

THE PRACTICE OF THE (UN) SECURITY COUNCIL
WITH REGARD TO TREATIES AND (OTHER)
AGREEMENTS GOVERNED
BY INTERNATIONAL LAW

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INTRODUCTION

The purpose of this study is to present the main trends of Council practice with regard to treaties and other agreements governed by international law, thus “embracing all those agreements that would possibly fall through the cracks if reference could only be made to treaties”¹. The threshold for the determination of a threat to peace and security is clear: inadmissible conduct which is inconsistent with a legally non-binding agreement may qualify; the conduct may also be in violation of a legally binding agreement but that is not a

1 J. KLABBERS, *The Concept of Treaty in International Law*, Kluwer Law International, The Hague, London, Boston, 1996, 307 pages, at p. 82.

prerequisite for such determination². The normative nature of an agreement i.e. “aimed at influencing future behavior”³ is sufficient to render the threshold operational.

Instruments may be part and parcel and sometimes the very subject-matter of the dispute or situation brought before the Council or it may *motu proprio* refer to them as being relevant to the issue at hand. In obvious contrast with a judicial approach⁴, the Council’s task is not to qualify these instruments as agreements or not, neither “to delimit the precise scope of the agreement”⁵. The Council’s duty is to draw operational consequences from these instruments within the exercise of its particular responsibilities. This way it contributes to establish “conditions under which ... respect for the obligations arising from treaties” can be maintained as stated in the preamble to the Charter. The international peace and security perspective requires the Council to pay attention to an alleged breach of “a treaty which provokes an upset in the established political organization of the international community” while at the same time placing “a great strain” upon “the mutual relations of a few States (more KW) directly concerned or affected by the breach (or the allegation of the breach)”⁶. This distinction is not a legal one, “but a political and matter-of-fact one”⁷ which the law should take into account. These kinds of breaches “are not *per se* amenable to *unilateral* legal reactions or remedies”⁸.

Council practice is rich and wide ranging from supporting the negotiations and welcoming the adoption of a treaty over urging

2 K.WELLENS, The UN Security Council and New Threats to the Peace: back to the future, *Journal of Conflict and Security Law*, 2003, Vol. 8 n° 1, pp. 1-56, at p. 16.

3 J. KLABBERS, op. cit., at p 19 referring to treaty-like instruments.

4 J.KLABBERS, op. cit., Chapters VI and VII.

5 J. KLABBERS, op. cit., at p. 258 referring to the 1994 Qatar v. Bahrain case before the ICJ.

6 S. ROSENNE, *Breach of Treaty*, Cambridge, Grotius Publications Limited, 1985, 142 pages at p. 107.

7 *Ibidem*.

8 *Ibidem* at p. 110.

states to sign and ratify into monitoring the implementation of the provisions of a treaty once it has entered into force⁹. Because of their object and purpose some categories of treaties and agreements are more likely to end up before the Council (Section One). The Council has clarified the duty to negotiate in good faith (Section Two). Appeals to conclude a treaty may be coupled with the imposition of coercive measures (Section Three). The Council may not only call upon States to become parties to or to ratify a treaty (Section Four), it may also deal with the substantive content of a treaty (Section Five) and give its approval (Section Six). Council monitoring of the implementation of a treaty puts pressure on the *res inter alios acta* rule (Section Seven) and its impact on the *pacta sunt servanda* rule has to be analyzed (Section Eight). Article 103 of the Charter governs the relationship between the imposition of coercive measures to induce compliance and existing treaties (Section Nine). The Council may call upon States to refrain from concluding a treaty or to review existing agreements (Section Ten). Agreements may constitute a pre-condition for Council action (Section Eleven). Council practice inevitably has implied interpretation of treaties (Section Twelve) and pronouncements on hierarchy between treaties and between resolutions and agreements outside the scope of article 103 (Section Thirteen). The Council also dealt with registration, entry into force and termination of a treaty (Section Fourteen).

9 See for instance on the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: resolution 1261,6; 1314, preamble and operative paragraph 4; and PRST/2002/12. For the topical and chronological information on the resolutions and presidential statements (PRST) adopted before 31 December 2000 and which are referred to in this contribution, see K. WELLENS, (Ed.), *Resolutions and Statements of the United Nations Security Council (1946-2000) A thematic guide*, Kluwer Law International, The Hague, London, New York, 2001, 193pp. For instruments adopted or issued since 1 January 2001 one could turn to the UN Home Page. Developments up to 30 September 2003 have been covered.

SECTION ONE: SPECIAL CASES OR CATEGORIES
OF TREATIES AND AGREEMENTS

There are categories of treaties and agreements, which by their object and purpose are bound to come up before the Council given its responsibilities under the Charter. The 1968 Non-Proliferation Treaty (NPT) probably is the most prominent in this respect, although other arms control conventions and treaties on human rights, humanitarian and refugee law are also frequently part of the proliferation of references to international law by the Council.

As threats to international peace and security increasingly originate from intra-state conflicts, the agreements the Council is looking at in various ways still to be explored, are, in many cases concluded between a central government and independence movements or rebel forces. These agreements will cover cease-fires and peace deals to end protracted armed conflicts; in a number of cases they constitute *pacta de contrahendo/negotiando*.

Moreover, UN involvement in the post-conflict peace building process will require Status of Forces Agreements (SOFAs) or Status of Mission Agreements (SOMAs) to be concluded.

Finally, Memoranda of Understanding (MOUs) will contain practical arrangements for international agencies to perform their statutory or agreement-based tasks.

On a number of occasions the Council expressed concern over the absence of a global conventional regime in particular areas, adding its expectation that such regimes would be brought into existence in not too distant a future.

The Non-Proliferation Treaty

That the NPT occupies a prominent place amongst the arms control treaties the Council has been dealing with is hardly surprising.

In its January 1992 PRST the Council emphasized the need for early ratification and implementation by the States concerned of all international and regional arms control arrangements. Among those treaties the NPT came first.

Pursuant to article X, paragraph 1 any Party wishing to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of the NPT, have jeopardized the supreme interests of the country, shall give notice of such withdrawal not only to all other Parties but also the Security Council (SC). The Council, as part of its “forgotten competences”¹⁰ has dealt with these and various other aspects of a critically important treaty¹¹.

In 1995 each of the nuclear weapons States parties to the NPT gave assurances to the non-clear weapons States parties to safeguard their security in the event of such States being the victim of an act of, or object of a threat of, aggression in which nuclear weapons are used¹², arguably making the invocation of article 60, (2), (c) of the Vienna Convention both unnecessary and unjustified.

The Signature in April 1996 in Cairo of the African Nuclear-Weapon-Free Zone Treaty (the Treaty of Pelindaba) by more than 40 African countries, as well as the signing of the relevant protocols to the treaty by the majority of nuclear-weapons states, became a separate item on the Council’s agenda¹³.

After their tests conducted in May 1998, India and Pakistan were urged to become parties, without delay and without conditions, to both the NPT and the Nuclear Test Ban treaty. On the same occasion all other states were called upon to do likewise¹⁴.

As “the inspection regime is a key means of monitoring the effectiveness”¹⁵ of arms control treaties, the entire IAEA safeguards system is the foundation of the NPT¹⁶ and, if fully effective, it

10 See K. HERNDL, The “forgotten” competences of the Security Council in ALOIS MOCK and HERBERT SCHAMBECK, (Eds), *Verantwortung in unserer Zeit. Festschrift für Rudolf Kirchschläger*, Osterreichische Staatsdruckerei, Wien, 1990, 278 pp, pp. 83-91.

11 Resolution 825, preamble.

12 Resolution 984, 2.

13 PRST/1996/17.

14 Resolution 1172,13.

15 A. AUST, *Modern Treaty Law and Practice*, Cambridge, Cambridge University Press, 2000, 443 pages at p. 238.

16 Resolution 487,3.

plays an integral role in the treaty's implementation¹⁷. The inspection regime was the focus of Council attention on three separate occasions.

In the 1980's the IAEA testified that the safeguards had been satisfactorily applied with regard to Iraq¹⁸.

In the early 1990's the SC was concerned by reports that Iraq had attempted to acquire materials for a nuclear-weapons programme contrary to its NPT obligations: a plan to be developed by the Director-General of the IAEA for the ongoing monitoring and verification should take into account both the obligations and the rights of Iraq under the NPT¹⁹.

In 1991 the Council affirmed that Iraq's failure to comply with its safeguards agreement with the IAEA constituted "a breach of its international obligations"²⁰ and condemned it as "a violation of its commitments" as party to the NPT²¹.

Iraq's incomplete notifications and concealment of activities, and its refusal of access to designated sites were material and unacceptable breaches of its obligations under resolution 687 and of its acceptance of the relevant provisions of that resolution which established the cease-fire²². In the operative paragraphs Iraq's "serious violation" of a number of its obligations under Section C of resolution 687 were condemned as "a material breach of the relevant provisions of resolution 687 which established a cease-fire"²³.

17 PRST of 31.1.1992 and Resolution 825, preamble.

18 Resolution 487, preamble.

19 Resolution 687, preamble and C, 13.

20 Resolution 707, preamble.

21 Resolution 707, 2.

22 PRST of 6 July 1992.

23 Resolution 707,1.

In 1996 the same refusal of access was described as a clear and flagrant violation of the provisions of 687 and subsequent resolutions²⁴ amounting to “gross violations” two months later²⁵.

In 1998 the Council condemned Iraq’s decision to suspend cooperation with the UN Special Commission and the IAEA as a “totally unacceptable contravention of its obligations” under the relevant resolutions and the MOU of 23 February 1998²⁶ and the subsequent decision to cease cooperation with the UN Special Commission as a flagrant violation of previous resolutions; it did not add any qualification with regard to the continued restrictions on the work of the IAEA²⁷.

In Resolution 1441 the accumulation of inaccurate and incomplete disclosure of information required, repeated obstruction of access to sites, absence of international inspections since December 1998 and non-compliance with commitments on terrorism²⁸ led the Council to decide that Iraq had been and remained in material breach of its obligations under relevant resolutions²⁹. The Council specified in particular failure of cooperation with UN inspectors and the IAEA and non-completion of the actions required under paragraphs 8 to 13 of Resolution 687. Any false statement or omissions in the declarations required now and failure to comply with and cooperate fully in the implementation of this new resolution would constitute a further material breach of Iraq’s obligations³⁰.

In the preamble of resolution 1441 the Council recalled its earlier declaration in paragraph 33 of resolution 687 that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution,

24 Resolutions 1115,1 and 1205,1; PRST/1996/11 and PRST/1996/28; Resolution 1060,1 refers to it as a clear violation.

25 PRST/1996/36.

26 Resolution 1194, 1.

27 Resolution 1205, 1 and 2.

28 Resolution 1441, preambular paragraphs.

29 Resolution 1441, 1.

30 Resolution 1441,4.

including the obligations on Iraq therein. This coupled with the demand that Iraq would confirm within seven days its intention to comply fully with this resolution³¹ could lend support to the view of the consensual nature of the cease-fire as an agreement governed by international law, over and above it being contained in a binding resolution adopted under Chapter VII. Although in this line of reasoning it would then be possible to consider the use by the Council of the term “material breach” in the perspective of article 60 of the Vienna Convention as its drafters intended it, one can only agree with TOMUSCHAT that Iraq’s acceptance of Resolution 687 did not transform the resolution into “a bilateral instrument”³².

Except in those cases where the relevant treaty or agreement is actually identified by the Council in its pronouncements on a material breach, condemnation of conduct as “material breach of its obligations” under a set of resolutions indirectly refers back to conventional obligations, and this only to the extent that they were included in those previous resolutions as sources of obligations resting upon a State irrespective of such inclusion.

In 1993 the Council considered with regret the IAEA Board of Governors’ findings that the Democratic People’s Republic of Korea (DPRK) was in non-compliance with its obligations under the IAEA - DPRK safeguards agreement³³.

When the DPRK informed the Council of its intention to withdraw from the NPT, the Council expressed its concern and called upon the DPRK to reconsider its announcement.

After the US, the UK and the Russian Federation as the depositories to the Treaty questioned whether the DPRK’s stated reasons for withdrawing from the Treaty constituted extraordinary events relating to the subject-matter of the Treaty, the Council noted

31 Resolution 1441, 9.

32 C. TOMUSCHAT, *Obligations arising for States without or against their will*, tome 241, RCADI, 1993-IV, pp. 195-374, at p. 243.

33 Resolution 825, preamble.

that the DPRK has expressed its willingness to seek a negotiated solution to the issue³⁴.

After the DPRK decided to suspend the effectuation of its withdrawal separate agreements were concluded with the IAEA (February 1994) allowing inspectors to complete their activities and with the US (October 1994)³⁵. In November 1994 the SC noted with satisfaction the DPRK's decision to remain a party to the NPT and to come into full compliance with the IAEA safeguards agreement³⁶.

Status of Forces Agreements

Whereas in 1990 the early conclusion of SOFAs was considered as merely facilitating successful and safe deployment and functioning of Peacekeeping operations (PKO)³⁷ only a few years later the Council made it clear that when considering the establishment of a PKO it would require that an agreement on the status of the operation in the host country be negotiated expeditiously and should come into force as near as possible to the outset of the operation³⁸.

The Council has constantly been calling for the prompt³⁹ conclusion of the SOFA or status of mission agreement⁴⁰, sometimes before the elapse of a particular deadline⁴¹ as recommended by the General Assembly⁴². Occasionally the

34 Ibidem.

35 PRST/1994/13.

36 PRST/1994/64

37 PRST of 30.5.1990.

38 Resolution 868,6, (c).

39 Resolutions 937,8 and 968,7.

40 In case of a more or less unwilling partner, the call for the conclusion of the SOFA is addressed to the SG: resolution 1246,6 on the situation in East Timor and 862,5 on the situation in Haiti.

41 Resolutions 976,13; 1291,10; 1159,19; 1270,16; 1289, 16; 1320, 6 and 1509,7.

42 General Assembly Resolution 52/12,B, paragraph 7.

Council did postpone the deployment of elements of a particular mission⁴³.

Clearly the successful and safe deployment of PKOs gave rise to the “urgent need to realise immediate international co-operation”⁴⁴.

On every occasion the Council made it perfectly clear that, pending the conclusion of the agreements, the model SOFA dated 9 October 1990 would provisionally apply⁴⁵.

The recommendation for provisional application, unless otherwise agreed by the parties, was contained in the Secretary-general’s 1997 report on renewing the UN and was endorsed by the GA in its resolution 52/12,B, and paragraph 7 adopted without a vote on 19 December 1997.

Such provisional application of SOFAs, unless otherwise agreed by the parties and apparently taken for granted by the Council is based upon Member states having endorsed the SG recommendation to that effect. In the absence of an explicit provisional clause in the SOFA, the obligation to provisionally apply the SOFA arises from this support for Resolution 52/12,B⁴⁶, this being one of the other manners negotiating States and International Organisations could agree on provisional application according to article 25 of the Vienna Conventions.

There is thus no separate need for the Council to exercise its Chapter VII powers to bring such an obligation into existence.

The determination of the sc to obtain strict respect applies equally to both SOFAs and status of mission agreements. This was illustrated with respect to Croatia⁴⁷ and when the Council noted

43 Resolution 1118,10.

44 I. SINCLAIR, *The Vienna Convention on the Law of Treaties*, second edition, Manchester University Press, 1984, 270 pages at p. 46 on the reason in general for provisional application.

45 Resolutions 1163,5; 1185,7; 1215,4; 1291, 10; 1159,19; 1270, 16; 1289,16 and PRST/2002/1.

46 See in general terms A. AUST, op. cit., at p. 139.

47 Resolution 994, preamble.

with concern the continued violations of the model SOFA, which Ethiopia has signed and Eritrea has merely agreed to respect⁴⁸, although its duty to conclude a SOFA had been incorporated into the Algiers Agreement⁴⁹. The government of Rwanda and UNAMIR were urged to continue to implement the Status of Mission Agreement of 5 November 1993 and any subsequent agreement concluded to replace that agreement in order to facilitate the implementation of the new mandate⁵⁰.

Outstanding difficulties should be resolved within the framework of an existing SOFA with the relevant authorities⁵¹.

Because of a “consistent pattern as to the applicable norms” and to the manner they should be implemented and by virtue of the fact that the UN is the recurrent party SOFAs may be considered to transcend the legal character and confines of mere contract-treaties and to “be considered as treaties on a par with law-making treaties, that is, in so far and to the extent to which they share the potential of the latter to generate customary international law”⁵².

Framework Agreements and pacta de contrahendo/negotiando

The long standing nature of the disputes and situations before the Council, the complexity of the issues involved and the time needed to reach an acceptable and lasting solution all contribute to the frequent occurrence of framework agreements and pacta de

48 Resolution 1466, preamble.

49 Resolution 1369,5, (e).

50 Resolution 997,7.

51 PRST/1995/40: call upon the Governments of Bosnia and Herzegovina and of Croatia.

52 The reasons invoked by M. ZIECK with regard to the Special Agreements with UNHCR may be invoked here as well: M. ZIECK, UNHCR’s ‘Special Agreements’, in J. KLABBERS and R. LEFEBER, *Essays on the Law of Treaties. A Collection of Essays in Honour of Bert Vierdag*, M. Nijhoff Publishers, The Hague, Boston, London, 1998, 204 pages, pp. 171-187 at pp. 185 and 187.

contrahendo/negotiando, “to arrange the consequences of success or failure after a war had been fought”⁵³. Ceasefire agreements would normally at least create the expectation that further agreements are to follow.

Examples do include the General Framework Agreement for Peace in Bosnia Herzegovina and the Annexes thereto⁵⁴, the OAU Framework Agreement and the Algiers Comprehensive Peace Agreement as the basis for a peaceful resolution of the border dispute between Eritrea and Ethiopia⁵⁵, the Agreement on the normalization of the relations between the Republic of Croatia and the Federal republic of Yugoslavia committing the parties to settle peacefully the disputed issue of Prevlaka by negotiations in the spirit of the Charter of the UN and good-neighbourly relations⁵⁶ and of course the Declaration on Principles signed by Israel and the PLO in Washington on 13 September 1993⁵⁷.

While the Council has welcomed and endorsed these framework agreements and monitored the subsequent negotiations on the agreements to be reached, it did not elaborate on or clarify the legal rights and obligations to which these framework agreements could be considered to give rise⁵⁸.

Memoranda of Understanding

When in the aftermath of armed conflict the UN becomes involved in the post-conflict peacekeeping or peace-building process there

53 A. AUST, op. cit., Foreword, at p. XV.

54 Collectively the Peace Agreement, Resolution 1491, preambular paragraph.

55 Resolutions 1226,5 and 1369.

56 Resolution 1183, preamble.

57 Resolution 904,5 and PRST/1996/3. On the DOP as a treaty see inter alia E. BENVENISTI, *The Israel-Palestinian Declaration of Principles: A Framework for Future Settlement*, EJIL, vol. 4, 1993, pp. 542-554. and A. CASSESSE, *The Israel-PLO Agreement on Self-Determination*, EJIL, vol. 4, 1993, pp. 564-581.

58 See for the ICJ's position the Interhandel case as referred to by J. KLABBERS, op. cit., at p. 194.

is, in addition to SOFAs, a need for practical arrangements to render such involvement operational. Most frequently Memoranda of Understanding⁵⁹ may thus be concluded between the SG, one of his representatives and the host country⁶⁰, between a country and a UN agency⁶¹, a refugee repatriation Protocol between the interested States and the Office of the UNHCR⁶² or a Transitory Administration⁶³.

MOUs may also be concluded between the UN and de facto authorities⁶⁴ or between a UN agency and local authorities⁶⁵.

An exchange of letters of 7 October 1993 between the SG and the Chairman of ECOWAs defined the respective roles and responsibilities of the two missions in Liberia⁶⁶.

With respect to the situation in Georgia the two sides, the Special representative of the SG and the commander of the collective Peacekeeping Forces of the Commonwealth of Independent States (CIS) signed a protocol related to the stabilization of the situation in the security zone⁶⁷.

There can be no doubt that the Council considers the MOUs and other similar arrangements to be binding on the parties concerned. The Council stressed the importance of full

59 On the notion which in AUST's view refers to a legally non-binding instrument see *op. cit.*, at p. 4 and pp. 24-26.

60 MOUS of 20 May 1996 and of 23 February 1998 with Iraq: resolutions 1194, preamble and 1352, preamble.

61 MOU of 14 October 1999 between Indonesia and UNHCR: PRST/2000/26.

62 Resolution 1215,3 on the Western Sahara.

63 Indonesia with UNTAET on 6 April 2000 on legal, judicial and human rights matters, and their MOU of 11 April on tactical coordination, and the establishment on 5 July 2000 of a Joint Border Commission: PRST/2000/26.

64 With the Taliban on humanitarian issues: PRST/1998/22.

65 PRST/2000/26.

66 PRST/1994/53.

67 Resolution 1311, preamble.

implementation⁶⁸ and it considered a decision to suspend cooperation to be an unacceptable contravention of the MOU⁶⁹.

SECTION TWO: THE DUTY TO NEGOTIATE IN GOOD FAITH

As the mere maintenance of a status quo such as on Cyprus does not constitute a solution to a dispute⁷⁰, its settlement should be negotiated, just and lasting⁷¹.

Once a Council recommendation to negotiate⁷² has been accepted by the parties, the Court would consider it to be a *pactum de negotiando*⁷³. Council pronouncements on the duty to negotiate in good faith towards the adoption of a treaty or an agreement are in line with international judicial law. While courts and tribunals are not that frequently called upon to assess the way parties have been performing that duty, the Council has ample opportunity to do so.

The interlocutors have, in accordance with article 7 of the Vienna Convention, to be authorized to engage in fruitful discussions on all essential aspect of a settlement⁷⁴.

The principle of free consent is universally recognized, as stated in the preamble of the Vienna Convention. However, in the absence of negotiations being initiated the Council may consider the imposition of coercive measures to bring parties to the negotiating

68 PRST/1998/22.

69 Resolution 1194,1.

70 PRST of 23.12.1991.

71 PRST of 9.6.1989.

72 See for instance resolution 135,1 on the question of the relations between the Great Powers.

73 J. KLABBERS, op. cit., at p. 177 on the PCIJ case concerning the Railway Traffic between Lithuania and Poland (Railway sector Landwarów-Kaisiadorys).

74 Resolution 383, preamble.

table⁷⁵ and it may hold responsible any party that refuses to take part in a dialogue⁷⁶.

The time element inherent in threats to peace and security⁷⁷ explains why the Council urges parties to embark upon negotiations immediately⁷⁸, promptly⁷⁹, without delay⁸⁰ and it also has an impact on the duration of the negotiating process. Although in the majority of cases the Council expects parties to reach agreement not before too long, it sometimes even fixes a particular deadline⁸¹. While it may express its impatience over the protracted nature of the negotiations, the Council also demonstrates a realistic approach when dealing with long-lasting and/or very complex situations, where assistance by a third party deserves time to come to fruition⁸². In other cases parties were urged to pursue uninterrupted negotiations at the UN Headquarters until an overall framework agreement is reached⁸³.

Parties have to take all necessary measures to facilitate negotiations⁸⁴. This evidently implies first of all that parties have to receive documents the purpose of which is to facilitate meaningful negotiations⁸⁵ and also a duty to refrain from any unilateral or other action that might jeopardize the process or prejudice the outcome of the negotiations⁸⁶.

75 Resolution 1072, B, 11.

76 Resolution 785,9.

77 See K. WELLENS, op. cit., *Journal of Conflict and Security Law*, pp. 12-13.

78 Resolution 660, 3.

79 Resolution 1183,4.

80 Resolution 1320,4.

81 Resolution 67,3; PRST/1994/52 on Angola.

82 PRST/1994/45 on Angola.

83 Resolution 774,6.

84 Resolution 693, preamble.

85 Resolution 1494 on the situation in Abkhazia, Georgia, paragraphs 5 and 6 referring to Basic Principles for the Distribution of Competences between Tbilisi and Sukhumi finalized by the Group of Friends of the SG.

86 Resolutions 367,8; 391,3; 401,3 and 422,3 on the situation in Cyprus and PRST/1998/2 on the permanent status negotiations covering the issue of Jerusalem.

Although parties should not attach pre-conditions to their participation in negotiations⁸⁷ the Council itself has, with regard to the Palestine question, identified conditions that, after a cease-fire, may well be considered as the basis for further negotiations⁸⁸.

Negotiations have to be conducted without undue pressure being exercised upon the parties for instance by way of the protracted presence of foreign troops on the territory of one of the parties⁸⁹.

The Council requests parties to regularly report on the progress made during the process⁹⁰ and this enables it to assess whether they have negotiated constructively⁹¹ have indeed displayed maximum political will⁹² and flexibility, in a reciprocal spirit of understanding and moderation⁹³ taking into account not only their own interests but also the legitimate aspirations and requirements of the opposing side⁹⁴. Negotiations have to be comprehensive covering all issues on the table⁹⁵.

The aim of achieving a lasting, comprehensive, just and honourable/equitable settlement⁹⁶ will require concessions from both sides⁹⁷.

As negotiations with armed groups on access of humanitarian and UN agencies to persons in need have proven to be rather difficult, the Council encouraged the work by UN agencies to

87 Resolutions 882, preamble; 348,2, (d) and 1250,7.

88 PRST of 19.10.1948.

89 Resolution 3 and the Decision of 29 March 1946 on the Iranian question.

90 Resolutions 2 and 1285,5.

91 Resolution 1183, 4.

92 PRST/1994/47.

93 Resolution 367,6.

94 Resolution 391, preamble.

95 Resolution 1250,5 and 7.

96 Resolution 514,4 and PRST of 22 July 1993.

97 Resolution 370, preamble; resolutions 1427,5 and 1494, 7 on the situation in Abkhazia, Georgia.

prepare a manual of field practices of such negotiations to facilitate more effective negotiations⁹⁸.

SECTION THREE: APPEALS TO DRAFT OR TO CONCLUDE A
TREATY AND THE IMPOSITION OF COERCIVE MEASURES

Pending the coming into force of the special agreements under article 43, “as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under article 42” consultations were foreseen in article 106 between the Permanent Members of the Council “with a view to such joint action on behalf of the Organisation as may be necessary for the purpose of the maintenance of international peace and security”. Although the transition period has not yet ended, the recent method of the Council “authorizing member states to take enforcement measures autonomously made it neither necessary nor possible to have recourse to art. 106”⁹⁹ These “transitional security arrangements” still do apply.

After the end of the Cold War the Secretary-general (SG) recommended that the SC should take the initiative for negotiation of the agreements to be concluded between the Council and Members or groups of Members as foreseen in article 43, paragraph 3¹⁰⁰. Their absence did not leave the Council “impotent in the face of an emergency situation” as the Court pointed out¹⁰¹ and separate ad hoc stand-by agreements have been concluded since the mid 1990’s between the SG and several individual Member States, an initiative welcomed by the SC¹⁰². The SC called upon

98 PRST/2002/41.

99 Geiger, article 106 in B. SIMMA, (Ed.), *The Charter of the United Nations. A Commentary*, Second edition, Oxford University Press, 2002, 1328-1329, MN 12-13.

100 Agenda for Peace, A/47/277 (S/24111) at 12-13.

101 Certain Expenses of the United Nations (article 17, paragraph 2, of the Charter), Advisory opinion of 20 July 1962: ICJ Reports 1962, p. 151, at 167.

102 PRST/1994/22.

states to participate in the stand-by arrangements the further enhancement of which was a first priority in improving the capacity for rapid deployment of PKOs¹⁰³, but that is still a far cry from the agreements foreseen in article 43.

In 2001 the Council recognized that its partnership with troop-contributing countries could be strengthened through the assumption by Member states of their shared responsibility “to provide personnel, assistance and facilities to the United Nations for the maintenance of international peace and security”¹⁰⁴, a fundamental obligation laid down in article 43, paragraph 1.

In contrast with other main organs of the UN the SC has no general mandate or specific competence to encourage the progressive development of international law and its codification (article 13,1,a) or to prepare draft conventions for submission to the General Assembly with respect to matters falling within its competence (article 62 on ECOSOC). It has nevertheless throughout its history made repeated calls upon States in general to draft and conclude both law-making treaties and contract-treaties.

Law-making treaties

In this category two main areas of international law became the subject of such calls, although at different intervals: arms control and terrorism

Partially exercising its responsibility under article 26 of the Charter, the Council urged the Atomic Energy Commission in due course to prepare and submit to it a draft treaty or treaties or convention or conventions incorporating its ultimate proposals¹⁰⁵. Many years later the Council urged Member States to participate, in a positive spirit and on the basis of the agreed mandate, in

103 PRST/1995/9.

104 Resolution 1353, Annex I, A, paragraph 1.

105 Resolution 20, 3.

negotiations at the Conference on Disarmament in Geneva on a treaty banning the production of fissile material for nuclear weapons or other nuclear explosives devices, with a view to reaching early agreement¹⁰⁶.

The Council also urged all states, as provided for in article VI of the NPT, one of the cornerstones of the international regime on the non-proliferation of nuclear weapons and an essential foundation for the pursuit of nuclear disarmament¹⁰⁷ to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament¹⁰⁸.

While other International Organisations (IOs) are urged to intensify their work on devising an international regime for the marking of plastic or sheet explosives for the purpose of detection¹⁰⁹, Member States of the UN were encouraged to cooperate in resolving all outstanding issues with a view to the adoption, by consensus, of the draft comprehensive convention on international terrorism and the draft international convention for the suppression of acts of nuclear terrorism¹¹⁰.

Suffice it to mention at the global level that the Council also noted the absence of a comprehensive protection regime for internally displaced persons¹¹¹. The Council also welcomed the negotiation process on the elaboration of an international convention against transnational organized crime, including a draft protocol against the illicit manufacturing of and trafficking in firearms, ammunition and other related materials¹¹² and the establishment of a UN Group of Governmental Experts with a

106 Resolution 1172,14.

107 Resolution 1172,10.

108 Resolution 984,8.

109 Resolution 653,4.

110 Resolutions 1269,2 and 1456, Annex, 13.

111 PRST/2000/1.

112 PRST/1999/28 and resolution 1209.

mandate to examine the feasibility of developing an international instrument to enable states to identify and trace in a reliable manner illicit small arms and light weapons¹¹³.

Contract-treaties

Under contemporary international law, a “peace treaty forced on a state which has been the victim of aggression would be void”¹¹⁴, but pursuant to its article 75 the provisions of the Vienna Convention “are without prejudice to any obligation in relation to a treaty which may arise for an aggressor state in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State’s aggression”. A treaty imposed by the UN would not be void under article 52¹¹⁵. The Council has not hesitated to impose coercive measures upon recalcitrant States and other parties concerned in order to make them accept a peace plan or to sign a treaty¹¹⁶. It has expressed its readiness to reconsider measures if proposed territorial settlements are accepted unconditionally and in full¹¹⁷ and an agreement has been formally signed¹¹⁸, while maintaining its intention to reimpose measures if one of the parties would fail to do so¹¹⁹.

Subsequent formal acceptance by one party of a complete set of proposals may avert the imposition impose of additional measures¹²⁰, which the Council previously had decided, at least

113 PRST/2002/30.

114 A. AUST, *op. cit.*, at p. 257.

115 I.SINCLAIR, *op. cit.*, at p. 180.

116 Resolution 820,A, 3 and B, 10.

117 Resolution 942,1.

118 By Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia of the Peace Agreement for Bosnia and Herzegovina: 1021,1. On the unique arrangements of adoption and entry into force by the signature of an agreement on initialling see A.AUST, *op. cit.*, at p. 79.

119 Resolution 1022,1.

120 Resolution 945,5.

for the time being, not to impose given the direct negotiations between the parties¹²¹.

Accession by States to a set of particular conventions for the elimination of terrorism may result in the termination of coercive measures that were designed to make States take that step¹²².

On various occasions the SC did not fail to welcome the signing of treaties on a variety of issues such as the practical modalities for the implementation of a judgement of the ICJ¹²³, on ending foreign intervention in an internal armed conflict¹²⁴, the establishment of a Special Court¹²⁵, the settlement of a long-standing dispute after an earlier annexation of territory¹²⁶, the accession by a provisional administration to a number of international human rights conventions¹²⁷ or a dispute about the name of one of the parties¹²⁸.

SECTION FOUR: APPEALS TO BECOME PARTIES TO OR TO RATIFY A TREATY OR TO RECONFIRM COMMITMENTS

Apart from calls for new conventions to be concluded and the particular categories mentioned in Section One, the Council has sometimes launched an appeal to States to become parties to particular treaties such as those against the taking of hostages, prevention and punishment of crimes against internationally

121 Resolutions 890,14; 903,10 and 922,7.

122 Resolution 1372.

123 Resolution 910, preamble.

124 Pretoria Agreement on 30 July 2002 and Luanda Agreement on 6 September 2002 between the DRC and respectively Rwanda and Uganda: resolution 1445,1 and PRST/2002/24.

125 Between the UN and Sierra Leone: resolution 1400, preamble and para. 9.

126 Between Indonesia and Portugal on 5 May 1999 on the question of East Timor: 1236,1.

127 Resolution 786, preamble.

128 PRST/1995/46.

protected persons, including diplomatic agents¹²⁹, conventions designed to address the problems of refugees¹³⁰ or those relating to terrorism¹³¹.

Although the signing of a treaty does not impose an obligation to ratify it, the Council made calls upon States in general to ratify the major instruments of international humanitarian, human rights and refugee law¹³² or the Protocol adding article 3bis to the Chicago Convention on Civil Aviation. In the latter case the Council urged them to comply with all the provisions of the article pending the entry into force of the Protocol¹³³ thus extending the scope of the obligation provided for in article 18 of the Vienna Convention. In special cases individual states were invited to ratify a particular Convention such as the 1972 Bacteriological Weapons Convention¹³⁴, “an absolutely novel procedure” as entering into a treaty commitment “is a sovereign decision of each state”¹³⁵.

A procedure unforeseen in the Vienna Convention is the reconfirmation of commitment to a treaty. The Members of the SC reconfirmed their commitment to the UN Charter¹³⁶ and the Council as such pledged to uphold the purposes and principles of the Charter of the UN¹³⁷.

The sc invited Iraq to reaffirm unconditionally its obligations under the 1925 Geneva Protocol and under the NPT¹³⁸ and it requested the SG to convene a meeting of the Israel-Lebanon mixed

129 Resolutions 579, 4 and 638,5.

130 PRST/1997/34.

131 Resolutions 1269,2; 1373,3, (d) and 1456, Annex 2.

132 Resolution 1265,5 and PRST/2000/1.

133 Resolution 1067,7.

134 Resolution 687,C, 7.

135 C. TOMUSCHAT, op. cit., at p. 242.

136 PRST of 17.1.1986 and of 31.1. 1992.

137 Resolution 1318, Annex, I.

138 Resolution 687,C, 7 and 11.

Armistice Commission to *reactivate* the General Armistice agreement¹³⁹.

SECTION FIVE: THE SUBSTANTIVE CONTENT OF A TREATY

The substantive content of treaties, is normally “a matter for the parties to the treaty”¹⁴⁰. Although the Council has never exercised its competence, under article 38 of the Charter, if all the parties to any dispute so request, to make recommendations to the parties with a view to its pacific settlement, the scope of its involvement stretches from identifying the fundamental principles which should be included in a particular agreement to making an agreement subject to its explicit endorsement or approval.

The Council may limit itself to welcoming that parties will take into account particular treaties (OAU Charter, colonial treaties and international law applicable to such treaties)¹⁴¹ when reaching a mutually agreeable and binding border agreement.

It may also set out the requirements any settlement should meet¹⁴² or it may, after merely urging the parties to bear in mind previous resolutions¹⁴³ identify what the fundamental principles of a particular settlement are as a framework for the parties¹⁴⁴ who are not allowed to introduce concepts that are at variance with them¹⁴⁵. Once the SG has put forward a carefully balanced plan it would provide a unique basis for further negotiations¹⁴⁶.

139 Resolution 467,8.

140 A. AUST, *op. cit.*, at p. 7.

141 Resolution 1177, preamble.

142 Resolution 118.

143 Resolution 440,3.

144 Resolution 716,3.

145 Resolution 716,5. Apparently there was a need for the Council to reconfirm its position: resolutions 774,2 and 1092,14.

146 Resolution 1475,4.

The most prominent example of the Council identifying principles the application of which should be included in any future peace agreement is of course to be found in resolution 242¹⁴⁷ in which the SC further affirmed the necessity of additional guarantees¹⁴⁸. A peaceful and accepted settlement should be achieved in accordance with the provisions and principles of resolution 242¹⁴⁹. In subsequent years and also in its most recent PRSTs the Council made it clear that a just, lasting and comprehensive settlement should be based upon all its relevant resolutions, including 242, 338 and 1397, the Madrid terms of reference and the principle of land for peace¹⁵⁰.

The process of post-building peace building would normally require the inclusion within peace agreements of clear terms of disarmament, demobilisation and reintegration of ex-combatants¹⁵¹, especially child combatants¹⁵².

Furthermore, all actors involved are called upon, when negotiating and implementing peace agreements, to adopt a gender perspective¹⁵³.

In case of peace negotiations that are likely to provide for the deployment of UN peacekeepers the SG has to report to the SC on whether the provisions of a peace agreement meet the minimum

147 “(i) Withdrawal of Israel armed forces from territories occupied in the recent conflict; (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force”: resolution 242,1.

148 For freedom of navigation through international waterways in the area, a just settlement of the refugee problem and for the territorial inviolability and political independence of every State in the area: resolution 242, 2.

149 Resolution 242,3.

150 PRST/2002/20.

151 PRST/1999/21.

152 Resolutions 1314,11 and 1379,8, (e).

153 Resolution 1325,8.

conditions, including the need for a clear political objective, the practicability of the designated tasks and timelines, and compliance with the rules and principles of international law, in particular humanitarian, human rights and refugee law¹⁵⁴. Whereas in 2000 the SC merely underlined the importance that specific and practical measures based on the 1994 Convention on the Safety of UN and Associated Personnel should be included in the SOFAs¹⁵⁵, after the attack against the Headquarters of the UN Assistance Mission in Iraq on 19 August 2003, the Council, following up an earlier recommendation by the General Assembly¹⁵⁶ requested the SG to seek the inclusion of and host countries to include key provisions of the Convention in future, as well as, if necessary, existing SOFAs, status-of-missions and host country agreements¹⁵⁷.

In peace negotiations sponsored or supported by the UN the SC encourages early consideration of humanitarian elements¹⁵⁸.

With regard to refugee law the SC called upon African States further to develop institutions and procedures to implement the provisions of the OAU convention, especially those relating to the location of refugees at a reasonable distance from the frontier of their country of origin and the separation of the refugees from other persons who do not qualify for international protection afforded to refugees or otherwise do not require international protection¹⁵⁹.

On a very different matter the SC defined the contents of the instrument by which States that are not members of the UN may become a party to the Statute of the ICJ¹⁶⁰.

154 Resolution 1327,I.

155 PRST/2000/4.

156 Resolutions 57/28 of 19 November 2002, paragraph 3 and 57/155 of 16 December 2002, paragraph 11.

157 Resolution 1502, paragraph 5, (a).

158 PRST/2000/7.

159 Resolution 1208,4.

160 Resolutions 11, 71, 102, 103 and 600.

SECTION SIX: APPROVAL OF A TREATY

Pursuant to article 83, paragraph 1 of the Charter, the SC, having satisfied itself that the relevant Articles of the Charter have been complied with, in Resolution 21 resolved to approve the terms of trusteeship for the Pacific Islands formerly under mandate to Japan.

In some cases the SC, after examination, explicitly records its approval of relevant treaty documents such as the annexes to the proposed Peace Treaty with Italy relating to the creation and government of the Free Territory of Trieste¹⁶¹. In other cases, the Council endorses declarations signed between a Transitional Administration and governments of other States¹⁶², or agreements between States and other International Organisations¹⁶³, or between parties concerned¹⁶⁴. In still other cases the SC expresses its full support for peace agreements reached¹⁶⁵.

As the Council had established the ICTR as its subsidiary organ it was only natural that the appropriate arrangements between the UN and the Government of the United Republic of Tanzania on the seat of the Tribunal had to be acceptable to the Council¹⁶⁶.

Except for the Trusteeship Agreement these various modalities of Council 'approval' are situated on the political level, and do not

161 Resolution 16.

162 Kabul Declaration on good-neighbourly relations signed by the Transitional Administration of Afghanistan and the Governments of China, Iran, Pakistan, Tajikistan, Turkmenistan and Uzbekistan on 22 December 2002: resolution 1453,1.

163 The 1998 Belgrade agreements between the FRY and the OCSE and between the FRY and NATO: resolution 1203,1 and PRST/2001/11.

164 Bonn Agreement of 5 December 2001 on provisional arrangements in Afghanistan; resolution 1383, preamble and paragraph 1.

165 The Paris Agreements on Cambodia: resolution 718,4; 1344, preamble on the Comprehensive Peace Agreement between Eritrea and Ethiopia signed in Algiers on 12 December 2000; 1509,preamble on the Comprehensive Peace Agreement reached by Liberia's Government, rebel groups, political parties and civil society leaders in Accra on 18 August 2003.

166 Resolutions 955,6 and 977.

correspond in any way to the ‘approval’ envisaged by article 14, (3) of the 1986 Vienna Convention.

SECTION SEVEN: IMPLEMENTATION OF A TREATY AND THE
RES INTER ALIOS ACTA RULE

Normally parties to a treaty are each other’s custodes, and the *res inter alios acta* rule applies: pursuant to article 34 of the Vienna Convention a treaty cannot “by its own force, impose an obligation on a third state, nor modify in any way the legal rights of a third state without its consent”¹⁶⁷. The potential or real impact of a dispute or a situation on the maintenance of international peace and security inevitably entails SC involvement in the supervision of the implementation of the terms of the treaties and agreements concerned. The Charter-based obligation for States not to conduct themselves in such a way as to cause a threat to international peace and security¹⁶⁸ has an *erga omnes* character. Its expression through Articles 24 and 25 of the Charter, it could be argued, also attributes to the Council the power, if considered to be necessary in the exercise of its primary responsibility, to bypass, or to render inoperative, on a temporary basis, the *res inter alios acta* rule with regard to other treaties to which Member States are not parties.

It may be argued that the more detailed rules and norms to render that fundamental Charter-based obligation operational on a daily basis such as the NPT or treaties and agreements with the specific object and purpose of maintaining or restoring international peace and security share that permanent *erga omnes* character. It may also be argued that, in many cases, other treaty and agreement provisions do acquire, albeit on a temporary basis, an *erga omnes* character, because of the international community’s involvement working through the SC. This would obviously apply to those cases

167 A. AUST, op. cit., at p. 206.

168 See K. WELLENS op. cit., in *Journal of Conflict and Security Law*, at pp. 29 and 40.

where the bypassing of the *res inter alios acta* rule is not limited to a few neighbouring states but reaches out to all States of the international community, thus coming close to making those treaties “objective regimes”, the Council acting as trustee of the international community¹⁶⁹, deriving its specific authority directly from the Charter.

The role of the parties themselves

There can be no doubt that full support of the Council for an agreement also implies that it will follow closely the developments in its implementation¹⁷⁰.

Because of its role in the maintenance of international peace and security such monitoring may differ from that exercised by other bodies entrusted with supervising treaty implementation. The SC may be satisfied when the SG reports that parties have made sufficient and tangible progress implement a peace agreement¹⁷¹ or it may require more and will not allow any difficulty arising to delay the timetable for implementation¹⁷² as many delays and a climate of mutual suspicion, if to continue, could jeopardize the very foundation of agreements¹⁷³. Concern about obstacles to the smooth and timely implementation¹⁷⁴ does not diminish the Council’s determination to maintain the implementation timetable of the peace process¹⁷⁵. On other occasions a revised

169 C. TOMUSCHAT but referring to the Parties to the Antarctic Treaty: *op. cit.*, p. 247.

170 Resolution 628,2 on the tripartite Agreement between the People’s Republic of Angola, the Republic of Cuba and the Republic of South Africa and the bilateral Agreement between the former two. See also resolution 1507,7 on the Algiers Agreement between Ethiopia and Eritrea.

171 Resolution 898,20.

172 Resolution 766, preamble.

173 PRST of 3.6.1992.

174 Resolution 728, preamble.

175 Resolution 792, preamble.

implementation calendar may be important and be dictated by the circumstances on the ground¹⁷⁶.

Once a cease-fire or peace agreement has been signed and has entered into force the call for full implementation of the letter and the spirit of an agreement¹⁷⁷ in good faith¹⁷⁸ will of course first be addressed to the parties themselves. According to the Council implementation of agreement as between parties has to be strict¹⁷⁹, full¹⁸⁰ impartial¹⁸¹, and scrupulous¹⁸².

Ceasefire agreement should include appropriate modalities and mechanisms for their implementation¹⁸³ and parties should engage in a sincere dialogue to implement it¹⁸⁴. When addressing itself to the parties the Council may well draw their attention to such mechanisms aimed at facilitating implementation¹⁸⁵. Re-establishment of full compliance with Armistice Agreements represents a stage that had to be passed in order to make progress possible on the main issue between the parties¹⁸⁶.

176 PRST/2000/2.

177 Resolution 463,3.

178 Resolution 696, preamble.

179 Resolutions 55 and 612,1.

180 Resolution 616: later the Council stated that States should be merely guided by the principles, rules, standards and recommended practices laid down in the 1944 Chicago Convention on International civil Aviation: 1067, preamble and para. 6. Resolution 463,3; PRST/1996/42 and resolution 1269,2.

181 Resolution 463,3.

182 Resolutions 745,6; 729,5 and 1322,3.

183 PRST/1999/17.

184 PRST/2000/28.

185 E.g. the possibility of using the International Fact Finding Commission established by article 90 of the First Additional Protocol to the Geneva Conventions: resolution 1256,6; and the machinery provided for in the General Armistice Agreement between Israel and Jordan: resolution 127,6. After all, the parties to the various General Armistice Agreements have given assurance to the SG – during his survey of the various aspects of enforcement and compliance with them (resolution 113,2) – that they would unconditionally observe the cease-fire (resolution 114, preamble).

186 Resolution 114,4.

Two recent developments deserve to be noted. With regard to international obligations on the recruitment or use of children in armed conflict, the SC expressed its intention to enter into dialogue, as appropriate, or to support the SG in entering into dialogue with parties to armed conflict in violation of such obligations, in order to develop clear and time bound action plans to end this practice¹⁸⁷. Although reference is made to violations of obligations, the procedure the SC seems to have in mind could contain elements resembling to non-compliance procedures in branches of international law such as human rights, disarmament or environment.

Also with regard to the recruitment or use of children in armed conflict, the SC called upon the parties identified in a list by the SG to provide information on the steps they have taken to halt such practices¹⁸⁸. The reliance by the SC upon the identification of such parties by the SG constitutes a novel approach that fits in with similar instances in the area of illegal exploitation of natural resources during armed conflict.

Sometimes the SC commends States for their unflagging adherence, in difficult circumstances, to the conventions relating to the status of refugees and of stateless persons¹⁸⁹ or non-state parties for their expressed readiness to sign and observe a cease-fire agreement¹⁹⁰.

The role of other parties to a treaty

Particular mention should be given to Resolution 681, paragraph 5 in which the Council called upon the High Contracting Parties to the Fourth Geneva Convention, to ensure respect by Israel, the occupying

187 Resolution 1460,4.

188 Resolution 1460,5.

189 Resolution 568, preamble.

190 Resolution 566, preamble.

Power, for its obligations under the Convention in accordance with article 1 thereof¹⁹¹.

With regard to the situation in Cyprus the Council in 1964 called upon the governments of Greece, Turkey and the UK, under the 1960 Treaty of Guarantee, as guarantors to the 1960 Treaty concerning the establishment of the Republic of Cyprus not only to enter into consultation with the Government of Cyprus on the composition and size of the Peacekeeping Force and on the designation of a Mediator¹⁹². In 1974 the guarantors were called upon also to enter into negotiations for the restoration of peace in the area and constitutional government in Cyprus¹⁹³, to restore the constitutional structure of the Republic of Cyprus, established and guaranteed by international agreements¹⁹⁴.

Under a correct interpretation of article 103 of the Charter the Council, in 1974, should have rejected Turkey's argument that its military intervention was allegedly justified as the 1960 guarantee Treaty did permit the unilateral use of force¹⁹⁵.

In other cases the Council encouraged the guarantors, facilitators and witnesses merely to provide their continued support for a peace process and to intensify their contacts with the authorities of both countries¹⁹⁶. Although the signing by a witness has no legal significance, it is a reflection of its involvement in the negotiations

191 It may be noted that in 1999 the Council requested the SG to identify contributions the Council could make towards effective implementation of existing international humanitarian law: PRST/1999/6. See further also e.g. C. Bourlyannis, The Security Council and the implementation of international humanitarian law, *Denver Journal of International Law and Policy*, Volume 22, 1992, pp. 335 ff.

192 Resolution 186, 4 and 7.

193 Resolution 353, 5.

194 Resolution 353, preamble.

195 I. Seidl-Hohenveldern, Hierarchy of Treaties, in J. KLABBERS and R. LEFEBER, op. cit., pp. 7-18 at pp. 16-17.

196 Resolutions 1398, 17 and 1430,2.

and an expression of concern that the performance of the treaty should be a success¹⁹⁷.

The role of third parties

The situation of threat to the peace and security from which in most cases the agreement originates may render active third-party involvement most desirable, if not inevitable, thus requiring a temporary lifting of the *res inter alios acta* rule.

The Council's commitment to work with the parties to implement fully a particular agreement, does not prevent that its successful implementation rests first and foremost on the will of those parties¹⁹⁸. Although the sheer importance of agreements may require a sustained and vigorous support of the international community at large for instance in the form of assuming the political, military and economic burden of the implementation¹⁹⁹ this support is conditioned upon the consistent good faith and constant effort of the parties²⁰⁰.

Council practice of modalities for third parties' involvement varies considerably, as both examples of non-interference and active participation present themselves.

Here a distinction could be made between calls for non-interference of any kind by "all others concerned"²⁰¹, where the SC refers to entities who are actively involved in the unfolding situation on the ground and similar calls upon States to refrain from any action which could undermine²⁰² or could jeopardize directly or indirectly the implementation of agreements²⁰³, the SC thereby clearly setting aside the *res inter alios acta* rule.

197 A. AUST, op. cit., at p. 80.

198 Resolution 1292, preamble.

199 Resolutions 1174,I, 2 and 1491,I, para. 2.

200 Resolution 1113,3.

201 Resolution 1203,8.

202 Resolution 696, preamble.

203 Resolution 793,8.

The Council may also call on Member States to actively cooperate in the implementation²⁰⁴ or on all States, in particular to those that have links with the region and interests in it, to back the political will of the countries concerned to comply with the provisions of an agreement²⁰⁵ or to contribute to such implementation²⁰⁶.

With regard to the Treaty between the United Nations and Sierra Leone on the establishment of the Special Court for Sierra Leone, it could be noted that whereas the mere call in 2002 to cooperate fully with this Special Court was addressed only to the Government of Liberia, in May 2003 the Council called upon all States, in particular the government of Liberia, to act likewise²⁰⁷. In resolution 1508 adopted on 19 September 2003 the Council urged all States to cooperate fully with the Court²⁰⁸.

With regard to the 2002 Kabul *Declaration* on Good-neighbourly relations referred to earlier, the Council called on all States to respect the Declaration and to support the implementation of its provisions²⁰⁹ thus clearly considering it to be binding and may be having an *erga omnes* character.

Strictly speaking the above examples do not exactly involve a treaty rule becoming binding upon a third state, neither are they calls by the Council for Member States to fulfil in good faith the obligations assumed by them in accordance with the present Charter as provided for in article 2, paragraph 2 of the Charter. We may rather witness the first steps of a development towards the

204 Resolution 628,3.

205 Resolution 637,4.

206 Resolution 696, preamble.

207 Compare resolutions 1408 and 1478, preambular paragraphs.

208 It may be noted that in its Application filed on 4 August 2003 the Republic of Liberia, seeking to bring proceedings before the ICJ against Sierra Leone, alleged that the “Special Court cannot impose legal obligations on States that are not a party to the Agreement between Sierra Leone and the United Nations of 16 January 2002”. (ICJ Press Release 2003/26).

209 Resolution 1453,2 and PRST/2003/7.

obligation to give the UN every assistance beyond enforcement action as understood in article 2, paragraph 5.

SECTION EIGHT: (NON)-IMPLEMENTATION OF A TREATY
AND THE *PACTA SUNT SERVANDA* RULE

In case of a unilateral commitment entered into by a State or another entity, addressed to the UN and dealing with a matter of international peace and security, the Council would be empowered to monitor its implementation²¹⁰. It is thus hardly surprising that by the nature of things in the majority of cases and situations where the SC has to deal with treaties there is a problem with their implementation²¹¹. One should add that on numerous occasions of course the Council refers to or reaffirms conventional obligations without specifying their exact source in treaty law.

The Council's basic position was made clear when it declared that any party, which fails to abide by all the commitments entered into, would face rejection by the international community²¹².

The way the Council has exercised scrutiny over the implementation of treaties and agreements indicates various degrees of severity, dictated by the importance of the treaties at hand, the particularities of each case and of course the political context of the day.

The time factor inherent in the notion of threat to the peace clearly plays a role in this respect. Practice indicates that the Council's response is more rigorous towards a situation that is

210 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, at 132, paras. 261-262 with regard to the OAs and a merely political pledge by Nicaragua.

211 One may note that the Council almost invariably refers to the implementation of treaties and agreements and does not use the duty to perform a treaty as a standard expression.

212 Resolution 685, preamble.

“characterized by widespread non-compliance with the stipulations of the agreements, both by standing departures from the agreed rules and by temporary infringements of those rules”²¹³.

Violations of conventional rules of international humanitarian law, designed to prevent or to alleviate the human suffering of warfare²¹⁴ seem to attract the strongest condemnation by the Council²¹⁵ coupled with calls upon States and, as appropriate, international humanitarian organisations to collate substantiated information in their possession or submitted to them relating to such violations, including grave breaches of the Geneva Conventions and to make this information available to the Council²¹⁶.

Repeated use of chemical weapons is an open violation of the 1925 Protocol²¹⁷ and leads to a resolute condemnation²¹⁸.

In the Council’s view the importance of fully complying with existing legal obligations in the field of disarmament, arms limitation and non-proliferation should be underlined as well as the strengthening international instruments in this field²¹⁹.

Members of the SC will take appropriate measures in the case of any violations of the NPT notified to them by the IAEA²²⁰.

With regard to the situation in the Middle East the Council considered the refusal to participate in meetings of a mixed Armistice Commission as inconsistent with the very object and

213 Report SG cited by S. ROSENNE, *op. cit.*, at p. 112 and dealing with the General Armistice Agreements in the Middle East pursuant to resolution 113 of 4 April 1956.

214 PRST of 30.3.1984.

215 Resolution 771,2.

216 Resolution 771,5 See also resolution 674, A, 2.

217 PRST of 14.5. 1987.

218 Resolution 620,1.

219 Resolution 1456, Annex 7.

220 PRST of 31.1. 1992 on the responsibility of the sc in the maintenance of international peace and security.

purpose of the Armistice Agreement²²¹. Failure to comply with an unconditional obligation under a Peace Agreement to release prisoners constitutes a serious case of non-compliance²²².

Imposition and suspension of coercive measure in order to secure implementation

In the case of Angola the continuing non-implementation of major provisions of the agreements led to the imposition of coercive measures²²³ which the Council was ready to review if the SG would report that substantial progress was achieved towards full implementation²²⁴, the notion of substantial progress implying some kind of gradual implementation.

The Council's first reaction to non-implementation of cease fire and peace agreements on the former Yugoslavia consisted in expressing deep concern about serious violations of earlier agreements²²⁵ and in condemning those parties and other concerned that are responsible for such violations²²⁶.

Although the gradual lifting of coercive measures could reward cooperation in good faith in the effective implementation of a peace plan²²⁷, in the case of the Federal Republic of Yugoslavia (FRY) and the Bosnian Serb authorities suspension of measures would terminate if either of them would fail significantly to meet their obligations under the Peace Agreement²²⁸. An authorization to Member States to establish a multinational stabilisation force (SFOR) may be supplemented by a separate authorisation to take

221 Resolution 93, preamble.

222 PRST/1996/15.

223 Resolution 804.

224 Resolution 864, C, 27.

225 Resolution 721, preamble.

226 Resolution 758,5.

227 Resolution 820,31.

228 Resolutions 1022,3 and 1074, 5.

all necessary measures to effect the implementation of and to secure implementation with some Annexes of a Peace Agreement²²⁹ .

In July 2003 the Council stressed that the parties to Annex 1-A of the Peace agreement for Bosnia Herzegovina would continue to be held equally responsible for compliance with that Annex²³⁰ and reaffirmed its readiness to consider the imposition of measures in case any party would fail to do so²³¹ .

AUST rightly referred to the written assurance given by the foreign minister of the FRY that the FRY would ‘take all necessary steps, consistent with the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, to ensure that the Republika Srpska fully respects and complies with’ the Dayton agreements. Thus, “one state gave, in effect, undertakings to another state for the performance of an agreement by a constituent part of that other state”²³² .

In the case of Haiti the Council was ready to review measures imposed if the SG would report that de facto authorities had begun to implement in good faith an agreement to reinstate the legitimate government of President Aristide²³³ , although suspension could be terminated if the parties to the Governors Island agreement or any other authorities (!) in Haiti had not complied in good faith with the agreement²³⁴ .

A more or less consistent pattern seems to consist in condemnation of violations or non-compliance by the Council, coupled with the readiness to impose coercive measure in case of repetition. Suspension of those measures to reward significant progress in implementation may terminate in case of evidence of bad faith by any of the parties.

229 Resolution 1088, II, 19 In July 2003 the Council noted the support of the parties to the Peace Agreement for the continuation of the Force: resolution 1491, II, 9.

230 Resolution 1491, I I, 11.

231 Resolution 1491, I, 7.

232 A. AUST, op. cit., at p. 52.

233 Resolution 841,6.

234 Resolution 861,2.

Upholding pacta sunt servanda

The question arises whether and how the Council's practice of using varying degrees of severity is instrumental in upholding the rule of *pacta sunt servanda*, which according to the preamble to the Vienna Conventions is universally recognized.

Substantial progress towards the full implementation of a peace agreement as a benchmark for good conduct by the parties to a peace agreement, following delays and gaps in the completion of some major tasks arising from the accords²³⁵, although justified by both the complexity of the situation and the aftermath of a long-lasting armed conflict like the one in Angola, seems to validate gradual implementation of treaties.

Reference to a significant failure to meet treaty obligations²³⁶, may demonstrate a degree of lenience not necessarily found amongst parties to treaties in their mutual conventional relations and may come closer to approximate application of a treaty provision i.e. "when the attitude of one party makes the literal application of the obligation impossible"²³⁷, a principle upon the existence of which the Court threw doubts although it was not necessary for the Court to determine such existence in its Gabcikovo judgment²³⁸.

Welcoming the general respect for the ceasefire among the parties to the Lusaka Ceasefire agreement, while expressing nonetheless its concern at the hostilities in areas of the eastern Democratic Republic of the Congo (DRC)²³⁹ points in the same direction.

On the other hand, and exception made for the grave breaches of the Geneva Conventions and the Iraqi case reviewed earlier, the

235 Resolution 747, preamble.

236 Resolution 1074,5.

237 S. ROSENNE, op. cit., at pp. 96-97.

238 Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ. Reports 1997, p. 7 at 53, paragraph 76.

239 Resolution 1376,1.

use of the term “violations” by the Council did not exactly serve as an indication “of the great care that must be exercised before conduct or actions of governments are formally castigated as breach”²⁴⁰. By contrast, formulations like, ‘failing to meet its obligations’, ‘failure to comply’, ‘inconsistent with’ ‘contrary to its obligations’ ‘unacceptable contravention’ may serve as “diplomatic formulations for what many Governments and many informed observers regarded not merely as breach but as “material breach” within the meaning”²⁴¹ of article 60 of the Vienna convention, thus avoiding “pejorative language”²⁴², while expressing, albeit in passing, that “conduct which is not compatible with duly interpreted obligations of the State concerned can be the origin of an instance of international responsibility”²⁴³.

SECTION NINE: EXISTING TREATIES AND THE IMPOSITION OF COERCIVE MEASURES

Article 103 of the Charter leaves no doubt that UN membership does not suspend or terminate governance of state conduct by other conventional obligations; this is further corroborated by the frequent calls by the SC upon Member States to comply with such obligations. It is only in the event of a conflict between obligations under the Charter and other conventional obligations, that the hierarchical principle expressed in article 103 imposes temporary prevalence of the former category by suspending the operation of those treaties, so “that States should not be subjected to legal liabilities under

240 S. ROSENNE, op. cit., at p. 101.

241 S. ROSENNE, op. cit., at p.96 on the 1950 Advisory Opinion on South West Africa.

242 S. ROSENNE, op. cit., at p. 100.

243 S. ROSENNE, op. cit., at pp. 101 and 123.

treaties or other international agreements as a consequence of carrying out United Nations collective measures”²⁴⁴.

Article 103 is in fact an institutionalised and collective limitation on the potential unilateral invocation by parties to treaties of a fundamental change of circumstances under article 62, paragraph 3 of the Vienna Convention, since it rests upon the realistic forecast of threats to international peace and security.

Resolution 748 of 31 March 1992 imposing coercive measures upon Libya in the aftermath of the Lockerbie disaster marks the start of a Council practice of explicitly providing that States should act in accordance with provisions imposing such measures “notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement” thus restating the principle contained in article 103²⁴⁵.

With regard to the situation in the former Yugoslavia an explicit reference to the article and its scope was made in the PRST of 10 February 1993 dealing with navigation on the river Danube. When later requesting non-riparian States to provide such assistance as may be required by the riparian states in their responsibility to halt or control all shipping on the Danube, the Council explicitly stated that they should do so, notwithstanding the restrictions on navigation set out in the international agreements which apply to the Danube²⁴⁶.

244 Conclusion of the GA Committee on collective measures referred to by R. BERNHARDT, article 103 in B. SIMMA, (Ed.), *The Charter of the United Nations. A Commentary*, Oxford University Press, 1994, page 1121, at Marginal Note (MN) 12.

245 Later examples include resolutions 757,11 on the situation in Bosnia-Herzegovina and 1160,10 on the situation in Kosovo. For the Court’s pronouncement that *prima facie* the Charter obligations extend to resolution 748 see Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I. C. J. Reports 1992, p. 3, at 15, paragraph 39.

246 Resolution 820,17.

Under the early practice the notwithstanding proviso only referred to contractual arrangements²⁴⁷.

The scope of article 103 is further illustrated by the fact that the Council, when confirming that the coercive measures against Iraq applied to all means of transport, including aircraft, called upon States that their co-operation to ensure their effective implementation should be consistent international law, including the 1949 Chicago Convention on International Civil Aviation²⁴⁸. When imposing an arms embargo on the FRY in 1996, the Council stressed the importance of the continuing implementation of the Agreement on Sub-regional Arms Control signed in Florence on 14 June 1996²⁴⁹.

No problems seem to have occurred under article 72, paragraph 2 of the Vienna Convention in parties not having refrained from acts tending to obstruct the resumption of the operation of relevant treaties.

The present writer agrees with judge *Ad hoc* Lauterpacht in his Separate Opinion to the Genocide case when he pointed out that the “relief which article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *ius cogens*”²⁵⁰.

247 Resolutions 253,7 on Rhodesia and 418,3 on South Africa.

248 Resolution 670,7.

249 Resolution 1160,10.

250 Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, p. 325, at 440, paragraph 100.

SECTION TEN: APPEALS TO REFRAIN FROM CONCLUDING A
TREATY OR TO REVIEW EXISTING ONES

In normal circumstances States are free to conclude treaties with whatever partner they choose, that is unless the prospective partner finds itself in a situation declared to be illegal by the SC. The Council then may call upon all States to refrain from any dealings with that Government that are inconsistent with such a declaration²⁵¹ and to refrain from any relations implying recognition of the illegal situation²⁵².

Once the ICJ had responded to the Council's request for an Advisory Opinion on what the legal consequences were for States of the continued presence of South Africa in Namibia, notwithstanding SC resolution 276, the Council agreed with the Court's opinion and reproduced the operative part in its resolution 301. Members of the UN were thus under an obligation to refrain in particular from any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration²⁵³. Furthermore, States were called upon to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purported to act on behalf of or concerning Namibia²⁵⁴. Subject to the exceptions set forth by the ICJ i.e. certain general conventions the non-performance of which may adversely affect the people of Namibia, States were also called upon to abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf or concerning Namibia which would involve active intergovernmental co-operation²⁵⁵.

251 Resolution 276,5.

252 Resolution 238,1.

253 Resolution 301,6, (2).

254 Resolution 301,11, (a).

255 Resolution 103,11, (b).

With regard to the so-called ‘independent’ Bantustans all governments were called upon by the SC to refrain from having any dealings with them²⁵⁶.

Traditional review of a treaty

In normal circumstances States Parties may decide to review a treaty on an ad hoc basis or as result of a pre-existing review clause that they have included into the final provisions. Thus the SC expressed its concurrence in the General Assembly’s decision that a conference to review the Charter would be held at an appropriate time²⁵⁷.

A review conference may provide a good opportunity to reinforce the authority, efficiency and universal scope of a treaty. That is what the Council encouraged the 1972 Bacteriological Weapons Convention Review Conference to do²⁵⁸.

Review of treaties in case of an illegal situation

The occurrence of and persistence of a situation declared illegal by the SC may require an unforeseen review of existing treaties with a particular partner²⁵⁹. Namibia, Cyprus and East Timor are cases in point.

On the same day it submitted its request for an advisory opinion, the SC requested all States to undertake a detailed study and review of all bilateral treaties between themselves and South Africa in so

256 Resolution 402,1 and PRST of 21.9.1979 and 15.12. 1981.

257 Resolution 110.

258 Resolution 687, preamble.

259 With regard to the situation in the Middle East the Council repeatedly affirmed the principle of the inadmissibility of acquisition of territory by military conquest (resolutions 242,271 and 298), but it never declared the Israeli occupation to be illegal.

far as these treaties contain provisions which apply to the territory of Namibia²⁶⁰. The SG was requested to undertake a similar exercise for multilateral treaties to which South Africa was a party and which, either by direct reference or on the basis of relevant provisions of international law, might be considered to apply to the territory of Namibia²⁶¹. After the delivery of the Advisory Opinion the Council requested a review of bilateral treaties in order to ensure that they were not inconsistent with the operative paragraphs of that opinion as reproduced in the resolution²⁶².

A request was made to the Ad Hoc Sub-Committee on Namibia to review all treaties and agreements that were contrary to the provisions of the resolution in order to ascertain whether states had entered into agreements which did recognize South Africa's authority over Namibia²⁶³.

Given flagrant defiance by South Africa of SC resolutions the Council in 1985 urged Member states of the UN that had not done so to consider taking appropriate voluntary measures against South Africa, which could include the re-examination of maritime and aerial relations with South Africa²⁶⁴.

Another illegal situation triggered a request by the SC on the Government of the UK as the Administering Power to rescind or withdraw any existing agreements on the basis of which foreign consular, trade and other representation may be maintained in or with Southern Rhodesia²⁶⁵.

In 1974 the Council recorded its formal disapproval of the unilateral military actions undertaken against the Republic of Cyprus²⁶⁶ and in 1975 it regretted the unilateral declaration on a

260 Resolution 283,8.

261 Resolution 283,9.

262 Resolution 301,11, (c).

263 Resolution 301,14.

264 Resolution 566,14, (b).

265 Resolution 277,10.

266 Resolution 360,1.

Federated Turkish State²⁶⁷. The 1983 declaration by the Turkish Cypriot authorities purporting to create an independent State in Northern Cyprus was declared incompatible with both 1960 treaties on Cyprus. The attempt was declared invalid²⁶⁸. The Council's call for non-recognition did not specify further modalities²⁶⁹.

It is worth noting that as far as East Timor was concerned, the SC in December 1975 deplored the military intervention by Indonesia and called for its withdrawal, without declaring its presence illegal²⁷⁰. Subsequently, the Council did not submit a request for an advisory Opinion to the ICJ on the legal consequences for states of the continued presence notwithstanding these resolutions and kept silent until the events of 1999. It is well-known that the negotiation, conclusion and initial performance of the December 1989 Agreement between Indonesia and Australia on the Timor Gap was brought before the Court by Portugal in February 1991. The Court was requested to declare *inter alia* that the Agreement was in contravention of the aforementioned resolutions²⁷¹. The Court was not persuaded that the "relevant resolutions went so far" as to impose "an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is considered, to deal only with Portugal"²⁷².

Furthermore, the Court noted that "several States have concluded with Indonesia treaties capable of application to East Timor but which do not include any reservation in regard to that Territory"²⁷³. The Court, succinctly but aptly also observed that after the circulation of a Portuguese note of protest as an official document

267 Resolution 367,2.

268 Resolution 541, preamble and paragraph 2.

269 Resolution 543,7.

270 Resolution 384 and 389.

271 East Timor (Portugal v. Australia), Judgment, ICJ. Reports 1995, p. 90, at 94, paragraph 10, (2), (c).

272 Ibidem, at 103, paragraph 31.

273 Ibidem, para. 32

of the SC “no responsive action was taken”²⁷⁴. The Monetary Gold rule prevented the Court from ruling on Portugal’s claims on the merits²⁷⁵.

SECTION ELEVEN: AGREEMENTS AS PRE-CONDITION FOR
SUBSEQUENT SC ACTION

One of the lessons the Council learned from experience was to depart from its previous practice and not to send in observers or peacekeepers in the absence of the fulfilment of a number of conditions, one of these being the conclusion of and respect for a credible ceasefire or peace agreement²⁷⁶ or that an agreement remains in force²⁷⁷.

Full implementation of a SOFA is necessary to give effect to the mandate of an operation²⁷⁸.

With regard to UNAVEM I the Council decided that the arrangements for its establishment would enter into force as soon as the tripartite agreement and the bilateral agreement were signed²⁷⁹.

Later on the initialling of an agreement by the parties was a pre-condition for the Council’s readiness to authorize an increase in strength of UNAVEM II²⁸⁰. Formal signature of the agreement would lead the Council to consider any recommendation from the SG for an expanded UN presence in Angola²⁸¹.

274 Ibidem

275 Ibidem, at 105, paragraphs 34-35.

276 PRST/1999/13.

277 Resolution 1061,3.

278 Resolutions 1341, 17 and 1410,11.

279 Resolution 626,4.

280 Resolution 945,8.

281 Resolution 945,9.

The Council stressed that continued support by the international community, including the participation of the UN Mission in Liberia was contingent on the demonstrated enduring commitment of the parties to resolve their differences peacefully and to achieve national reconciliation in line with the peace process²⁸². The Council cannot envisage deployment of a UN PKO without full compliance by all parties with a previously signed agreement²⁸³.

SECTION TWELVE: INTERPRETATION OF TREATIES

Interpretation of treaties and other agreements governed by international law and which are implicated in a dispute or situation before the Council rests first and foremost with the parties themselves or entities entrusted by them with this task of interpretation.

Interpretation by the Council

It is obvious that the SC, as any other organ of the Organization, is not only interpreting Charter provisions²⁸⁴ but also, in addition to the parties themselves, other conventional obligations. In doing so the Council may put forward its own interpretation or refer to interpretations given by the SG.

As uncertainty as to the scope of obligations may contribute to a pattern of non-compliance²⁸⁵, the Council may consider it necessary to provide some clarification. Thus the Council

282 Resolution 1041,8.

283 Resolution 721, 2.

284 *Inter alia* through monitoring that no State is acting in violation of the principles of article 2 of the Charter and through PRSTs such as that adopted on 31.1.1992 and the increasing number of PRSTs dealing with issues of a more general nature, see further K. WELLENS, op. cit., *Journal of Conflict and Security Law*, passim.

285 SG as cited by ROSENNE, op. cit., pp. 112-113, paras. 10 and 15 of the Report.

reaffirmed and urged Israel to accept²⁸⁶ the de jure applicability of the Fourth Geneva Convention, and specified its territorial scope of application to the Palestinian territories, occupied by Israel since 1967, including Jerusalem and the other occupied Arab territories²⁸⁷. Because of its object and purpose the territorial scope of the Fourth Geneva Convention is different from the one underlying the presumption expressed in article 29 of the Vienna Convention.

The Council considered the armistice regime between Israel and the neighbouring Arab States, which had been in existence for nearly two and a half years, to be of a permanent character, and it pointed out that neither party could reasonably assert that it was actively a belligerent or required to exercise the right of visit, search and seizure for any legitimate purpose of self-defence²⁸⁸.

Shortly afterwards the SG pointed out in his study that the “very logic of the armistice agreements shows that infringements of other articles cannot serve as justification for an infringement of the cease-fire article”²⁸⁹.

In two consecutive statements the Council specified that all the parties in Haiti, thus also the de facto authorities were bound to comply with their obligations not only under the Governors Island agreement, but also by those embodied in the relevant treaties to which Haiti is a party²⁹⁰.

Interpretation of the 1951 Refugee Convention led the Council to an explicit denial of amnesty to individuals who are responsible for serious breaches of international humanitarian law²⁹¹ and to

286 Resolution 681,4.

287 Resolution 641,3.

288 Resolution 95, preamble.

289 Paragraph 18 as cited by S. ROSENNE, *op. cit.*, at p. 113.

290 PRST of 17.9. 1993 and of 6.10.1993.

291 PRST/1994/59.

call on parties to desist from further refoulement of refugees and to halt a policy of forced repatriation²⁹².

With regard to Sierra Leone the SC not only emphasized that an amnesty under a peace agreement did not extend to human rights violations committed against the civilian population after the date of its signing²⁹³, but it also recalled that the Special Representative of the SG appended a statement to his signature of the Lome agreement that the UN holds the understanding that the amnesty provisions should not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law²⁹⁴. This is a prime example of an interpretative declaration that “purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions”²⁹⁵.

Interpretation of course goes hand in hand with calls upon states and parties to bring their conduct in conformity with relevant provisions.

In 1990 the Council reaffirmed that Iraq remained fully responsible for the safety and well-being of third-state nationals in accordance with international humanitarian law including where applicable, the Fourth Geneva Convention²⁹⁶.

During and after the 2003 war in and against Iraq the Council urged all parties concerned to allow full and unimpeded access by international humanitarian organisations to all people of Iraq in need of assistance and to make all necessary facilities for their operations²⁹⁷. The Council also noted and specified the duties for

292 By Burundi: PRST/1996/31; by Zaire to Rwanda and Burundi: PRST/1995/41.

293 Resolution 1289,5.

294 Resolution 1315, preamble.

295 A. PELLET, ILC Special Rapporteur on reservations to treaties in his third report as cited by AUST, *op. cit.*, at p. 102.

296 Resolution 666,2.

297 Resolution 1472,8.

an Occupying Power under article 55 of the Convention to ensure the food and medical supplies to the population²⁹⁸.

Interpretation by other entities

With regard to the General Armistice agreement between Israel and Syria the Council noted that under the provisions of the agreement, where interpretation of the meaning of a particular provision, other than the preamble and article I and II, is at issue, the Mixed Armistice Commission's interpretation was to prevail²⁹⁹. As the parties had agreed that an excerpt from the summary record of the Israel-Syrian Armistice Conference of 3 July 1949 was an authoritative comment on article V of the General Armistice Agreement they were called upon by the Council to give effect to It³⁰⁰.

With regard to the situation in Bosnia and Herzegovina after the Dayton Agreements the Council reaffirmed that the High Representative is the final authority in theatre regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement. In case of dispute he may give his interpretation³⁰¹ and make binding decisions as he judges necessary on issues as elaborated by the Peace Implementation Council in Bonn on 9 and 10 December 1997³⁰².

298 Ibidem, preamble and paragraph 1. See also in general terms 1483, preamble. For another example of a general call to respect the Geneva Conventions and the Additional Protocols see resolution 1234,6 on the conflict in the DRC.

299 Resolution 93.

300 Ibidem. By calling up the parties to give effect to it, the Council thus went further than the PCIJ in its Advisory Opinion on the jurisdiction of the European Commission on the Danube between Galatz and Braila, where it considered an Interpretative Protocol merely to be part of the preparatory work of the Definitive Statute, as it was not inserted in the Final Protocol: PCIJ 1927, Series B, N° 14, at 34 as referred to by J. KLABBERS, op. cit., at p.173.

301 Resolution 112,3.

302 Resolution 1491, I, para. 4.

When interpreting conventional provisions the Council has in general respected the general rule of interpretation as expressed in article 31 of both Vienna Conventions.

The interpretations given by the Council itself to non-Charter provisions cannot be considered to be ‘subsequent agreement’ (article 31, 3, (a) between the parties regarding the interpretation of those treaties or the application of its provisions, neither can they qualify as subsequent practice (article 31,3, (b), whereas interpretations given by such parties before the Council would “have considerable probative value when they contain recognition by a party of its own obligations under an instrument”³⁰³.

SECTION THIRTEEN: HIERARCHY BETWEEN TREATIES
AND BETWEEN RESOLUTIONS AND AGREEMENTS OUTSIDE
THE SCOPE OF ARTICLE 103

“Confidence in international intercourse requires the certainty of compliance with any juridical commitment. Therefore, as a rule, there cannot be any hierarchic superiority between treaties. Any exception to this rule touches on a cornerstone of international law, as it tampers with the rule *pacta sunt servanda*. The superiority of a given treaty should be clearly manifested”³⁰⁴.

On a number of occasions that did not bring into operation article 103, the Council has made it clear indeed that particular conventions and agreements do occupy a more prominent place in the international order than others.

The respect for the inviolability of diplomatic personnel and the premises of their missions is not only a solemn obligation for all

303 International Status of South-West Africa, Advisory Opinion, ICJ Reports 1950, p. 128, at 135-136.

304 I. Seidl-Hohenveldern, op. cit., at p. 18.

States parties to the Vienna Conventions on Diplomatic and Consular Relations³⁰⁵, which must be respected in all cases³⁰⁶ but any flagrant violation strikes at the root of the conduct of international relations³⁰⁷. The Council thus echoed the Court's 1980 pronouncement that these obligations are "of cardinal importance for the maintenance of good relations between States in the interdependent world of today"³⁰⁸.

That the Council is not always clear or consistent about the relationship between its own resolutions and agreements reached between parties was illustrated in the early years when it considered that the 1949 Armistice agreements between the parties involved in the conflict in Palestine superseded the truce provided for in its resolutions 50 and 54³⁰⁹ while finding later that retaliatory actions by Israel in October 1953 constituted violations of these Council provisions and were inconsistent with the obligations of the parties under the General Armistice Agreement between Israel and Jordan³¹⁰. The SG expressed the correct position when he pointed out that that cease-fire article stated "though in more clear terms, the reaffirmation by the Security Council, in its resolution of 11 August 1949 of the order contained in its resolution of 15 July 1948 to the governments and authorities concerned to observe an unconditional cease-fire"³¹¹. When thirty years later in 1979 the Council reaffirmed the validity of the General Armistice Agreement between Israel and Lebanon in accordance with its relevant

305 Resolution 457, preamble.

306 PRST/1999/12 on the bombing of the Chinese Embassy in Belgrade.

307 Resolution 667, preamble.

308 United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, p. 3, at p. 42, paragraph 91.

309 Resolution 73,2.

310 Resolution 101,A, 1.

311 Paragraph 19 as cited by S. ROSENNE, *op. cit.*, at p. 114.

decisions and resolutions, the Council seems to have reversed once more the order of precedence³¹².

Lack of clarity or consistency on this resolution/agreement relationship also seems to have been with the Council when dealing with the situation in the former Yugoslavia.

A UN peacekeeping plan and its implementation were in no way intended to prejudge the terms of a political settlement³¹³, while the Council later affirmed that nothing in a resolution should be construed as contradicting or in any way departing from the spirit or the letter of the peace plan for the Republic of Bosnia and Herzegovina³¹⁴.

Conversely it later declared that an UNMIK-FRY Common document signed on 5 November 2001 by the Special Representative of the SG and the Special Representative of the President of the FRY and the Government of the FRY and the Government of the Republic of Serbia was consistent with resolution 1244³¹⁵. The Council urged the High Representative to monitor the implementation and any amendments to an Agreement on the Special relationship between the FRY and the Republika Srpska in order to ensure that it remains consistent with the territorial integrity and sovereignty of Bosnia Herzegovina as a whole and with the Peace Agreement³¹⁶. The complex interplay of resolutions and agreements could hardly be better illustrated.

Sometimes the Council takes more care in clarifying the resolution/treaty relationship. It may insert a without prejudice clause working both ways, thus preserving a position of equality between a monitoring mechanism established by its resolutions and the operation of existing or even future non-proliferation

312 Resolution 450,6.

313 Resolution 740,7.

314 Resolution 824, preamble.

315 PRST/2001/34.

316 PRST/2001/11.

agreements or regimes on the international or regional level: neither mechanisms nor the regimes shall impair each other's operation³¹⁷.

SECTION FOURTEEN: REGISTRATION, ENTRY INTO FORCE AND
TERMINATION OF A TREATY

Whereas Iraq claimed that they were not in force because of lack of ratification, the SC duly noted that Iraq and Kuwait, as independent sovereign States, had signed at Baghdad on 4 October 1963 "Agreed Minutes... regarding the restoration of friendly relations, recognition and related matters, thereby recognizing formally the boundary between Iraq and Kuwait, which were registered with the United Nations in accordance with article 102 of the Charter³¹⁸.

AUST rightly observed that it is "unthinkable that the Security Council would ignore a treaty which is relevant to a matter of international peace and security just because it was not registered"³¹⁹.

When treaties enter into force, the SC may welcome or take note of that event without any further subsequent action for the time being³²⁰.

When a Treaty the adoption of which was acknowledged by the Council as having historic significance³²¹, has provided for special competences or responsibilities for the Council, the situation may develop differently. Noting that not all states are parties to the Rome Statute on the International Criminal Court (ICC), and in order to facilitate Member States' ability to contribute to operations established or authorised by the UN, the SC, consistent with the

317 Resolution 1051,3.

318 Resolution 687, preamble and paragraph 2.

319 A. AUST, *op. cit.*, at p. 280.

320 Anti-personnel Mines Convention: resolution 1265, 18.

321 PRST/1999/6.

provisions of article 16 of the Rome Statute requested and renewed the request that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall (for a 12-month period) not commence or proceed investigation or prosecution of any such case, unless the Security council decides otherwise³²². The Council further decided that Member States should take no action inconsistent with this paragraph and with their international obligations³²³.

In resolution 1497 the SC decided that current or former officials or personnel from a State contributing to the Multinational Force in Liberia and which is not a party to the Rome Statute shall be subject to the exclusive jurisdiction of that contributing state unless expressly waived³²⁴.

A full-fledged determination by the SC of the termination of the applicability of an agreement because its objectives had been fully attained³²⁵ took place twice. In Resolutions 683 and 956 the SC, in the exercise of its responsibilities under article 83, paragraph 1 of the Charter, made such a determination with regard to the Trust Territory of the Pacific Islands in the light of the entry into force of new status agreements, properly approved by duly constituted legislatures after plebiscites were being held.

322 Resolutions 1422 and 1487.

323 Resolutions 1422, 3 and 1487,3. On Resolution 1422 see inter alia Carsten Stahn, The ambiguities of Security Council Resolution 1422(2002), *European Journal of International Law*, Vol. 14, pp. 85-104.

324 Resolution 1497, paragraph 7.

325 For an example of the Council determining that the goal of an international agreement had been achieved but without any subsequent termination see resolution 880, preamble on the Paris Agreements on Cambodia.

CONCLUDING REMARKS

The above picture of Security Council practice with regard to treaties illustrates the wide range of Council involvement. The Council has called for and monitored negotiations. Appeals to conclude a treaty have been accompanied by the (potential) imposition of coercive measures. The Council has, admittedly to varying degrees, actively determined the substantive content of treaties to be concluded. Sometimes treaties were subject to Council approval. In monitoring treaty implementation the Council has not hesitated to set aside the *res inter alios acta* rule.

Although the SC has occasionally demonstrated some lenience towards gradual implementation, in many cases it has imposed coercive measures in order to induce parties to comply fully with their commitments, thereby suspending the operation of conflicting conventional obligations.

Confronted with situations it had declared to be illegal, the Council has called upon States to refrain from entering into treaty relations which could imply recognition of that situation.

The Council has increasingly made its own action on the ground dependent upon the existence and implementation of agreements between the parties concerned.

The Council has interpreted treaties and agreements and in doing so it has dealt with hierarchy between treaties and attempted to clarify the relationship between its own resolutions and those agreements in situations where the application of article 103 was not called for.

Because of their object and purpose special categories of treaties and agreements figured more prominently in Council practice. This was the case for the NPT, SOFAs, Framework Agreements, MOUs and the Fourth Geneva Convention.

The Council has not shied away from recalling the continued applicability and importance during times of armed conflict of various treaty obligations other than the Geneva Conventions³²⁶.

The above review also illustrates the wide variety of the identity of participants to relevant treaties and agreements such as States, IOs, IO agencies, de facto authorities and rebel forces.

The overall Council approach towards treaties and agreements, although reflecting a rich palette of modalities, has maintained its instrumental character, as it is necessarily incidental and subordinated to the exercise of its primary responsibility to maintain and restore international peace and security³²⁷. The emphasis has always been on the determination of violations of the Charter-based prohibition not to engage in conduct that may cause a threat to international peace and security³²⁸ rather than on reinstating the performance of treaties. Thus determination of appropriate reparation in order to redress the internationally wrongful act constituted by breaches duly established³²⁹ has only been resorted to by the Council in exceptional circumstances such as in the case of Iraq.

The Council has in many cases treated the violation or non-compliance with provisions of other treaties and agreements governed by international law, “as being of relatively secondary significance”³³⁰ insofar as they appeared to have been subsumed in

326 See for instance after the attack on the HQ of the UN Assistance mission in Iraq in Baghdad on 19 August 2003, resolution 1502: the SC emphasized that there are existing international law prohibitions against attacks intentionally directed against personnel involved in a humanitarian assistance or peacekeeping mission undertaken in accordance with the UN Charter which in situations of armed conflict constitute war crimes (preambular paragraph) and operative paragraphs 3 and 4.

327 And not international law enforcement, see K. WELLENS, op. cit., *Journal of Conflict and Security Law*, at pp. 17-18.

328 See K. WELLENS, op. cit., *Journal of Conflict and Security Law*, at pp. 29 and 40.

329 S. ROSENNE in general terms, op. cit., at p. 124.

330 Ibidem, at p. 117.

the violation of that Charter-based obligation. This Council approach did not really facilitate “the practical treatment of the interpretation and application of the treaty, and through those processes the treatment of actual or potential breach of that particular treaty” as it was feared by ROSENNE in 1984³³¹.

Given the Council’s primary responsibility, this state of affairs could probably not have been different, although a more thorough and detailed examination “of the reasons which led the government said to be in default in its treaty obligations to have decided to adopt the course of action in fact adopted”³³² would have been highly desirable despite the pressure of time.

The Council’s relentless calls for parties to continue compliance with treaties and agreements despite inconsistent conduct by their partners has rendered any invocation of article 60 of the Vienna Convention more difficult and less likely.

Although in the international legal order “restrictions on states are not to be presumed lightly”³³³, such a presumption in fact appears to underlie the Council’s approach as it becomes clear from the above review, especially through the imposition of coercive measures in order to ensure implementation of commitments undertaken by parties in treaties and other agreements. As soon “as a hint of commitment can be discerned, this commitment is deemed”³³⁴ binding by the Council.

Although occasionally the Council was looking at treaties rather as instruments than as agreements embodied in instruments when it made its appeals for States to become parties or to start negotiations in order to conclude them, in most cases the emphasis was clearly on the obligations contained in those instruments³³⁵.

331 Ibidem.

332 Ibidem at p. 119.

333 J. KLABBERS, *op. cit.*, at 68 referring to the Lotus case.

334 Ibidem at p. 199.

335 See on this distinction the references given by KLABBERS, *op. cit.*, at 2, note 9.

The “idea that statesmen meet, negotiate for some time, devote resources to establish something during the negotiation stage, and in the end claim that they were only engaged in a practical joke, is not conceivable”³³⁶, in the Council’s eyes. Furthermore, “concluding agreements while not meaning what one says comes dangerously close to acting in bad faith”³³⁷, something the Council is determined to sanction, as many of its clients have experienced in the more recent past.

KLABBERS’ observation that “there is a fine line between an intent to be bound, and an intent to do so something or to refrain from doing something”³³⁸, is particularly poignant to instruments before the Council as it starts from the presumption that commitments undertaken and instruments agreed upon by states and other actors, are intended to be (legally) binding. The exercise of its powers of appreciation may result in states having entered into obligations they never anticipated³³⁹

The overall objective to maintain or restore international peace and security may have considerably reduced if not make disappear any inclination on the part of the Council to ascertain the precise legal status of instruments relevant to the matter before it. while having regard above all to their actual terms and always having in mind the particular circumstances in which they were drawn up³⁴⁰. Analogous to the UN Secretariat’s understanding with regard to registration it has to be noted that also the Council’s action “does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status”³⁴¹. Occasionally the Council may have been seen to attach some degree of

336 Ibidem, at p. 256.

337 J. KLABBERS, *op. cit.*, at p. 259.

338 Ibidem, at p. 93.

339 J. KLABBERS, page 92, note 129 referring to C. TOMUSCHAT.

340 Aegean Sea Continental Shelf, Judgment, ICJ Reports 1978, p. 3, at 39, paragraph 96.

341 Note by the Secretariat, issued in every volume of the UNTS, and cited by J. KLABBERS, *op. cit.*, at p. 83, note 84.

normativity to mere political pledges for the only reason that reliance upon them was important for the maintenance of international peace and security.

Instruments between international actors “concluded with a view to mutual adherence”³⁴² but “deliberately left outside the realm of law”³⁴³ and forming part of the dispute or situation before the Council, are always eligible for being endowed with “(une certaine KW) portée juridique”³⁴⁴ through the mere exercise by the Council of its powers of appreciation covering the wide range of modalities depicted above. The international peace and security objective may have, be it on a temporary basis, attached an *erga omnes* character on many of the instruments at stake, which they did not possess before the international community became involved through the SC.

The Council’s reference to notions such as reliance or good faith is always ancillary, concomitant to its drawing operational consequences from the commitment undertaken by parties with the overarching and decisive aim of restoring or maintaining international peace and security. Conversely, the Court’s pronouncement in 1962 that in the nature of things it could not be otherwise than that most interpretations of the Charter of the UN will have political significance³⁴⁵ applies a fortiori to SC interpretations of both the Charter and other treaties and agreements. And as, in line with the Court’s final sentence of that same paragraph, the interpretation of a treaty provision is essentially a judicial task, one cannot attribute either a judicial character to the performance by the Council of an exclusively political task³⁴⁶.

342 J. KLABBERS, *op. cit.*, at p. 4

343 *Ibidem*, at p. 19.

344 See further M. Virally, *La distinction entre textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et texts qui en sont dépourvus*, Rapport préliminaire et rapport définitive, Institut de Droit International, Volume 60-I, pp. 166-374.

345 *Certain Expense of the United Nations* 9 article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: ICJ. Reports 1962, p. 151, at 155.

346 *Ibidem*.

The without prejudice clause contained in article 75 of the Vienna Convention is limited in scope as it only deals with the impact of coercive measures upon the aggressor state itself. The very existence of article 103 of the Charter renders superfluous and even pointless any attempt to look for an indirect without prejudice clause of a more general application through the combined effect of article 73 of the Vienna Convention excluding all questions relating to the international responsibility of a state from the scope of the Convention³⁴⁷ and article 59 of the ILC Articles on State Responsibility providing in turn that they cannot affect and are without prejudice to the Charter of the United Nations³⁴⁸.

The Council has not missed opportunities to confirm both state and individual responsibility in cases of non-compliance with the provisions of treaties and other agreements governed by international law³⁴⁹.

347 I. SINCLAIR, *op. cit.*, at p. 165.

348 Commentary as reproduced by J. CRAWFORD, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge University Press, 2002, 378 pages, at p. 314.

349 See further K. WELLENS, *op. cit.*, *Journal of Conflict and Security Law*, pp. 34-39 and pp. 47-49.