SECTION 3. U.N. DECLARATIONS AND RESOLUTIONS

The international legal system has no organ directly comparable to a national legislature with power to make law by majority vote. The powers of the U.N. General Assembly under the U.N. Charter (arts. 13–14) are basically recommendatory. The U.N. Security Council has certain compulsory powers when acting under Chapter VII of the Charter, but only extraordinarily would it exercise these powers to prescribe rules of conduct in legislative fashion. Assertion of Security Council authority to maintain peace in particular contexts (e.g., to elaborate obligations in the wake of the Iraq conflict, or to apply humanitarian law in the context of former Yugoslavia or Rwanda) will be addressed in Chapters 15 and 16.

Pressures to fill what some perceive as a vacuum in international law-making have led to a variety of attempts at proclaiming, clarifying, or codifying standards of conduct, whether on the part of states or of other actors. Some of these modes, and the controversies surrounding them, are addressed in this section and the next sections. We begin with the General Assembly and Security Council and then turn to modes of law-making in other arenas, which may be informal networks as well as formal institutions and may produce commitments at various points along a spectrum between "political" or "moral" and "legal."

A. GENERAL ASSEMBLY DECLARATIONS AND RESOLUTIONS

The legal effect of General Assembly resolutions and other decisions has been a subject of much scholarly discussion and diverse views of governments. Article 38 of the I.C.J. Statute does not mention resolutions or decisions of international organs as either a principal "source" or subsidiary means of determining applicable international law. Moreover, the U.N. Charter does not confer on the General Assembly power to enact binding rules of conduct. In contrast to the Security Council, it does not have authority to adopt binding decisions, except for certain organizational actions (such as admission of members and credentials). Such decisions can have "dispositive force and effect," as the International Court noted in *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 163.

The more general problem of legal effect is raised by General Assembly resolutions and decisions that express or clearly imply legal principles or specific rules of law. The General Assembly has adopted thousands of resolutions and numerous other decisions from 1946 to 2009. Some—probably fewer than a hundred—express general rules of conduct for states (as the Declaration against Torture in the *Filartiga* case, below). They are usually formulated as "declarations" or "affirmations" of law. In many cases, they were the product of study and debate over many years and were adopted by consensus (without a vote) or by near-unanimity.

General Assembly resolutions, declarations or decisions may be considered by governments and by courts or arbitral tribunals as evidence of international custom or as expressing (and evidencing) a general principle of law. They may also serve to set forth principles for a future treaty, as has been the case for the Declaration against Torture and a number of other declarations in the field of human rights. The fact that a law-declaring resolution has been adopted without a negative vote or abstention is usually regarded as strong presumptive evidence that it contains a correct statement of law. A resolution that has less than unanimous support is more questionable. The size and composition of the majority, the intent and expectations of states, the political factors and other contextual elements are pertinent in judging the effect.

At the San Francisco Conference of 1945 at which the U.N. Charter was drafted, a committee report noted that the General Assembly was competent to interpret the Charter, as such competence is "inherent in the functioning of any body which operates under an instrument defining its functions and powers." It then added that an interpretation of the Charter by the General Assembly would be binding on the member states if that interpretation "was generally accepted." Does this mean that the adoption of an interpretive resolution by unanimous vote (or near-unanimity) would be legally binding on the members? Would the question arise whether the Charter was being interpreted or in effect amended? If such resolutions involve a significant modification of the rights and duties of members, should they not be required to follow the amendment procedure which involves ratification? When such broad principles as self-determination, equality of states, human rights, and political independence are construed and given more specific meaning, is there not inevitably a "legislative" component inherent in the interpretation?

General Assembly resolutions illustrating some of these issues are found in the Documents Supplement, including the Universal Declaration on Human Rights (1948), the Declaration on Principles of International Law Concerning Friendly Relations Between States (1970), the Definition of Aggression Resolution (1974), and others at various times concerning permanent sovereignty over natural resources and economic rights and duties, areas beyond national jurisdiction as the common heritage of mankind, and diverse aspects of human rights. Their legal significance as evidence of custom or of the authoritative interpretation of the U.N. Charter will be addressed in the chapters concerning the subject-matters to which they pertain. Similar questions about legal effects can be asked about resolutions or other statements adopted within the framework of the United Nations or other global institutions, such as the Millennium Declaration of 2000 or the World Summit Outcome Document of 2005, approved by heads of state and government assembled in New York.

As you read the materials below, consider the different theories of the legal force of General Assembly resolutions in the context of litigation alleging violations of international law.

FILARTIGA v. PENA–IRALA

United States Court of Appeals for the Second Circuit, 1980
630 F.2d 876

[A wrongful death action was brought in federal district court by two nationals of Paraguay, the father and sister of a 17–year old Paraguayan, who, it was alleged, was tortured to death in Paraguay by the defendant Pena–Irala who at the time was Inspector–General of the police. Jurisdiction was claimed principally on the basis of the Alien Tort Statute (28 U.S.C. § 1350) which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

[The plaintiffs claimed that the conduct resulting in the wrongful death constituted torture which they contended violated the "law of nations"—that is, international customary law. On appeal, the Second Circuit Court of Appeals held that deliberate torture under the color of official authority violated the universal rules of international law. In reaching the conclusion that the prohibition of torture has become part of customary international law, the Court referred as evidence to the Universal Declaration of Human Rights and a 1975 U.N. General Assembly Declaration on the Protection of all Persons from Torture.

[Relevant portions of the Court's opinion follow:]

The Declaration [Against Torture] goes on to provide that "[w]here it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law." This Declaration, like the [Universal] Declaration of Human Rights before it, was adopted without dissent by the General Assembly.

These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter. Since their adoption, "[m]embers can no longer contend that they do not know what human rights they promised in the Charter to promote." Moreover, a U.N. Declaration is, according to one authoritative definition, "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated." 34 U.N. ESCOR, Supp. (No. 8) 15, U.N.Doc. E/cn. 4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat). Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community." E. Schwelb, Human Rights and the International Community 70 (1964). Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States." 34 U.N. ESCOR, supra. Indeed, several com-

mentators have concluded that the Universal Declaration has become, *in toto,* a part of binding, customary international law.

Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations. [United States v.] Smith, supra, 18 U.S. (5 Wheat.) at 160–61. The international consensus surrounding torture has found expression in numerous international treaties and accords. E.g., American Convention on Human Rights, Art. 5, OAS Treaty Series No. 36 at 1, OAS Off. Rec. OEA/Ser 4 v/II 23, doc. 21, rev. 2 (English ed., 1975) ("No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment"); International Covenant on Civil and Political Rights, U.N. General Assembly Res. 2200 (XXI)A, U.N. Doc. A/6316 (Dec. 16, 1966) (identical language); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 211 *(semble).* The substance of these international agreements is reflected in modern municipal—i.e. national—law as well. Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. According to one survey, torture is prohibited, expressly or implicitly, by the constitutions of over fifty-five nations, including both the United States and Paraguay. Our State Department reports a general recognition of this principle:

> There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens * * *. There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity.

NOTES

1. *Subsequent History.* After the *Filartiga* case was remanded to the district court, a default judgment was granted (defendants having been deported to Paraguay) and compensatory damages plus punitive damages of $5,000,000 to each plaintiff were assessed. *Filartiga v. Pena–Irala,* 577 F.Supp. 860 (E.D.N.Y. 1984). The district court on remand also cited the General Assembly Declaration, particularly noting that it declared that the victim shall be afforded redress and compensation "in accordance with national law." Id. These damage awards have not been collected, in the absence of assets of the defendants against which execution could be had.

The *Filartiga* case has been widely cited for the proposition that certain human rights principles are customary law and therefore part of the law of the United States. See Chapter 13. For more on the history of the case and its aftermath, see Koh, *Filartiga v. Pena–Irala*: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture, in International Law Stories 45–76 (Noyes, Dickinson & Janis eds., 2007); Aceves, The Anatomy of Torture: A Documentary History of *Filartiga v. Pena–Irala* (2007).

2. *Declarations versus Ordinary Resolutions.* Did the Court's reliance on the General Assembly Declaration as evidence of a binding rule against torture have the effect of conferring on the Assembly a degree of law-making authority inconsistent with the U.N. Charter? Does a "declaration" of a legal principle by the General Assembly have more weight than a resolution of a recommendatory character?

3. *Universal Declaration of Human Rights.* Does the Court's reference to the Universal Declaration as an "authoritative statement of the international community" imply a new "source" of international law other than treaty or custom? Would a declaration have obligatory force because it specified "with great precision" the obligations of member states under the Charter? If so, is there any reason to declare that the Declaration is customary law?

4. *General Assembly Votes as Evidence of Custom or General Principles.* The Court refers to the "universal renunciation" of torture in usage and practice. However, reports of Amnesty International regularly show that torture is employed in many countries under color of official authority. Does that rebut a finding of "state practice" sufficiently consistent and general to support a finding of custom? Is "state practice" the laws prohibiting torture or the acts of torture by state officials? Would the problem of inconsistent practice be avoided by treating the prohibition of torture as a general principle of law recognized in the law of all countries? Does the declaration provide that evidence?

Should a declaration by the General Assembly of a general principle of law be regarded as a definitive finding if adopted without dissent? Would the rules stated in a General Assembly declaration be binding on a state that claimed it voted for the declaration on the understanding that the General Assembly had only the authority to make recommendations?

General Assembly resolutions have been cited by national courts in many countries as evidence (or definitive proof) that a proposition of law expressed or implied by the resolution is binding international law. See Schreuer, Decisions of International Institutions before Domestic Courts (1981); Henkin, Resolutions of International Organizations in American Courts, in Essays on the Development of the International Legal Order (Kalshoven, Kuyper, & Lammers eds. 1980).

SOSA v. ALVAREZ–MACHAIN

Supreme Court of the United States, 2004
542 U.S. 692

[The Supreme Court first considered the Alien Tort Statute involved in *Filartiga* in *Sosa v. Alvarez–Machain,* which is discussed in Chapter 13. The case concerned allegations that Alvarez–Machain had been involuntarily detained without legal authority by bounty-hunters operating as U.S. agents who captured him in Mexico and brought him to the United States. U.N. resolutions (including the Universal Declaration) and other U.N. sources were drawn to the Court's attention in an effort to establish that such a detention violated the law of nations. The Court lent its imprimatur to much of *Filartiga*'s approach to the Alien Tort Statute but was unpersuaded that the brief detention constituted a violation of specific

obligations of the United States under the relatively strict test that it found appropriate for construing the statute. Its analysis addressed whether the instruments invoked by Alvarez–Machain, including General Assembly declarations, established an applicable rule of law.]

* * * Alvarez cites two well-known international agreements that, despite their moral authority, have little utility under the standard set out in this opinion. He says that his abduction by Sosa was an "arbitrary arrest" within the meaning of the Universal Declaration of Human Rights (Declaration), G. A. Res. 217A (III), U. N. Doc. A/810 (1948). And he traces the rule against arbitrary arrest not only to the Declaration, but also to article nine of the International Covenant on Civil and Political Rights (Covenant), Dec. 19, 1966, 999 U. N. T. S. 171, to which the United States is a party, and to various other conventions to which it is not. But the Declaration does not of its own force impose obligations as a matter of international law. See Humphrey, The UN Charter and the Universal Declaration of Human Rights, in The International Protection of Human Rights 39, 50 (E. Luard ed. 1967) (quoting Eleanor Roosevelt calling the Declaration " 'a statement of principles . . . setting up a common standard of achievement for all peoples and all nations' " and " 'not a treaty or international agreement . . . impos[ing] legal obligations' "). And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts. * * * Accordingly, Alvarez cannot say that the Declaration and Covenant themselves establish the relevant and applicable rule of international law.

NOTES

1. *Eleanor Roosevelt and the Universal Declaration on Human Rights.* The *Sosa* Court quotes the statement made by Mrs. Roosevelt at the time of the General Assembly vote on the Universal Declaration, in her capacity representing the United States. For more on the debates over the legal influence of the Declaration despite its formally non-binding quality, as well as Mrs. Roosevelt's personal positions and contributions, see Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights 71–72, 84–87, 166–71, 235–38 (2002), and further discussion in Chapter 13.

2. *Self-Determination.* In several advisory opinions, the International Court of Justice has referred to the General Assembly declarations on self-determination and independence of peoples in territories that have not yet attained independence as having legal effect, and as "enriching the *corpus juris gentium.*" *Namibia*, 1971 I.C.J. 16, 31; *Western Sahara*, 1975 I.C.J. 12; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136. May these "declarations" be regarded as "authentic" interpretation of the principles of the Charter that already bind the member states and therefore as obligatory or legally authoritative for all members? Could it be plausibly argued that when such broad principles as self-determination and human rights are given more specific meaning in General Assembly declarations, they would go beyond "recommendations" and have a legislative effect beyond that authorized by the Charter? Can one assume that the governments voting in favor of such law-declaring resolutions intend to accept them as binding, rather than recommendatory? If they do not all have that intention, can the declaration be properly regarded as a binding interpretation of the Charter? For a critique of the I.C.J.'s tendency to endorse pronouncements of the General Assembly as "law" even contrary to principled positions of affected states, see Pomerance, The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial, 99 A.J.I.L. 26 (2005).

3. *Nuclear Weapons.* In the 1996 advisory opinion on *Nuclear Weapons*, p. 79 *supra*, at paras. 68–73, the I.C.J. examined a series of resolutions in which the General Assembly by large majority votes condemned nuclear weapons and characterized them as illegal. Yet the Court found that those resolutions fell short of establishing a rule of international law. What theories did the Court apply in assessing the potential legal significance of these resolutions?

Several of the separate and dissenting opinions addressed the problematic significance of General Assembly resolutions. Judge Schwebel wrote in dissent:

> In its opinion, the Court concludes that the succession of resolutions of the General Assembly on nuclear weapons "still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons". In my view, they do not begin to do so. * * * The continuing opposition, consisting as it does of States that bring together much of the world's military and economic power and a significant percentage of its population, more than suffices to deprive the resolutions in question of legal authority.
>
> The General Assembly has no authority to enact international law. None of the General Assembly's resolutions on nuclear weapons are declaratory of existing international law. The General Assembly can adopt resolutions declaratory of international law only if those resolutions truly reflect what international law is. If a resolution purports to be declaratory of international law, if it is adopted unanimously (or virtually so, qualitatively as well as quantitatively) or by consensus, and if it corresponds to State practice, it may be declaratory of international law. The resolutions of which resolution 1653 is the exemplar conspicuously fail to meet these criteria. While purporting to be declaratory of international law (yet calling for consultations about the possibility of concluding a treaty prohibition of what is so declared), they not only do not reflect State practice, they are in conflict with it, as shown above. Forty-six States voted against or abstained upon the resolution, including the majority of the nuclear Powers. It is wholly unconvincing to argue that a majority of the Members of the General Assembly can "declare" international law in opposition to such a body of State practice and over the opposition of such a body of States. Nor are these resolutions authentic interpretations of principles or provisions of the United Nations Charter.

The Charter contains not a word about particular weapons, about nuclear weapons, about *jus in bello*. To declare the use of nuclear weapons a violation of the Charter is an innovative interpretation of it, which cannot be treated as an authentic interpretation of Charter principles or provisions giving rise to obligations binding on States under international law. Finally, the repetition of resolutions of the General Assembly in this vein, far from giving rise, in the words of the Court, to "the nascent *opinio juris*", rather demonstrates what the law is not. When faced with continuing and significant opposition, the repetition of General Assembly resolutions is a mark of ineffectuality in law formation as it is in practical effect.

4. *Specific Determinations.* Does the General Assembly have law-making power when it makes a determination in specific cases? The International Court, in its 1971 advisory opinion on *Namibia* commented on the authority of the General Assembly to assume functions under the Mandate for South West Africa as follows: "For it would not be correct to assume that because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting in specific cases within the framework of its competence, resolutions which make determinations or have operative design." 1971 I.C.J. 16, 50. Does this not mean that if an international body is given authority (i.e., competence to make decisions) such decisions when made by the requisite majority are binding? Would this include resolutions which recognize particular entities as states for purposes of participation in that body? Would it also include resolutions that treat items as within the competence of that body and as outside the exclusively domestic jurisdiction of a State?

5. *Recent Declarations: Human Cloning; Indigenous Peoples.* Among the most recent General Assembly declarations with potential (though contested) law-generative effects are a Declaration on Human Cloning, U.N. Doc. A/RES/59/280, annex, adopted in March 2005 by a vote of 84 to 34, with 37 abstentions; and a Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295, adopted in September 2007 by a vote of 143 to 4 (Australia, Canada, New Zealand, United States voting against), with 11 abstentions and 34 absent. What is the significance of the vote distributions on these resolutions for their import as authoritative declarations of law? In explaining its negative vote on the Indigenous People's Declaration, New Zealand observed that "the history of the negotiations on the Declaration and the divided manner in which it had been adopted demonstrated that the text did not state propositions that were reflected in State practice, or which would be recognized as general principles of law." For the voting breakdown and analysis of the Cloning resolution, see Arsanjani, Negotiating the UN Declaration on Human Cloning, 100 A.J.I.L. 164 (2006).

6. *Further Reading.* Writings on this subject include Higgins, The Development of International Law Through the Political Organs of the United Nations (1963); Schachter, International Law in Theory and Practice 85–94 (1991); Oberg, The Legal Effects of Resolutions of the U.N. Security Council and General Assembly in the Jurisprudence of the International Court of Justice, 17 E.J.I.L. 879 (2005); Alvarez, International Organizations as Law-Makers 159–69, 259–60 (2005).

B. SECURITY COUNCIL "LAW-MAKING"

The Security Council differs from the General Assembly in that the U.N. Charter confers on the Council power to take compulsory measures under Chapter VII (Articles 39–51) of the Charter, which U.N. members are legally bound to implement under Articles 24 and 25. Please examine those provisions (in the Documents Supplement). What kinds of powers do you think they confer? Until the Security Council began exercising its compulsory powers actively at the end of the Cold War, questions about the scope of (and limits on) its legal authority were largely hypothetical. Starting in 1990, however, the Council has acted with respect to a wide range of specific international and internal conflicts (some of which are discussed in Chapter 15), mostly by imposing economic sanctions and mandating other nonforcible measures under Article 41. As we will see, these actions have raised novel questions of constitutional character and have spurred a tremendous amount of controversy in diplomatic circles and in scholarship.

Beginning in the 1990s and accelerating in the 2000s, the Security Council has embarked upon certain exercises of authority that have been characterized as law-making in character. These began in the context of specific conflicts but then reached more broadly across the global agenda of threats to peace and security. In increments in the initial phases of the Iraq conflict (1990–1991) and the conflict in former Yugoslavia (1991–1995), the Council adopted resolutions "affirming" or "declaring" certain propositions of law which were widely accepted but perhaps not entirely beyond dispute at the time of their pronouncement. For example, it laid the groundwork for future proceedings to obtain reparations from Iraq and to establish responsibility for violations of international humanitarian law in ex-Yugoslavia through resolutions affirming that states and individuals committing violations could be held responsible in international law. See, e.g., S.C. Res. 674 (Oct. 29, 1990) (Iraq); S.C. Res. 764 (July 13, 1992) (Yugoslavia). In S.C. Res. 687 (Apr. 3, 1991) which established the terms of cease-fire at the end of the Iraq–Kuwait war, it imposed obligations on Iraq that were markedly more stringent than Iraq's obligations under its existing treaties or customary law and also established mechanisms for demarcating the boundary between Iraq and Kuwait and determining compensation to be paid by Iraq. To enforce that new regime, the Council maintained in place a comprehensive program of economic sanctions which affected not only Iraq but all states that would otherwise have had dealings with Iraq. On these developments, see Chapter 15.

In the decade between 1991 and 2001, the Council asserted itself in various ways with respect to global threats from terrorism, weapons of mass destruction, and serious violations of human rights and humanitarian law. Most of the novel steps in this decade were taken with respect to specific targets in order to achieve precisely defined objectives. Libya, for example, was put under sanctions for its role in the explosion of Pan Am

Flight 103 over Lockerbie, Scotland; Iraq was subjected to a unique program of supervised demilitarization and disarmament; and Haiti, Somalia, Rwanda, Sierra Leone, and other countries were placed under Chapter VII measures in order to bring extreme violence under control there. In 1999 the Council placed Taliban-controlled Afghanistan under a sanctions regime with the primary objective of ending its support for international terrorism. See Chapter 15.

Then, just days after the attacks of September 11, 2001, the Council embarked upon one of its most ambitious initiatives to date. In Resolution 1373 (Sept. 28, 2001), it required states to take a variety of obligatory measures to combat terrorism, including the enactment of criminal legislation to prevent terrorist acts and the freezing of assets. This resolution is widely perceived as a landmark in the evolution of Security Council activity, not only for its political and economic import in the global counterterrorist struggle, but also for having broken new ground in international law-making. Other Security Council resolutions that have been characterized as legislative in character include Resolutions 1422 (July 22, 2002) and 1487 (July 12, 2003) on the International Criminal Court (see Chapter 16), and perhaps most important, Resolution 1540 (Apr. 28, 2004) on weapons of mass destruction. Such resolutions, some of which are reprinted in the Documents Supplement, share the features of prescribing obligations of a general character, rather than dealing with a particular state or conflict.

Many states and commentators have welcomed the Security Council's "legislative phase," but others have been critical both on policy grounds and for legal-constitutional reasons. It is said that the Council was intended to be an executive, not legislative, organ, and that its forays into law-making may exceed its powers under the U.N. Charter. Concerns have been expressed about the Security Council's perceived "democratic deficit," in that its membership is restricted to fifteen states, of whom five—the permanent members—have a veto and thus carry disproportionate weight in deliberations over the content of obligations to be imposed on the U.N. community as a whole. In many quarters, "hegemony" of the strongest permanent member is unwelcome. Resistance to law-making by the Security Council is bound up with the long-running controversy over reforming the Council's structure to make it more representative and responsive to diverse constituencies. The debate over these questions at the intersection of U.N. constitutional law and global politics has been intense, as the following excerpt illustrates.

TALMON, THE SECURITY COUNCIL AS WORLD LEGISLATURE

99 A.J.I.L. 175, 179, 182–86 (2005) (footnotes omitted)

Several general objections may be raised to Security Council legislation. First, a patently unrepresentative and undemocratic body such as the Council is arguably unsuitable for international lawmaking. However, this objection, although valid, could also be made to any other Council action. It can hardly be maintained that authorizing the use of force requires less democratic legitimacy than imposing an obligation to prevent and suppress the financing of terrorist acts. Second, it may be argued that the International Court of Justice (ICJ) does not know of legislative resolutions as a source of international law. This contention does not take into account that Council resolutions are legally based in the United Nations Charter, an international convention in the sense of Article 38(1)(a) of the ICJ Statute, which makes them classifiable as "secondary treaty (or Charter) law." The fact that the ICJ has been able to apply resolutions of the Council without remarking upon the incompleteness of Article 38 strongly suggests that binding Council resolutions, both of a general and of a particular character, are still properly regarded as coming within the scope of the traditional sources of international law. This quality would change only if the Council expressly purported to legislate outside the Charter framework, that is to say, for nonmembers of the United Nations. Third, Council practice may be criticized as contrary to the basic structure of international law as a consent-based legal order. This view overlooks the nature of all binding decisions of the Council as, according to Article 25 of the UN Charter, based on the consent of the member states. Finally, the assumption of legislative powers by the Council may be said to be difficult to reconcile with its general role under the Charter as a "policeman" rather than a legislature or jury. Yet the powers of the Council are to be determined not by reference to its general role but on the basis of the provisions of the UN Charter.

* * *

Although the Security Council has a wide margin of discretion in deciding when and where a threat to the peace exists and what measures member states should take to maintain or restore international peace and security, its power is not legally unfettered. This part examines three possible legal limits to Council legislation: restrictions deriving from the text of the UN Charter, the principle of proportionality, and the concept of the integrity of treaties.

Restrictions Deriving from the Text of the UN Charter

The Council enjoys powers only insofar as they are conferred on it or implied in the UN Charter. Only resolutions that are *intra vires* the UN Charter acquire binding force in terms of Article 25, which speaks of "decisions of the Security Council in accordance with the present Charter." The Council's legislative powers are thus limited by the jurisdiction of the United Nations at large, as well as by the attribution and division of competences within the organization.

According to Article 39, the Council may take action under Chapter VII only to "maintain or restore international peace and security." The basic restriction of the Council's legislative power is that it must be exercised in a manner that is conducive to the maintenance of internation-

al peace and security. The Charter does not establish the Council as an omnipotent world legislator but, rather, as a single-issue legislator. This restriction is confirmed by the fact that the Charter allocates to the General Assembly the task of making recommendations for the purpose of progressively developing and codifying international law. Most international issues, especially those of an administrative or technical nature, will remain outside the ambit of Security Council legislation. For example, the Council cannot lay down general rules on the breadth of the territorial sea or the drawing of straight baselines in the law of the sea, although it may find that a particular improper or excessive territorial sea claim constitutes a threat to international peace and security. * * * [I]n all cases there must be a genuine link between the general obligations imposed and the maintenance of international peace and security. Thus, the Council cannot regulate financial transactions in general but only transactions that may be linked to a threat to the peace; that is, to terrorist acts, the proliferation of weapons of mass destruction, and possibly transnational organized crime, the illegal arms trade, and drug trafficking.

Another restriction of Council legislation may be derived from provisions in the Charter that provide for only recommendatory powers of the Council. According to Article 26, the Council "shall be responsible for formulating ... plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments." Such plans are not binding on member states, not least because of their implications for national security and the right to self-defense. The term "regulation of armaments" is to be understood in the sense of "arms control," including the reduction, limitation, or elimination of arms and armed forces, as well as the production and possession of and trade in armaments. While certain types of armaments (such as nuclear, chemical, and biological weapons) or the excessive stockpiling of armaments might per se constitute a threat to the peace, the Council cannot impose general disarmament obligations on states, for example, by prohibiting the development, production, or possession of a particular type of weaponry. The Council also cannot mandate participation in the UN Register for Conventional Arms, established on a voluntary basis by the General Assembly in 1992, or limit the military budgets of states. Article 26, however, does not preclude the Council from imposing disarmament obligations on a particular state, if that state's possession of certain weapons, judged on the basis of its previous conduct, constitutes a threat to international peace and security.

* * *

The Principle of Proportionality

Even though the Security Council, when acting under Chapter VII, is not bound to respect international law apart from the Charter, the Charter itself indicates in several provisions that the Council's actions are subject to the principle of proportionality. These provisions indicate that Council legislation must be necessary in order to maintain international

peace and security, meaning that the usual ways to create obligations of an abstract and general character (the conclusion of treaties and the development of customary international law) must be inadequate to achieve that aim. Council legislation is always emergency legislation. In the Council's open debate on April 22, 2004, the Swiss representative seized upon this point, stating: "It is acceptable for the Security Council to assume such a legislative role only ... in response to an urgent need." This sense of urgency was emphasized by several other delegations, as well as by the president of the Council, who stated with regard to Resolution 1540 that

> there was a gap in international law pertaining to non-State actors. So, either new international law should be created, either waiting for customary international law to develop, or by negotiating a treaty or convention. Both took a long time, and everyone felt that there was an "imminent threat", which had to be addressed and which could not wait for the usual way.

A gap or lacuna in the legal framework is not required to signal an urgent need for Council legislation, as is shown by Resolution 1373, some of whose provisions were based on the Convention for the Suppression of the Financing of Terrorism. In that case, the need for Council legislation arose because, at the time, only four states were parties to the Convention, making it a long way from coming into force.

The character of Council legislation as emergency legislation does not mean that the general obligations imposed are provisional or temporary and must be replaced by a multilaterally negotiated treaty that allows all interested states to participate, on an equal footing, in defining their obligations. Calls by several states for the early conclusion of a binding international legal instrument on the subject matter of the resolution were not included in Resolution 1540. This does not exclude the possibility that a treaty will subsequently be concluded on that subject matter. However, in the event of a conflict between the obligations under the resolution and those under a subsequent treaty, the obligations under the resolution will prevail. If the treaty were intended to replace the resolution, the Council would either have to abrogate the resolution or, at least, endorse the treaty in another resolution or a statement by the president.

In practice, the principle of proportionality will have little limiting effect on Council legislation, as the Charter allows the Council a broad margin of appreciation with respect to the proportionality of its action. Legislation would therefore violate the Charter only if its impact on the member states were manifestly out of proportion to the objective pursued, the maintenance of international peace and security. As with other *ultra vires* decisions of the Council, there is no procedure for reviewing the legality of legislation. The resulting problems are far from being resolved, and in any case are not susceptible of resolution by means of simplified formulations.

The Concept of Integrity of International Treaties

Several states have argued that the Council does not have the power to take decisions under Chapter VII to amend international treaties. For example, the representative of Pakistan declared: "Pakistan strongly adheres to the position that the Security Council, despite its wide authority and responsibilities, is not empowered to unilaterally amend or abrogate international treaties and agreements freely entered into by sovereign States." South Africa asserted that "the Council's mandate leaves no room either to reinterpret or even to amend treaties that have been negotiated and agreed by the rest of the United Nations membership." These statements must be seen in the context of the discussion about the legality of Resolutions 1422 and 1487, which turned on the interpretation of Article 16 of the Rome Statute of the International Criminal Court. The states in question argued that the provision allowed the Council to request the deferral of investigations or prosecutions only in specific cases. A general request, they argued, would amount to an amendment of the treaty. The discussion was apparently influenced more by the attitude of states toward the International Criminal Court than by the general question of the Council's authority under Chapter VII. But even had Article 16 of the Rome Statute not foreseen a general request, that could not prevent the Council from making such a request if it was necessary for the maintenance of international peace and security. According to Article 103 of the Charter, in the event of a conflict between a request and the Rome Statute, the request would prevail. The ICJ held in the *Lockerbie* case that obligations imposed by the Council take precedence over obligations under international treaties. A precondition, however, is that the Council may impose the obligation in the first instance. A decision by the Council that states shall not exercise their right under the Nuclear Non–Proliferation Treaty to withdraw from that treaty would contravene Article 26 of the UN Charter, which gives the Council only recommendatory powers in the area of regulation of armaments. A valid legislative resolution whose application is not limited in time, owing to the continuing character of the threat addressed, may have the effect of a *de facto* amendment to existing treaties, that is to say, an alteration of the treaty without altering its text.

Whether the Council may impose existing treaties upon the member states, either by obliging them to become parties or by making the treaty mandatory, is a different question. So far the Council has not done so, although several writers have advocated this practice. In Resolution 1373 the Council only called upon states in a nonbinding provision to "become parties as soon as possible to the relevant international conventions and protocols relating to terrorism." While the Council may impose certain treaty obligations on states, as in Resolution 1373, it cannot, as a rule, impose whole treaties, since they contain not just substantive obligations, but also purely technical or administrative provisions whose imposition will not be necessary to address a threat to international peace and security.

NOTES

1. *Review of Security Council Law-Making?* Article 103 of the U.N. Charter provides for Charter obligations to prevail over other obligations. Because Security Council resolutions adopted under Chapter VII of the Charter enjoy this higher status, those affected by such resolutions may well be concerned that the Council itself should act in a lawful manner, both in relation to the Charter as an international constitution and in relation to peremptory norms of international law reflecting the interests of the international community as a whole. As indicated in Chapter 2 on normative hierarchy, legal challenges to Security Council authority have been brought in a variety of national, regional, and international tribunals and those challenges are continuing. Ian Johnstone has identified at least fifteen such challenges, several of which assert that the Council has acted in violation of *jus cogens*. See Johnstone, Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit, 102 A.J.I.L. 275 (2008); see also the excerpt from the *Kadi* decision of the European Court of Justice in Chapter 10. While there have been some decisions relevant to appreciating the powers of the Security Council (including by the I.C.J. in the *Lockerbie* case where Article 103 was invoked), the legislative dimension of the Council's authority as asserted in the post–9/11 era has not yet been fully tested or settled. Given the decentralized nature of the international legal system, it is not likely that there will be a definitive answer to the questions about Security Council legislation any time soon.

2. *Further Reading*. For additional perspectives on the Security Council's law-making initiatives, see Szasz, The Security Council Starts Legislating, 96 A.J.I.L. 901 (2002); Alvarez, International Organizations as Law–Makers 184–217 (2005). For more on the debate over potential external review of Security Council law-making and other Council actions, see De Wet, The Chapter VII Powers of the United Nations Security Council (2004); Orakhelashvili, The Impact of Peremptory Norms on the Interpretation and Application of U.N. Security Council Resolutions, 16 E.J.I.L. 88 (2005); Sarooshi, International Organizations and Their Exercise of Sovereign Powers (2007).

SECTION 4. TRANSNATIONAL