹³⁶ See Sassòli, *supra* note 51, at 681, 690; Alvarez, *supra* note 108, at 135. See also G.T. Harris, The Era of Multilateral Occupation (2006) 24 *Berkeley Journal of International Law* 1-78 at 77.

¹³⁷ See e.g. S/RES/1874 (2009) of 12 June 2009, para. 29; S/RES/1817 (2008) of 11 June 2008, para. 5; S/RES/1738 (2006) of 23 December 2006, para. 10; S/RES/1737 (2006) of 27 December 2006, para. 8; S/RES/1172 (1998) of 6 June 1998, para. 13; S/RES/1566 (2004) of 8 October 2004, para. 4; S/RES/1379 (2001) of 20 November 2001, para. 9(e); S/RES/1373 (2001) of 28 September 2001, para. 3(d); S/RES/1314 (2000) of 11 August 2000, para. 4; S/RES/1067 (1996) of 26 July 1996, para. 7; S/RES/638 (1989) of 31 July 1989, para. 5; S/RES/579 (1985) of 18 December 1985, para. 4.

¹³⁸ S/RES/687 (1991) of 3 April 1991, para. 7. See also S/RES/1762 (2007) of 29 June 2007, para. 2, where the Security Council “urge[d] Iraq [...] to adhere to all applicable disarmament and non-proliferation treaties”.

¹³⁹ S/RES/687 (1991) of 3 April 1991, para. 33.

¹⁴⁰ For a similar view, see Fassbender, *supra* note 88, at 1097, n. 22. Iraq ratified the Biological Weapons Convention on 19 June 1991.

¹⁴¹ See L. Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed*

Islamic Conference has on several occasions called upon the Security Council to “force” or “compel Israel [...] to accede to the treaty on the Non-Proliferation of Nuclear Weapons”.¹⁴² It is, however, submitted that the UN Charter does not give the Security Council the power to oblige member States to become parties to a treaty or unilaterally impose on them treaty obligations *in the form of a treaty*.¹⁴³ Equally, the Security Council does not have the power to hold a State to a treaty against its will, for example by deciding that its withdrawal from a treaty under its provisions is null and void.¹⁴⁴ The sovereign equality of member States as such is not an obstacle to the imposition of treaty obligations.¹⁴⁵ The problem rather lies with the powers of the Security Council. No “specific power” to impose treaties in the sense of article 24(2) of the Charter has been granted to the Security Council. It also cannot be justified as an implied power because it is not necessary for the performance of the functions of the Council.¹⁴⁶ There are other “less intrusive means” (i.e. means which impair State sovereignty to a lesser degree) to maintain international peace and security, such as making all the provisions of a treaty binding obligations under a Security Council resolution.¹⁴⁷ The Council can impose obligations; it cannot impose treaties.

The source and nature of obligation is different in the two cases. A treaty is an international agreement based on the voluntary consent of two or more States to be bound by its terms.¹⁴⁸ The principle of voluntary consent is a fundamental structural principle of international treaty law. The preamble of the Vienna Convention on the Law of Treaties expressly provides that “the principles of free consent and good faith [...] are universally recognized”.¹⁴⁹ Consent, however, is not voluntary if it is the result of a binding decision of the Security Council. Consent also cannot be substituted by a decision of the Security Council, especially if the other treaty party is the United Nations itself. A treaty is “an expression of concurring wills”. These wills “must be attributable to two or more subjects of law and not to one subject alone”.¹⁵⁰ The Security Council, even when acting under Chapter VII, cannot change the concept of treaty in international law.

The Security Council can, however, prescribe treaty provisions by incorporating them into a binding resolution. The Council is not prevented from transferring the substance of a

Conflicts (1994) 69 *New York ULR* 916-962 at 954-957 (with regard to the four Geneva Conventions and Additional Protocol I in the context of internal armed conflicts); P.C. Szasz, *The Security Council Starts Legislating* (2002) 96 *AJIL* 901-905 at 903 (with regard to the international conventions and protocols relating to terrorism); A.L. Paulus/J. Müller, *Security Council Resolution 1718 on North Korea’s Nuclear Test* (2006) 10/29 *ASIL Insights*, <http://www.asil.org/insights061103.cfm> (with regard to the Nuclear Non-Proliferation Treaty).

¹⁴² See e.g. the Final Communiqués of the Islamic Summit Conferences: Ninth Session, 12-13 November 2000, para. 39; Eighth Session, 9-11 December 1997, paras. 33, 71; Seventh Session, 13-15 December 1994, para. 33; all available at <http://www.oic-oci.org/>.

¹⁴³ For an excellent exposition of this issue, see Fassbender, *supra* note 88, at 1098-1101. For the same view, see also L.M. Hinojosa Martínez, *The Legislative Role of the Security Council in its Fight Against Terrorism: Legal, Political and Practical Limits* (2008) 57 *ICLQ* 333-359 at 348.

¹⁴⁴ When the Democratic People’s Republic of Korea (DPRK) announced its withdrawal from the Treaty on Non-Proliferation of Nuclear Weapons the Security Council only demanded that “the DPRK immediately retract its announcement of withdrawal” and “return to the Treaty” (S/RES/1718 (2006) of 14 October 2006, paras. 3, 4). See also S/RES/1695 (2006) of 15 July 2006, para. 6; S/RES/825 (1993) of 11 May 1993, para. 1.

¹⁴⁵ Stahn, *supra* note 22, at 98-99; Paulus/Müller, *supra* note 141.

¹⁴⁶ See *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949, 174 at 182-183.

¹⁴⁷ See the text *infra* at notes 151, 152. As there are less intrusive measures which the Security Council could take, the imposition of treaty obligations in the form of a treaty would also be disproportionate.

¹⁴⁸ See arts. 2(1)(a), 51, 52 of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, 1155 UNTS 331.

¹⁴⁹ VCLT, preamble, para. 4.

¹⁵⁰ P. Reuter, *Introduction to the Law of Treaties* (London: Kegan Paul, 1995), at 31, para. 69.

(draft) treaty into a resolution under Chapter VII of the Charter, if the conditions set out in the Charter are met.¹⁵¹ It can do so by paraphrasing treaty provisions or by including them directly into the resolution. The treaty provisions may either be included verbatim in the operative part of the resolution or added to the resolution in the form of an annex; in the latter case, they must be read as forming an integral part of the resolution. Depending on the situation, the Security Council may prescribe some or even, if necessary, all provisions of a treaty. The important difference to the imposition of a treaty is that the obligations are binding by virtue of a binding Council decision and not qua treaty. Consequently, a State cannot escape those obligations by relying on any of the grounds for invalidity, termination, or suspension or operation of treaties as set out in the Vienna Convention on the Law of Treaties.¹⁵² There is also no room for opt-outs or reservations.

The Security Council's practice of unilaterally prescribing treaty provisions has been criticized as contrary to the principle of consent which is fundamental to treaty law¹⁵³ and a corollary of the principles of sovereignty, equality, and independence of States.¹⁵⁴ This view, however, overlooks the fact that any binding decision of the Security Council within its competence, including any treaty obligation imposed, is covered by the general consent of member States to the UN Charter, and in particular by their consent "to accept and carry out the decisions of the Security Council in accordance with the present Charter".¹⁵⁵ Even a member State against which sanctions are imposed is – at least in theory – considered to have consented to the imposition of those sanctions.¹⁵⁶

B. Security Council practice

Since the early 1990s, the Security Council has adopted the practice of prescribing some or all of the provisions contained in an existing treaty for non-State parties. Four main situations may be distinguished:

1. General prescription of multilateral treaty provisions for a particular State

The Security Council may prescribe the provisions of an existing multilateral treaty for a particular State which is not yet, or not longer, a party to that treaty. After the Second Gulf War, the Security Council, acting under Chapter VII of the Charter, decided in resolution 687 (1991) that "Iraq shall unconditionally accept the destruction, removal or rendering harmless" of all biological weapons and all stocks of agents and all related subsystems and components and "shall unconditionally undertake not to use, develop construct or acquire" such items.¹⁵⁷ These obligations were, by and large, identical to obligations of parties to the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction – a convention which Iraq had signed but, at the time, had not yet ratified.¹⁵⁸ The

¹⁵¹ See Fassbender, *supra* note 88, at 1097.

¹⁵² See arts. 42-64 VCLT. A State may, however, claim that a resolution conflicts with a norm of *jus cogens* (arts. 53, 64 VCLT).

¹⁵³ See arts. 34-27 VCLT.

¹⁵⁴ See e.g. M. Fremuth/J. Griebel, On the Security Council as a Legislator: A Blessing or a Curse for the International Community? (2007) 76 *Nordic Journal of International Law* 339-361 at 354-355.

¹⁵⁵ See art. 25 of the UN Charter.

¹⁵⁶ For a similar view, see Hinojosa Martínez, *supra* note 143, at 354-355.

¹⁵⁷ S/RES/687 (1991) of 3 April 1991, paras. 8, 10.

¹⁵⁸ See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972, Arts. I, II (1015 UNTS 163). Iraq had

Security Council thus practically prescribed several obligations in that convention for Iraq.¹⁵⁹

On 10 January 2003, the Democratic People's Republic of Korea (DPRK or North Korea) notified the United Nations Security Council of its decision to "revoke the suspension on the effectuation" of its 1993 withdrawal from the Nuclear Non-Proliferation Treaty (NPT) and asserted that its withdrawal would be effective the next day.¹⁶⁰ Although there is some controversy about when exactly that withdrawal took effect, it can be argued that at least by 10 April 2003 the DPRK was no longer a party to NPT. When North Korea conducted a nuclear weapons test in October 2006, the Security Council adopted resolution 1718 (2006) demanding that the DPRK "immediately retract its announcement of withdrawal" from the NPT and "return to the Treaty".¹⁶¹ In addition, and more importantly, the Council, acting under Chapter VII, decided that "the DPRK [...] shall act strictly in accordance with the obligations applicable to parties under the Treaty on the Non-Proliferation of Nuclear Weapons".¹⁶² This decision was repeated in June 2009 after the DPRK conducted another nuclear weapons test.¹⁶³ While the Security Council did not force the DPRK to rejoin the NPT under coercive sanctions,¹⁶⁴ it prescribed by fiat all the obligations incumbent upon non-nuclear parties to the NPT for the DPRK by incorporating them into the resolutions. The resolutions created an "NPT-like" regime that is, however, not based on the NPT itself but on a Security Council decision under Chapter VII of the Charter.¹⁶⁵

The Security Council's action in the case of the DPRK may prompt accusations of hypocrisy and double standards if compared with its reaction to the nuclear weapons tests by India and Pakistan in May 1998. In resolution 1172 (1998), the Security Council, in non-binding language, simply demanded that the two States refrain from further nuclear tests and urged them, and all other States that have not yet done so, to become Parties to the Treaty on Non-Proliferation of Nuclear Weapons and to the Comprehensive Nuclear Test Ban Treaty without delay and without conditions.¹⁶⁶ The rule of law requires that like cases are treated alike, unless objective differences justify differentiation. However, it is for the Security Council to decide whether the two cases are really alike and, if so, whether a difference in treatment is objectively justified. In addition, inaction on the part of the Security Council in a particular case cannot give rise to any legitimate expectations on the part of States that the Council will not act in their case. The principle of equality must always be reconciled with the principle of legality, according to which no one may rely, to his own

signed the Convention on 11 May 1972. In S/RES/687 (1991) of 3 April 1991, para. 7, the Security Council also 'invite[d]' Iraq to ratify the Convention. Iraq ratified the Convention on 19 June 1991.

¹⁵⁹ For a similar view, see Fassbender, *supra* note 88, at 1097, n. 22. Contra G.S. Carlson, An Offer They Can't Refuse? The Security Council Tells North-Korea to Re-sign the Nuclear Non-Proliferation Treaty (2008) 46 *Columbia Journal of Transnational Law* 420-467 at 449, n. 208 ('Resolution 687 [...] did not impose treaty obligations on Iraq').

¹⁶⁰ Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968 (729 UNTS 161). The DPRK acceded to the NPT on 12 December 1985. On 12 March 1993, it announced its withdrawal from the NPT which, according to art. 10(1) of the Treaty would have become effective three months later. On 11 June 1993, just one day short of the three months notification period, it decided to "put a moratorium on the effectuation of its withdrawal from the NPT". For details, see M. Asada, Arms Control Law in Crisis? A Study of the North Korean Nuclear Issue (2004) 9 *Journal of Conflict & Security Law* 331-355 at 338-350; F.L. Kirgis, North Korea's Withdrawal from the Nuclear Nonproliferation Treaty, *ASIL Insights*, January 2003, <http://www.asil.org/insigh96.cfm>.

¹⁶¹ S/RES/1718 (2006) of 14 October 2006, paras. 3, 4.

¹⁶² *Ibid.*, para. 6.

¹⁶³ S/RES/1874 (2009) of 12 June 2009, para. 8.

¹⁶⁴ *Contra* Carlson, *supra* note 6, at 449.

¹⁶⁵ Paulus/Müller, *supra* note 141. For the proportionality of S/RES/1718 (2006), see Carlson, *supra* note 6, at 455.

¹⁶⁶ See S/RES/1172 (1998) of 6 June 1998, paras. 3, 13.

benefit, on an unlawful act committed in favour of another.¹⁶⁷

2. *General prescription of multilateral treaty provisions for all States*

The Security Council may prescribe the provisions of an existing multilateral treaty not just for one particular State, but for all. In resolution 1373 (2001), the Security Council set out a range of abstract measures for all States to undertake in combating terrorism. These measures included obligations to prevent and suppress the financing of terrorist acts, to freeze the resources of terrorists, and to criminalize the perpetration of terrorist acts.¹⁶⁸ Several provisions of the resolution were almost identical¹⁶⁹ with provisions in the 1999 International Convention for the Suppression of the Financing of Terrorism which, at that time, had only four parties and had not yet entered into force.¹⁷⁰ This prompted Spain's representative to the UN General Assembly to declare: "Security Council resolution 1373 (2001) gives legal and political strength to a series of tools for international cooperation that were previously binding only on those States parties to conventions against terrorism."¹⁷¹ While this action was questioned in the literature,¹⁷² it was widely welcomed by UN member States and even hailed by some as "one of the most important resolutions in [the] history [of the Security Council]".¹⁷³ Most member States later became parties to the Convention.¹⁷⁴ In this respect the resolution can be seen as a treaty-promoting instrument.

3. *Prescription of multilateral treaty provisions for all States for a particular situation*

In addition to making treaty provisions generally binding for some or all member States, the Security Council may also impose certain treaty obligations on member States with regard to a particular situation only. In May 2003, the Council adopted resolution 1483 (2003) which dealt with the consequences of the US-led invasion and occupation of Iraq and, in particular, the widespread looting of the Iraq National Museum, the National Library and other cultural and archaeological sites. In paragraph 7 of the resolution, the Council imposed a world-wide ban on trade in or transfer of Iraqi cultural property illegally removed since 1990, and required member States to take appropriate steps to facilitate the safe return to Iraq of such property. If the resolution is read in conjunction with the Iraq Antiquities Law of 1936, which makes the export of all movable antiquities without the permission of the Iraqi authorities illegal,¹⁷⁵ it becomes clear that the Council, in effect, made applicable to the UN membership certain provisions of the 1954 First Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict¹⁷⁶ and the 1970 UNESCO Convention on the Means

¹⁶⁷ See European Court of First Instance, *Melli Bank v Council*, Joined Cases T-246/08 and T-332/08, Judgment of 9 July 2009, para. 75.

¹⁶⁸ S/RES/1373 (2001) of 28 September 2001, paras. 1, 2.

¹⁶⁹ Compare S/RES/1373 (2001), para. 1(b) and para. 2(f) with Articles 4(a) and 2(1) and Articles 12(1) and 12(2) of the 1999 Convention, respectively.

¹⁷⁰ International Convention for the Suppression of the Financing of Terrorism, 9 December 1999. For text, see A/RES/54/109, Annex. The Convention entered into force only on 10 April 2002.

¹⁷¹ UN Doc. A/56/PV.17, 3 October 2001, 6.

¹⁷² M. Happold, Security Council Resolution 1373 and the Constitution of the United Nations (2003) 16 *Leiden Journal of International Law* 593-610.

¹⁷³ UN Doc. S/PV.4453, 18 January 2002, 7 (France).

¹⁷⁴ As at 1 August 2009, the Convention had 169 parties.

¹⁷⁵ Antiquities Law No. 59 of 1936 (as amended by Law No. 120 of 1974 and Law No. 164 of 1975), Arts. 3, 15, 26. An unofficial translation of the Law is available at <<http://www.ifar.org/>>.

¹⁷⁶ First Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, Sec. I.3 (249 UNTS 358).

of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.¹⁷⁷ At the time, these had only 87 and 100 parties respectively.

4. Prescription of bilateral treaty provisions for a particular State or States

The Security Council may also make binding upon a member State provisions of a bilateral treaty which has not yet entered into force, or is no longer in force, between the parties. In resolution 1718 (2006), the Security Council did not just prescribe obligations under the NPT, it also decided that the DPRK shall “act strictly in accordance with [...] the terms and conditions of its International Atomic Energy Agency (IAEA) Safeguards Agreement”.¹⁷⁸ The DPRK and the IAEA had concluded a Safeguards Agreement in January 1992 in accordance with article III (4) of the NPT.¹⁷⁹ However, the Safeguards Agreement remained in force only as long as the DPRK remained a party to the NPT,¹⁸⁰ and was automatically terminated when the DPRK withdrew from the NPT in 2003.¹⁸¹ By its decision, the Security Council brought the obligations under the Agreement, although not the Agreement itself, back to life.

In resolution 1671 (2006), the Security Council, acting under Chapter VII of the Charter, authorized the temporary deployment of a European Union force (Eufor RD Congo) to support the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC). The Council urged the Government of the Democratic Republic of the Congo (DRC) and the European Union (EU) to conclude a status-of-forces agreement (SOFA), and decided “that, until such an agreement is concluded, the terms of the status-of-forces agreement for MONUC dated 4 May 2000 shall apply mutatis mutandis between the European Union and the Government of the Democratic Republic of the Congo in respect of Eufor RD Congo, including possible third-country contributors”.¹⁸² The Council thus prescribed the provisions of the MONUC agreement for the DRC and the EU. The two parties never concluded a separate SOFA, which meant that their relations throughout the four-month mission of Eufor RD Congo were governed not by treaty but by resolution 1671 (2006).

The Security Council has not restricted its activities to treaties between member States or between member States and international organizations but has also acted on its own account, prescribing provisions of a treaty between the United Nations and a member State which had not yet entered into force. In resolution 1757 (2007), the Council, acting under Chapter VII of the Charter, decided that “the provisions of the annexed document, including

¹⁷⁷ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, Arts. 3, 7(a), 7(b), 8 (823 UNTS 231).

¹⁷⁸ S/RES/1718 (2006) of 14 October 2006, para. 6. This decision was repeated in S/RES/1874 (2009) of 12 June 2009, para. 8.

¹⁷⁹ Agreement of 30 January 1992 between the Government of the Democratic People’s Republic of Korea and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA INFCIRC/403, May 1992. The Safeguards Agreement came into force on 10 April 1992.

¹⁸⁰ See article 26 of the Safeguards Agreement. See also Kirgis, *supra* note 160.

¹⁸¹ The Security Council, in resolution 1718 (2006), para. 4, demanded that “the DPRK return to [...] the International Atomic Energy Agency (IAEA) safeguards”. See also Asada, *supra* note 7, at 35-353; R. Winters, Preventing repeat offenders. North Korea’s withdrawal and the need for revisions to the Nuclear Non-Proliferation Treaty (2005) 38 *Vanderbilt Journal of Transnational Law* 1499-1529 at 1508.

¹⁸² S/RES/1671 (2006) of 25 April 2006, para. 12. See also S/Res/1551 (2004) of 9 July 2004, para. 20 (deciding that “the status of forces agreements currently contained in Appendix B to Annex 1-A of the General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto shall apply provisionally in respect to the proposed EU mission and its forces”).

its attachment, on the establishment of a Special Tribunal for Lebanon [STL] shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under article 19(1) of the annexed document before that date”.¹⁸³ The “annexed document” referred to by the Security Council was the “Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon” which had been signed by the Government of Lebanon and the United Nations respectively on 23 January and 6 February 2007, but had not been ratified by Lebanon because of a deadlock in Lebanese domestic politics.¹⁸⁴ In resolution 1757 (2007), the Security Council in effect set an ultimatum to Lebanon to ratify the treaty within ten days or have the content of the treaty imposed upon it. While the Security Council could not substitute a Chapter VII decision for the ratification by Lebanon and, consequently, could not bring into force the Agreement itself,¹⁸⁵ it could and indeed did prescribe *the provisions* of the annexed Agreement for Lebanon in a binding decision.¹⁸⁶ This course of action triggered five Council members to abstain. The Russian representative explained his country’s concerns as follows:

The arrangement chosen by the sponsors is dubious from the point of view of international law. The treaty between the two entities – Lebanon and the United Nations – by definition cannot enter into force on the basis of a decision by only one party. The constituent documents for the Tribunal, imposed by a unilateral decision of a United Nations body – that is, a Security Council resolution – essentially represent an encroachment upon the sovereignty of Lebanon. We do not believe that the establishment of a special tribunal by decision of the Council under Chapter VII of the Charter is warranted. There is no basis for a reference to Chapter VII in the draft resolution.¹⁸⁷

There is thus no treaty in force between the United Nations and Lebanon on the establishment of the Special Tribunal.¹⁸⁸ The STL is not a treaty-based internationalized tribunal such as, for example, the Special Court for Sierra Leone, but an independent international tribunal set up by the Security Council using its Chapter VII powers.¹⁸⁹

Another example of the Security Council prescribing the provisions of a treaty between the United Nations and a member State may be found in the area of SOFAs for UN peacekeeping missions. In resolution 1769 (2007), the Security Council, acting under Chapter VII of the Charter of the United Nations, requested that the Secretary-General and the Government of Sudan conclude within 30 days a SOFA with respect to the United

¹⁸³ S/RES/1757 (2007) of 30 May 2007, para. 1(a). The resolution was adopted by 10 affirmative votes with 5 abstentions (China, Indonesia, Qatar, Russian Federation and South Africa). See UN Doc. S/PV.5685, 30 May 2007, at 5-6.

¹⁸⁴ Article 19(1) of the Agreement provided: “This Agreement shall enter into force on the day after the [Lebanese] Government has notified the United Nations in writing that the [domestic] legal requirements for entry into force have been complied with.” The Lebanese Government was unable for internal political reasons to send the required notification to the United Nations. See B. Fassbender, *supra* note 88, at 1092.

¹⁸⁵ The statement of the Spokesperson of the UN Secretary General that “the document annexed to resolution 1757 (2007), has entered into force” (UN Doc. SG/SM/11035 – L/3117, 11 June 2007) is at best misleading.

¹⁸⁶ For the same view, see B. Fassbender, *supra* note 88, at 1096-1097. *Contra* N. Shehadi/E. Wilmshurst, *The Special Tribunal for Lebanon: The UN on Trial?*, Chatham House Briefing Paper, MEP/IL BP 07/01, July 2007, at 6-7 (arguing that “the agreement is now in force by virtue of the resolution”).

¹⁸⁷ UN Doc. S/PV.5685, 30 May 2007, at 5.

¹⁸⁸ It should however be noted that the Agreement was registered *ex officio* by the United Nations on 1 August 2007 with the Secretariat of the United Nations and recorded as having entered into force on 10 June 2007. See Certificate of Registration No. 44232, 7 September 2007; and UN Doc. ST/LEG/SER.A/726, 2007 at 15.

¹⁸⁹ For the same view, see Fassbender *supra* note 88, at 1101; F. Mégret, A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice (2008) 21 *LJIL* 485-512. *Contra* D. Shraga, Mixed or Internationalized Courts, in: Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009), 424-426 at 424 (arguing that the STL, “established by Agreement, whose entry into force was imposed by a Chapter VII resolution, is likewise a treaty-based organ”).

Nations-African Union Mission in Darfur (UNAMID) and “decide[d] that pending the conclusion of such an agreement the model status-of-forces agreement dated 9 October 1990 (A/45/594) shall provisionally apply with respect to UNAMID personnel operating in that country”.¹⁹⁰ For more than six months, until the SOFA between the Government of the Sudan and UNAMID was signed,¹⁹¹ the African Union/United Nations hybrid mission operated on the basis of the provisions of the model SOFA prescribed by the Security Council.

The Security Council has also used its Chapter VII powers unilaterally to change the content of existing treaties between the United Nations and a member State. In resolution 687 (1991), the Council mandated the Secretary-General to set up a Special Commission with the task of carrying out an immediate on-site inspection of Iraq’s biological, chemical, and missile capabilities.¹⁹² The detailed modalities of these inspections, and especially the status, privileges and immunities of the Special Commission, were laid down in May 1991 in an agreement between the United Nations and Iraq.¹⁹³ The Agreement provided, inter alia, that Iraq extends to the Executive Chairman, the Deputy Executive Chairman and other members of the Special Commission whose names shall be communicated to the government, the privileges and immunities, exemptions and facilities which are enjoyed by diplomatic envoys in accordance with international law.¹⁹⁴ In December 1999, the Security Council, acting under Chapter VII of the Charter, established, as a subsidiary body of the Council, the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) which replaced the Special Commission and undertook its responsibilities in Iraq. It also “decide[d] that UNMOVIC shall [...] assume the Special Commission’s part in agreements existing between the Special Commission and Iraq and between the United Nations and Iraq, and affirm[ed] that the Executive Chairman, the Commissioners and the personnel serving with UNMOVIC shall have the rights, privileges, facilities and immunities of the Special Commission”.¹⁹⁵ In this situation, the Security Council did not merely adapt a treaty between the United Nations and Iraq but modified the content of an already existing treaty between the parties and unilaterally prescribed its modified provisions for Iraq. The resolution of the Security Council in fact took the place of a new agreement regarding the status, privileges and immunities of UNMOVIC which, otherwise, would have had to be concluded between the United Nations and Iraq. Although identical in substance, the status of UNMOVIC, unlike that of the Special Commission, was based not on a treaty but on a Chapter VII resolution.

C. Imposition of new additional obligations with regard to treaties distinguished

The Security Council may prescribe new obligations complementing existing treaties as well as existing treaty obligations. On occasion, the Security Council has expressly

¹⁹⁰ S/RES/1769 (2007) of 31 July 2007, para. 15. For similar provisions, see S/RES/1706 (2006) of 31 August 2006, para. 12; S/RES/1626 (2005) of 19 September 2005, para. 9. Prior to resolution 1626 (2005), the Security Council simply “noted” or “recalled” that pending the conclusion of such an agreement, the model status-of-forces agreement for peacekeeping operations of 9 October 1990 should apply provisionally; see e.g. S/RES/1590 (2005) of 24 March 2005, para. 16; S/RES/1545 (2004) of 21 May 2004, para. 10; S/RES/1528 (2004) of 27 February 2004, para. 9; S/RES/1320 (2000), 15 September 2000, para. 6; S/RES/1270 (1999) of 22 October 1999, para. 16.

¹⁹¹ The SOFA between the Government of the Sudan and UNAMID was signed on 9 February 2008 in Khartoum, Sudan; see UN Doc. S/2008/98, 14 February 2008, 5, para. 23.

¹⁹² S/RES/687 (1991) of 3 April 1991, para. 9(b).

¹⁹³ Exchange of letters constituting an agreement between the United Nations and Iraq regarding the status, privileges and immunities of the Special Commission established pursuant to Security Council Resolution 687 (1991) of 3 April 1991, New York, 6 May 1991 and Baghdad, 17 May 1991, 1607 UNTS 275.

¹⁹⁴ *Ibid.* See also S/RES/707 (1991) of 15 August 1991, para. 3(g).

¹⁹⁵ S/RES/1284 (1999) of 17 December 1999, para. 11.

stressed that nothing in a resolution “will impose on State parties new obligations” with regard to a certain treaty.¹⁹⁶ This means that the Council considers itself free to impose new additional obligations linked to a treaty if this is necessary in the interest of the maintenance of international peace and security. For example, in resolution 1807 (2008), the Council, acting under Chapter VII of the Charter of the United Nations, decided that:

- all governments in the region, and in particular those of the Democratic Republic of the Congo and of States bordering Ituri and the Kivus, shall take the necessary measures:
- (a) To ensure that aircraft operate in the region in accordance with the Convention on International Civil Aviation, signed in Chicago on 7 December 1944, in particular by verifying the validity of documents carried in aircraft and the licences of pilots’
 - (b) To prohibit immediately in their respective territories operation of any aircraft inconsistent with the conditions in that Convention [...].¹⁹⁷

The Democratic Republic of Congo and the States bordering the Congolese provinces of North and South Kivu and the Ituri district (i.e. Uganda and Rwanda) are all parties to the Convention on International Civil Aviation (Chicago Convention). Articles 29 and 32 of the Chicago Convention list the documents and certificates which aircraft of a contracting State and pilots of such aircraft, engaged in international navigation, must carry. Article 16 provides that the appropriate authorities of each contracting State shall have the right, without unreasonable delay, to search aircraft of the other contracting States on landing or departure, and to inspect the certificates and other documents prescribed by this Convention. The Security Council took up this treaty right of contracting States and transformed it into an obligation in order to prevent the illicit transport of weapons by air to Ituri and the Kivus.

III. ENDORSEMENT OF TREATIES

The Security Council has on several occasions expressed its support for, or its full commitment to, treaties in order to put its weight and authority behind them, especially if they were challenged by the conduct of States. These resolutions are not usually adopted under Chapter VII of the Charter or, if they are, the respective provisions are part of the preamble or the non-binding provisions of the operative paragraphs. For example, in response to the nuclear tests by India and Pakistan in May 1998, the Council reaffirmed “its full commitment to and the crucial importance of the Treaty on the Non-Proliferation of Nuclear Weapons and the Comprehensive Nuclear Test Ban Treaty”.¹⁹⁸

The Security Council may also make reference to a bilateral treaty in the sense of giving it a clean bill of health and confirming its consistency with international law. This seems to have been the aim of the United States which, in return for abstaining from resolution 1593 (2005) which referred the situation in Darfur to the Prosecutor of the ICC, made it a condition that the Security Council took note of the controversial immunity agreements that it had concluded with a number of countries which removed US officials and personnel from the (otherwise existing) jurisdiction of the ICC.¹⁹⁹ In order to dispel the idea

¹⁹⁶ See e.g. S/RES/1817 (2008) of 11 June 2008, para. 5.

¹⁹⁷ S/RES/1807 (2008) of 31 March 2008, para. 6. The same provision can also be found in S/RES/1596 (2005) of 18 April 2005, para. 6.

¹⁹⁸ S/RES/1172 (1998) of 6 June 1998, para. 10. See also S/RES/1835 (2008) of 27 September 2008, preambular para. 3; S/RES/1540 (2004) of 28 April 2004, preambular para. 6.

¹⁹⁹ See S/RES/1593 (2005) of 31 March 2005, preambular para. 5 (“The Security Council [...] *taking note* of the existence of agreements referred to in Article 98-2 of the Rome Statute”). Speaking with regard to this resolution, the US representative stated: “We appreciate that the resolution takes note of the existence of those

that the resolution could have any such function, the Danish representative in the Security Council stated: “As regards the formulation regarding the existence of the agreements referred to in article 98 paragraph 2 of the Rome Statute, Denmark would like to stress that the reference is purely factual; it is merely referring to the existence of such agreements. Thus the reference in no way impinges on the integrity of the Rome Statute.”²⁰⁰

One could also think of the Security Council, acting under Chapter VII of the Charter of the United Nations, formally endorsing a bilateral or multilateral treaty.²⁰¹ By adopting as its own an immunity or amnesty agreement concluded between two States, a State and a non-State actor or two non-State actors, the Council could endow the treaty with a higher authority, similar to that of its own decisions under Chapter VII. The closest the Security Council has come to such a situation is resolution 1464 (2003) where, in the non-binding part of the resolution, the Council “endorse[d] the agreement signed by the Ivorian political forces in Linas-Marcoussis on 24 January 2003”.²⁰² The agreement foresaw an “amnesty for all military personnel being held on charges of threatening State security and [...] soldiers living in exile”.²⁰³ It was, however, made clear that “the amnesty law will under no circumstances mean that those having committed serious economic violations and serious violations of human rights and international humanitarian law will go unpunished”.²⁰⁴ In *Prosecutor v. Radovan Karadžić* before the International Criminal Tribunal for the Former Yugoslavia (ICTY), the accused claimed that in an agreement between himself and the United States he had been promised immunity from prosecution if he withdrew from public life. The prosecution did not dismiss such a possibility outright but stated that “for the Agreement to be legally binding, it would have to be reflected in a UNSC resolution, the UNSC being the only body that could limit the Tribunal’s Statute”.²⁰⁵ While the ICTY, of course, was established by the Security Council itself in a binding Chapter VII resolution, it is suggested that the Council could equally limit the jurisdiction of a treaty-based tribunal by endorsing an amnesty or immunity agreement, provided that such an agreement does not violate a norm of *jus cogens*.²⁰⁶

agreements and will continue to pursue additional such agreements with other countries as we move forward.” (UN Doc. S/PV.5158, 31 March 2005, at 4). See also Cryer, *supra* note 29, at 204-205.

²⁰⁰ UN Doc. S/PV.5158, 31 March 2005, at 6. See also the statements of the representative of Argentina, *ibid.*, at 8, and Brazil, *ibid.*, at 11, who explained his country’s abstention, inter alia, on the ground that the preamble referred to those agreements.

²⁰¹ See e.g. S/RES/1154 (1998) of 2 March 1998, para. 1 (“endorses the memorandum of understanding signed by the Deputy Prime Minister of Iraq and the Secretary-General on 23 February 1998”).

²⁰² S/RES/1464 (2003) of 14 February 2003, para. 1.

²⁰³ Linas-Marcoussis Agreement, done on 24 January 2003, para. 3(i). For text, see UN Doc. S/2003/99, 27 January 2003, annex I.

²⁰⁴ See the Programme of the Government of National Reconciliation annexed to the Linas-Marcoussis Agreement, section VII, para. 5.

²⁰⁵ See *Prosecutor v. Radovan Karadžić*, Decision on the accused’s Holbrooke agreement motion, ICTY Case No. IT-95-5/18-PT, 8 July 2009, para. 23. See also *ibid.*, paras. 13, 60, and the Prosecution’s Response to Karadžić’s Submission Regarding Alleged Immunity Agreement, ICTY Case No. IT-95-5/18-I, 20 August 2008, para. 12.

²⁰⁶ While the Special Court for Sierra Leone held that “it is a crystallized norm of international law that a government cannot grant amnesty for serious crimes under international law” (*Prosecutor v. Fofana*, Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, Case No. SCSL-2004-14- AR72(E), 25 May 2004, para. 3), it is not (yet) certain that the prohibition of amnesties has achieved the status of *jus cogens*.

IV. ENFORCEMENT OF TREATIES

The Security Council has called upon, urged, required, underlined the need for, or demanded that all “States Parties” abide by, comply strictly with, or fully implement their obligations under certain treaties.²⁰⁷ The Council has also addressed such requests to particular States. For example, the Security Council, in non-binding form, has repeatedly called upon “Israel, as the occupying Power, to abide scrupulously by the Geneva Convention relative to the Protection of Civilian Persons in Time of War”.²⁰⁸

The Security Council has made further determinations that a certain action constitutes a breach of a bilateral or multilateral treaty. In 1973, it considered that the forcible diversion and seizure by the Israeli air force of a Lebanese civilian airliner on lease to Iraqi Airways from Lebanon’s air space constituted “a violation of the Lebanese-Israeli Armistice Agreement of 1949”.²⁰⁹ In August 1991, the Security Council determined that the non-compliance by the Government of Iraq with its obligations under its safeguards agreement with the IAEA constituted “a violation of its commitments as a party to the Treaty on the Non-Proliferation of Nuclear Weapons”.²¹⁰ On numerous occasions, the Council also considered, affirmed, confirmed, declared or determined that certain practices or actions by Israel in the occupied Palestinian territory constitute a “violation” or even “a flagrant violation” of the Geneva Convention relative to the Protection of Civilian Persons in Time of War.²¹¹ In none of these cases, however, did the Council attempt to enforce the treaties in question.

Enforcement of treaty obligations, and in particular bilateral treaty obligations, has so far proven the exception. On 26 June 1995, on the occasion of the Organization of African Unity summit, an assassination attempt on Egyptian President Mubarak took place in Addis Ababa. Evidence implicated the Government of Sudan. After an investigation revealed that three of the suspects involved in the crime were taking shelter in Sudan, the Government of Ethiopia on 25 July 1995 requested their extradition under the 1964 Extradition Agreement between the two countries.²¹² Under article I of the Agreement Sudan was obliged to extradite the suspects for prosecution.²¹³ In resolution 1044 (1996), the Security Council, in non-binding form, called upon the Government of Sudan to comply with the requests of the Organization of African Unity without further delay to:

Undertake immediate action to extradite to Ethiopia for prosecution the three suspects sheltering in the Sudan and wanted in connection with the assassination attempt *on the basis of the 1964 Extradition*

²⁰⁷ See e.g. S/RES/1874 (2009) of 12 June 2009, para. 6, S/RES/1846 (2008) of 2 December 2008, para. 15, S/RES/1817 (2008) of 11 June 2008, para. 5, S/RES/1718 (2006) of 14 October 2006, para. 4, S/RES/984 (1995) of 11 April 1995, preambular para. 5.

²⁰⁸ See e.g. S/RES/446 (1979) of 22 March 1979, para. 3, S/RES/471 (1980) of 5 June 1980, para. 4, S/RES/484 (1980) of 19 December 1980, para. 2, S/RES/592 (1986) of 8 December 1986, para. 3, S/RES/605 (1987) of 22 December 1987, para. 3; 607 (1988) of 5 January 1988, para. 2.

²⁰⁹ S/RES/337 (1973) of 15 August 1973, para. 2.

²¹⁰ S/RES/707 (1991) of 15 August 1991, para. 2.

²¹¹ See e.g. S/RES/694 (1991) of 24 May 1991, para. 1, S/RES/592 (1986) of 8 December 1986, para. 4; S/RES/476 (1980) of 30 June 1980, para. 3 S/RES/465 (1980) of 1 March 1980, para. 5; S/RES/471 (1980) of 5 June 1980, preambular para. 5; S/RES/452 (1979) of 20 July 1979, preambular para. 4.

²¹² See Extradition Treaty between the Government of the Republic of the Sudan and the Imperial Ethiopian Government, done on 29 March 1964, UN Doc S/1996/197, 15 March 1996, at 106-111.

²¹³ See the statement of the British representative in the Security Council: “If they are still in Sudan, the answer is straightforward: the Government must extradite them to Ethiopia under the terms of the Bilateral Extradition Treaty” (UN Doc. S/PV.3660, 26 April 1996, at 24).

Three months later, in resolution 1054 (1996), the Security Council expressed its deep alarm that the Government of Sudan had “failed to comply” with this request and determined that its non-compliance constituted a threat to international peace and security. Acting under Chapter VII of the UN Charter, the Council demanded that Sudan take “immediate action to ensure extradition to Ethiopia for prosecution of the three suspects sheltering in Sudan”, and decided to impose a suite of enforcement measures, including the reduction of diplomatic presence in Sudan, travel restrictions on senior officials and members of the armed forces, and a call to international and regional organisations not to convene any conference in the country.²¹⁵ Despite these enforcement measures, the suspects were never extradited; this may explain why the Security Council has refrained from large scale treaty enforcement. Ultimately, only the use of force can end the violation of treaty obligations. In the case of the Iraqi occupation of Kuwait, the demands of the Security Council that Iraq cease and desist from actions that violate the Charter of the United Nations, the Geneva Convention relative to the Protection of Civilian Persons in Time of War, the Vienna Convention on Diplomatic Relations, and the Vienna Convention on Consular Relations²¹⁶ were followed up by military action which could also be seen, at least in part, as treaty enforcement action.

V. INTERPRETATION OF TREATIES

The Security Council regularly applies and, incidentally, interprets treaties. While the main object of treaty interpretation is, of course, the Charter of the United Nations, the Council also frequently construes other treaties outside the UN framework. For example, the Council determined that the Geneva Convention relative to the Protection of Civilian Persons in Time of War is applicable to the territories occupied and annexed by Israel,²¹⁷ and to Iraqi-annexed Kuwait.²¹⁸ In resolution 541(1983), the Council found that the declaration of independence by the Turkish Cypriot authorities “is incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee”.²¹⁹ The request in resolutions 1422 (2002) and 1487 (2003) addressed to the ICC was expressly made “consistent with the provision of Article 16 of the Rome Statute”. The Security Council thereby indicated that it considered its request to be consistent with the provisions of the Rome Statute; an interpretation strongly challenged in the literature.²²⁰ The Council on several occasions also pronounced that a certain treaty provision reflects customary international law.²²¹ Thus, in response to the shooting down by the Cuban Air Force of two civil aircraft in February 1996, it condemned “the use of weapons against civil

²¹⁴ S/RES/1044 (1996) of 31 January 1996, para. 4(a) (italics added).

²¹⁵ S/RES/1054 (1996) of 26 April 1996, paras. 1-4.

²¹⁶ S/RES/674 (1990) of 29 October 1990, para. 1. See also *ibid.*, preambular para. 4, and S/RES/667 (1990) of 16 September 1990, preambular para. 4.

²¹⁷ See e.g. S/RES/904 (1994) of 18 March 1994, preambular para. 7; S/RES/726 (1992) of 6 January 1992, para. 2; S/RES/694 (1991) of 24 May 1991, para. 1; S/RES/672 (1990) of 12 October 1990, para. 3; S/RES/641 (1989) of 30 August 1989, para. 3; S/RES/636 (1989) of 6 July 1989, para. 3; S/RES/605 (1987) of 22 December 1987, para. 2; S/RES/592 (1986) of 8 December 1986, para. 1; S/RES/497 (1981) of 17 December 1981, para. 3; S/RES/484 (1980) of 19 December 1980, para. 1; S/RES/478 (1980) of 20 August 1980, para. 2; S/RES/465 (1980) of 1 March 1980, preambular para. 5; S/RES/446 (1979) of 22 March 1979, preambular para. 4.

²¹⁸ S/RES/674 (1990) of 29 October 1990, preambular para. 6; S/RES/670 (1990) of 25 September 1990, para. 13.

²¹⁹ S/RES/541 (1983) of 18 November 1983, preambular para. 4.

²²⁰ See e.g. Stahn, *supra* note 22, at 88-97; Cryer/White, *supra* note 87, at 148-150.

²²¹ See e.g. S/RES/1838 (2008) of 7 October 2008, paras. 2, 3; S/RES/620 (1988) of 26 August 1988, para. 2.

aircraft in flight as being incompatible with [...] the rules of customary international law as codified in article 3 *bis* of the Chicago Convention”.²²² Article 3 *bis* had been adopted in an amendment to the Convention by the Assembly of the International Civil Aviation Organization on 10 May 1984. At the time the resolution was passed in July 1996, the amendment had not yet entered into force. It finally entered into force more than two years later, on 1 October 1998.

Such “interpretative resolutions” may be regarded as other “supplementary means of interpretation” in the sense of article 32 VCLT or, if the resolutions are binding on the parties to the treaty, as “relevant rules of international law applicable in the relations between the parties” (article 31(3)(c) VCLT). It has been suggested that Security Council resolutions under Chapter VII may be regarded as a subsequent “agreement between the Member States of the UN” (see article 31(3)(a) VCLT).²²³ This view overlooks the fact that, while the Security Council “acts on their behalf”,²²⁴ it does not act as the agent of the individual member States.²²⁵ The Security Council rather “acts on behalf of the whole international community represented in the United Nations”.²²⁶ Whatever their status, interpretative resolutions by the Security Council cannot override the clear meaning of the terms of the treaty or a clearly established contrary intention of the parties to the treaty being interpreted.

A particular interpretation of a treaty by the Security Council is not binding upon the International Court of Justice. According to the Charter of the United Nations, the Security Council and the ICJ are equals.²²⁷ It has rightly been pointed out that the Security Council “does not enjoy priority of any kind over the ICJ”.²²⁸ It is not inconceivable that both organs come to different conclusions on the interpretation of a certain treaty provision;²²⁹ after all, the Security Council is a political organ which bases its decisions primarily on political criteria, while the ICJ makes decisions on the basis of international law. The duty of loyal cooperation between organs of the United Nations means, however, that the ICJ has to pay due respect to the Security Council and take its interpretation into consideration.²³⁰ Nothing more can be said for other courts and tribunals. The interpretation offered by the Security Council, depending on the situation, may carry great weight but is neither authoritative nor conclusive.²³¹

²²² S/RES/1067 (1996) of 26 July 1996, para. 6. Art. 3 *bis* of the Chicago Convention provides that the “contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight”.

²²³ Jain, *supra* note 10, at 248-249.

²²⁴ Art. 24(1) of the UN Charter.

²²⁵ Delbrück, *supra* note 37, at 452.

²²⁶ SCOR, 9th year, 662nd meeting, 23 March 1954, at 14, para. 46 (Egypt).

²²⁷ See art. 7(1) of the UN Charter.

²²⁸ Delbrück, *supra* note 37, at 447.

²²⁹ E. Klein, Die Internationalen und die Supranationalen Organisationen, in: W. Graf Vitzthum (ed.), *Völkerrecht* (4th edn., Berlin: De Gruyter, 2007), 265-385 at 349-350; G. Gaja, Réflexions sur le rôle du Conseil de Sécurité dans le Nouvel Ordre Mondial (1993) 97 *RGDIP* 297-320 at 315.

²³⁰ E. Klein, Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten. Zu Fragen der Zuständigkeit und Organtreue, in: Rudolf Bernhardt et al. (eds.), *Völkerrecht als Rechtsordnung – internationale Gerichtsbarkeit – Menschenrechte: Festschrift für Hermann Mosler* (Berlin: Springer, 1983), 467-491 at 481-491.

²³¹ See Stahn, *supra* note 22, at 102 (arguing that the ICC “is the final arbiter over the interpretation of the [Rome] Statute”); Cryer/White, *supra* note 87, at 152 (arguing that “it cannot be the case that [the Security Council] has the final say”).

International law is generally pictured as a horizontal, decentralized legal order which lacks central organs for its creation, modification, interpretation and enforcement. However, as early as the 1930s, Hans Kelsen postulated in his *Pure Theory of Law* that the international legal order was geared towards centralization.²³² He noted “that not only the creation of legal norms, but also their application, indeed all functions stipulated by a legal order, may be centralized [...] in this dynamic sense, that is, to be performed by one organ”.²³³ In 1944, he wrote: “The problem of world organization is a problem of centralization; and the whole evolution of the law from its primitive beginnings to its standard of today has been, from a technical point of view, a continuous process of centralization.”²³⁴ It may be said that the turning point in the transition to a more centralized international legal order was the founding of the United Nations. The ultimate goal of this legal development, according to Kelsen, is “an international legislative body competent to adapt international law to the changing circumstances”.²³⁵ In this sense, Security Council treaty action may be seen as a further step towards the centralization of the international legal order; a legal order built around the United Nations. Experience shows that functions and powers (to fulfil these functions) over time gradually gravitate towards a strong and determined centre. The UN Charter, and especially articles 25 and 103, provides the Security Council with the legal tools to further this process. Centralization is not necessarily a counterpoint, or even a guarantee against the fragmentation of international law. As Security Council treaty action shows, it may itself contribute to the fragmentation of international law, not in the sense that the same rule is applied differently by different organs, but in the sense that the same central organ creates different rules for what it considers exceptional or *sui generis* situations.

²³² H. Kelsen, *Pure Theory of Law* (translated from the second (revised and enlarged) German edition by Max Knight) (Clark, NJ: Lawbook Exchange, 2005), at 328.

²³³ *Ibid.*, at 317.

²³⁴ H. Kelsen, *Peace Through Law* (Chapel Hill: University of North Carolina Press, 1944), at 21.

²³⁵ *Ibid.*, at 22.