



**UNIVERSITÉ
DE GENÈVE**

Archive ouverte UNIGE

<https://archive-ouverte.unige.ch>

Master

2014

Open Access

This version of the publication is provided by the author(s) and made available in accordance with the copyright holder(s).

The UN Security Council as legislator. A critical analysis

Ogunlade, Titilopemi

How to cite

OGUNLADE, Titilopemi. The UN Security Council as legislator. A critical analysis. Master, 2014.

This publication URL: <https://archive-ouverte.unige.ch/unige:73883>

© This document is protected by copyright. Please refer to copyright holder(s) for terms of use.



**UNIVERSITÉ
DE GENÈVE**

FACULTÉ DE DROIT

The UN Security Council as legislator. A critical analysis.

Under the seminar 5364 “**Droit de l’ONU : questions choisies**”

Master’s thesis

By

TITILOPEMI OGUNLADE

Under the guidance of
Professor NICHOLAS MICHEL
And assistant MÉLISSA FARDEL

May 11th 2014

Table of contents

| | |
|---|----|
| Introduction | 2 |
| I. Security Council legislative powers under Chapter VII of the Charter | 4 |
| a. The Security Council, a legislative organ? | 4 |
| b. Art. 41 of the UN Charter | 6 |
| II. Cases where the Security Council makes use of indirect legislative powers | 8 |
| a. Creation of the <i>ad hoc</i> international criminal tribunals | 8 |
| b. Amendment of an international treaty | 15 |
| III. Cases where the Security Council makes use of direct legislative powers | 19 |
| IV. Why the Council should avoid legislating | 21 |
| Conclusion | 22 |
| Bibliography | 23 |

Introduction

The UN Security Council's scope of intervention has broadened significantly over the past years.¹ This is undoubtedly due to the end of the Cold War; a period in which the exaggerated use of veto power by its permanent members prevented the Council of taking any considerable measures under Chapter VII of the UN Charter.² However, the new scope of the Security Council's intervention is also due to the substantial growth of internal conflicts after the cold war, as well as the human rights and humanitarian law violations that take place during these conflicts, causing a threat to international peace and security.³ In order to appease the conflicts, the UN Security Council has had to take measures based on Chapter VII of the UN Charter, which enables it to act when it determines the existence of a threat to the peace, a breach to the peace or in the case of an act of aggression.⁴ It would seem, however, that the Security Council has gradually adopted an extensive interpretation of the UN Charter's seventh chapter and in so doing, extended its own powers.⁵ The Council has intervened in such a diverse number of situations, ranging from resolutions concerning a specific conflict⁶ to adopting more general resolutions and enforcing general obligations to Member States (like it did when it adopted Resolution 1373(2001) in order to prevent further international terrorist acts after September 2001)⁷. The latter is a new role that goes beyond its conventionally accepted power of implementing specific legally binding obligations on Member States under Chapter VII of the UN Charter. This newfound role, although presenting its advantages, has been largely criticized. It is evident that in assuming this new role the UN Security Council has stepped out of the competency

¹ VOEFFRAY François, «Le Conseil de sécurité de l'ONU : gouvernement mondial, législateur ou juge?: quelques réflexions sur les dangers de dérives», in CAFLISCH Lucius, *La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international*, Martinus Nijhoff Publishers, Leiden, 2007, p. 1195.

² TZANAKOPOULOS Antonios, *Disobeying the Security Council: countermeasures against wrongful sanctions*, Oxford University Press, Oxford, 2011, p. 2.

³ CRONIN Bruce, HURD Ian, *The UN Security Council and the politics of international authority*, Routledge, Oxen, New York, 2008, p. 105.

⁴ Art. 39, UN Charter.

⁵ RICKENBACHER Michaela, *Les pouvoirs du Conseil de sécurité en vertu du Chapitre VII de la Charte des Nations Unies*, Thèse, Grade de docteur en droit, L'université de Genève, Genève, 2001, p. 4.

⁶ Namely, the invasion of Kuwait by Iraq in 1990.

⁷ DENIS Catherine, *Pouvoir normatif du Conseil de sécurité des Nations Unies: portée et limites*, Bruylant: Editions de L'Université de Bruxelles, Bruxelles, 2004, p. 1.

of its original function as a political organ.⁸ This has caused the Council to be referred to as exercising powers such as “law-making power” or “regulatory powers”.⁹ By adopting general resolutions and enforcing general obligations on its Member States, the Council has been said to take on an executive, judicial and legislative function.¹⁰

Before we continue in our study, we must first define what it means to legislate.

It is without doubt that the Security Council often adopts resolutions in which it prompts Member States to act in accordance to international, conventional and customary law. In so doing the Council does not create any new obligations for its Member States but rather, it reminds them of the existing law to which they are already bound and urges them to respect it. For this reason, such resolutions will not be the object of our study. Instead, we will examine cases in which the Security Council adopts resolutions of a general and abstract nature, void of any limit in time.¹¹ A resolution is said to be of general application when it is binding to all Member States.¹² But according to Catherine Denis¹³, one must distinguish between these resolutions of general application. There are those in which the Security Council exercises a *direct* normative power and there are those in which the Council’s normative power is *indirect*. In other words, while enforcing binding rules of general application, the Council makes use of either a direct normative power or an indirect normative power. The latter is the case in which the Security Council claims it is acting under existing international conventional or customary law but modifies the content of such laws. In so doing the Council creates new law. On the other hand, when the Council assumes direct normative powers, it overtly creates new obligations for Member States.¹⁴

In our present study, we will look at cases in which the Security Council has made use of both direct **(I)** and indirect **(II)** normative powers, namely while establishing the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and

⁸ CHESTERMAN Simon, "The UN Security Council and the Rule of Law", *New York University Public Law and Legal Theory Working Papers*, 15 December 2008, N 3.

⁹ DENIS, p. 1.

¹⁰ CHESTERMAN, UN Security Council, N 3.

¹¹ VOEFFRAY, p. 1201.

¹² DENIS, p. 15. An example of such a resolution is the already-mentioned UN Security Council Resolution 1373 (2001) on terrorism; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

¹³ DENIS Catherine is the author of «*Pouvoir normatif du Conseil de sécurité des Nations Unies: portée et limites* » (see note 5 for full reference).

¹⁴ DENIS, pp. 104 – 105.

the International Criminal Tribunal for Rwanda (ICTR), and also in the adoption of Resolution 1373 (2001)¹⁵ and Resolution 1540 (2004)¹⁶. But firstly, we will examine Chapter VII of the UN Charter in order to determine whether it grants the Council the power to legislate (I). Finally, we will then briefly discuss why the Security Council should avoid making use of legislative powers (IV).

I. Security Council legislative powers under Chapter VII of the Charter

a. The Security Council, a legislative organ?

The question whether the United Nations Security Council is endowed with legislative powers has sparked quite some scholarly debates. As rightly stated by Coicaud, whether this is the case is fully dependent on the definition given to "legislative powers".¹⁷ But whatever the case, we can affirm that it is usually a legislative organ that has the power to create new law. So is the UN Security Council a legislative organ?

Some would say that Security Council powers under Chapter VII of the Charter is limited to "stopping military activities or averting a specific danger for the maintenance of peace".¹⁸ This resembles what is called "a policing function".¹⁹ This same idea dates back to the San Francisco conference in 1945 where representatives met in order to draft the UN Charter. The American representative present at the conference described the Security Council as being the world's policeman.²⁰ However, although the "policing function" might have been what the drafters of the

¹⁵ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

¹⁶ UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540.

¹⁷ COICAUD Jean-Marc, HEISKANEN Veijo, *The legitimacy of international organizations*, United Nations University Press, Tokyo, 2001, p.335.

¹⁸ COICAUD, p. 317.

¹⁹ COICAUD, p. 317.

²⁰ SIMMA Bruno et al. (eds.), *The Charter of the United Nations : a commentary*, 3rd ed., Oxford University Press, Oxford, 2012, Volume I, N 63.

Charter were aiming to endow the Security Council with, that particular function is not explicitly mentioned in the Charter.²¹

Though it would have been a clear indicator of whether or not the Security Council has the power to legislate, the UN Charter makes no mention of neither executive or legislative functions²². According to the Appeals Chamber of the ICTY, it is impossible to transfer the notion of separation of powers which is used in national laws in the United Nations. More specifically, the Appeals Chamber of the ICTY judged that, “among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut”.²³ It goes further on to state that “there is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects”.²⁴ In fact, no provision in the Charter specifically states that the Security Council is endowed with legislative powers.²⁵ Even the General assembly cannot adopt binding rules of general application since it only holds the power to make recommendations under Art. 13(1)(a) of the Charter. According to this article, the General Assembly can only “encourag[e] the progressive development of international law and its codification”.²⁶ The General Assembly’s “quasi-legislative” power also allow it to adopt multilateral treaties but these can only become law when signed and ratified by the required number of countries.²⁷

In sum, we may deduce at this stage that the Charter is not formally a legislative organ under the UN Charter.

Does the lack of an explicit provision in the Charter mean that the Security Council acts *ultra vires* when it legislates? In other words, by creating new law, does the Council act beyond the powers granted to it by the Charter?

²¹ SIMMA Bruno, N 63.

²² TZANAKOPOULOS, pp. 7 - 8.

²³ ICTY, *Prosecutor v. DUSKO TADIC*, judgment, Appeal on Jurisdiction, case n° IT-94-1-AR72, 2 October 1995, paragraph 43.

²⁴ ICTY, *Prosecutor v. DUSKO TADIC*, judgment, Appeal on Jurisdiction, case n° IT-94-1-AR72, 2 October 1995, paragraph 43.

²⁵ VOEFFRAY, p. 1201.

²⁶ VOEFFRAY, p. 1201.

²⁷ CRONIN, HURD, p.83.

b. Art. 41 of the UN Charter

It is interesting to note that, in most cases, in order to justify the establishment of its resolutions, the Security Council avoids making reference to a precise provision in the Charter. It simply generally states that it is acting under Chapter VII of the Charter. This is, no doubt, done in order to avoid any scrutiny.²⁸ This is why we should take a closer look at Chapter VII of the Charter.

In the Charter itself, only Art. 41 seems to serve as an adequate legal basis for the Council's legislative acts, seeing as it provides a list of measures the Council can apply.²⁹ But before Art. 41 of the Charter can be applied, the conditions spelled out in Art. 39 of the Charter must be met.³⁰ Art. 39 reads:

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

This article gives the Security Council the task of defining the situation to which it is faced. If it finds that the situation constitutes a threat to the peace, a breach of the peace or an act of aggression, it can take certain measures under articles 41 and 42.³¹ This task can, at first hand, appear straight forward. But there has been an issue as to how “threat to the peace” should be interpreted. Based on the practice of the Security Council, the concept has evolved, no longer simply referring to an armed conflict.³² The concept is now seen as also including internal situations that are liable to provoke an international conflict.³³ The Appeals Chamber of the ICTY also confirmed the Council's interpretation of the notion of “threat to the peace” when it observed that the internal conflict in the territory of the former Yugoslavia constituted a “threat to the peace”.³⁴ According to the Appeals Chamber, it is a “common understanding”

²⁸ VOEFFRAY, p. 1197.

²⁹ SIMMA, Volume I, N 70, p.783.

³⁰ Art. 39, UN Charter.

³¹ COICAUD, p. 312.

³² COICAUD, p. 314.

³³ COICAUD, p. 317.

³⁴ ICTY, *Prosecutor v. DUSKO TADIC*, judgment, Appeal on Jurisdiction, case n° IT-94-1-AR72, 2 October 1995, paragraph 30.

which can be observed through the “subsequent practice” of the United Nations Member States that the “threat to the peace” now includes internal conflicts.³⁵ The Council has also been known to consider economic, social and ecological sources of instability as threats to the peace.³⁶ It has also considered human rights and humanitarian violations as threats to the peace.³⁷ This has even caused Cronin and Hurd to ironically question whether the Council will, in the future use the notion of “threat to the peace” to justify legislating in such a field as the environment.³⁸ This presents a clear illustration of the problems associated to the Council’s very broad interpretation of Art.39 of the Charter.

As mentioned above, after it has determined that there is a “threat to the peace”, the Council may then apply Art. 41 or 42 of the Charter. Art. 41 permits the Council to “decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures”. The term ‘measures’ used in the provision is sufficiently broad, so much that it could be interpreted to include binding rules of general application.³⁹ Due to its broad unrestrictive nature, Art. 41 of the Charter has served the Council in assuming a legislative role, for example, through the creation of the international criminal tribunals.⁴⁰ Admittedly, Art. 41 lists a number of measures, amongst which are “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations”. Though legislating does not appear in the enumeration, it can be affirmed that the list is only exemplary. This is made clear by the terms “may include” which appears before the list. The Security Council is therefore not limited to the list featured in Art. 41. In its efforts to maintain or restore international peace and security (Art. 39 UN Charter), the Council may adopt any measure not involving the use of armed force.⁴¹ The Council’s powers are equally broadened when articles 24 and 25 of the Charter – which relate to the functions and powers of the Council – are taken into account. According to these articles, Member States must accept and carry out the

³⁵ ICTY, *Prosecutor v. DUSKO TADIC*, judgment, Appeal on Jurisdiction, case n° IT-94-1-AR72, 2 October 1995, paragraph 30.

³⁶ CRONIN, HURD, p.83.

³⁷ CRONIN, HURD, p.83.

³⁸ CRONIN, HURD, p.83.

³⁹ SIMMA, Volume I, N 70, p784.

⁴⁰ SIMMA, Volume II, N 8, p.1304.

⁴¹ RICKENBACHER, p. 379.

decisions of the Security Council when the Council is acting in accordance with the Purposes and Principles of the United Nations. In other words, the Council, in order to maintain and restore international peace and security, may adopt any measure it considers necessary as long as the said measure respects the United Nations' Purposes and Principles.⁴² This has allowed the Council to take up functions (such as its interpretative or its enforcement functions) that are not specifically stated in the UN Charter but are considered to fall within the Council's powers. In the same sense, there is no clear prohibition in the Charter that prevents the Council from adopting general rules in order to promote peace and security.⁴³

We can then affirm that the UN Security Council is granted broad discretion and can therefore adopt any measure it considers adequate under Chapter VII and Art. 41 of the Charter.

II. Cases where the Security Council makes use of indirect legislative powers

a. Creation of the *ad hoc* international criminal tribunals

The Security Council adopted a surprising and substantially innovative resolution in 1993, which caused some controversy. Security Council Resolution 827 (1993) established the International Criminal Tribunal for the former Yugoslavia (ICTY)⁴⁴. The tribunal's mandate is to try individuals who acted in serious violation of international humanitarian law during the conflict in the former Yugoslavia⁴⁵, a conflict which broke out after the independence of Slovenia, Croatia and Bosnia-Herzegovina⁴⁶. France, New Zealand, the Russian Federation, Spain, the United Kingdom and the United States submitted the resolution's draft and the text was

⁴² CRONIN, HURD, p. 82.

⁴³ CRONIN, HURD, p. 82.

⁴⁴ UNSC Res 827 (25 May 1993) UN Doc S/RES/827.

⁴⁵ ROSAND: "The Security Council As "Global Legislator": Ultra Vires or Ultra Innovative?" *Fordham International Law Journal*, n° 3, vol. 28, 2004

⁴⁶ DAVID Eric, « Le Tribunal International pénal pour l'ex-Yougoslavie » *Revue belge de droit international*, vol. VI, 1992, p. 565.

adopted unanimously on the 25th of May 1993.⁴⁷ A year later, the Security Council went on to create the International Criminal Tribunal for Rwanda (ICTR) through Resolution 955 (1994) which was adopted on the 8th of November 1994. Its mandate is to prosecute those who committed acts of genocide and serious violations of international humanitarian law on Rwandan soil in the year 1994.⁴⁸ It also prosecutes Rwandan citizens who committed such atrocities in neighboring countries within the same year.⁴⁹

But not only did the Security Council adopt these resolutions establishing the above-mentioned *ad hoc* tribunals, it also adopted their Statutes.⁵⁰ The evident problem was the legal basis that would justify these two innovative resolutions. Hence, the Security Council proclaimed itself to be “acting under Chapter VII of the Charter of the United Nations”.⁵¹ Unlike its predecessor which was adopted through a unanimous vote, Resolution 955 obtained 13 favorable votes out of fifteen. Rwanda voted against and China abstained, deeming that Chapter VII was not a suitable legal basis for the creation of an international criminal tribunal.⁵² China’s stance can better be understood when taken into account the fact that, in most domestic law settings, the actual creation of jurisdiction falls solely in the competency of the legislator.⁵³ Despite the great controversies on the matter at the time, it is now largely accepted that the Council is endowed with the power to create tribunals. The ICTY even examined the question in the Tadic case and concluded by affirming the conformity of its own creation with the UN Charter⁵⁴. But that is not the focus of our study. The question we ask ourselves at this stage of our study is, whether through the adoption of the Statutes of the *ad hoc* international tribunals the Council creates new law.

The creation of an organ is not exceptionally new where Council activity is concerned. In fact, it is well established that the Council has the power to create

⁴⁷ ALBARET Mélanie et al., *Les grandes résolutions du Conseil de sécurité des Nations Unies*, Dalloz, Paris, 2012 p. 183.

⁴⁸ UNSC Res 955 (8 November 1994) UN Doc. S/RES/955.

⁴⁹ Art. 1, ICTR Statute.

⁵⁰ The Statutes of the *ad hoc* international tribunals are annexed to the resolutions establishing the latter. See UNSC Res 827 (25 May 1993) UN Doc S/RES/827 para 2; UNSC Res 955 (8 November 1994) UN Doc. S/RES/955 para 1.

⁵¹ UNSC Res 827 (25 May 1993) UN Doc S/RES/827; UNSC Res 955 (8 November 1994) UN Doc. S/RES/955.

⁵² ALBARET, p. 214.

⁵³ DENIS, N 147, p. 112.

⁵⁴ SIMMA, Volume II, N 26, p. 1320.

subsidiary organs⁵⁵. It has often created Committees and Commissions tasked with the mission of assuring the realization of the Council's decisions and the implementation of its measures.⁵⁶ Such was the case when the Council created Sanctions Committees concerning the situation in Sierra Leone, Rwanda, Liberia and also regarding the situation between Iraq and Kuwait.⁵⁷ After the Gulf War, the Council created the United Nations Compensation Commission (UNCC), which had the task of processing claims and implementing the compensation of losses endured from Iraq's invasion and occupation of Kuwait⁵⁸. These are examples of cases where the Council took necessary measures (such as the creation of a subsidiary organ) in a specific situation in order to maintain or restore international peace. However, as already noted, in the case of the establishment of the *ad hoc* international tribunals, not only did the Council create judiciary organs in specific situations in order to maintain or restore international peace, it also adopted the Statutes of the said tribunals⁵⁹.

This should not pose a problem since the Security Council claimed to only assemble existing general international criminal law in these two Statutes.⁶⁰ In other words, the Council asserts to have only gathered a list of general already-existing definitions of incriminations pertaining to international criminal law.⁶¹ The Secretary-General also backed up the Council's claim by insisting that by giving the ICTY its mandate to prosecute those responsible for serious violations of international humanitarian law, "the Security Council would not be creating or purporting to 'legislate' that law. Rather, the International Tribunal would have the task of *applying existing international humanitarian law*".⁶²

Undoubtedly, the Statute of the ICTY uses existing international criminal law as a yardstick to define certain crimes⁶³. For example, its article 2 criminalizes "grave breaches of the Geneva Conventions" of August 12 1949. This is also illustrated by its

⁵⁵ Art. 29, UN Charter.

⁵⁶ DENIS, p. 106.

⁵⁷ <http://www.un.org/sc/committees/> (5 March 2014).

⁵⁸ UNSC Res 687 (3 April 1991) UN Doc S/RES/1373, paragraph 18.

⁵⁹ DENIS, pp. 106 - 107.

⁶⁰ DENIS, p. 107.

⁶¹ DENIS, p. 107.

⁶² UN Security Council, *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808* (1993), §29 (emphasis added).

⁶³ DENIS, N 148, p. 114.

3rd article which enumerates a list of offenses considered as “violations of the laws or customs of war”⁶⁴. However, it would seem the ICTY Statute also criminalizes offenses that had never before been criminalized⁶⁵. This is the case of Art. 3(a) of the said Statute which criminalizes the “employment of poisonous weapons or other weapons calculated to cause unnecessary suffering.” The cited infraction represents the prohibition present in the Geneva Protocol of 17 June 1925 for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. The same prohibition is also present in the Paris Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction.⁶⁶ The lack of previous criminalization of these offenses cannot be regarded as an error or the result of inattention concerning the matter. In fact, it is apparent that a number of States did not want the criminalization of these offenses, as illustrated during the Diplomatic Conference of Geneva (1974-1977) where the Optional Protocols to the Geneva Conventions were adopted. While many States voted in favor of criminalizing the employment of poisonous weapons they still did not attain the required two-thirds majority.⁶⁷

The ICTR Statute also presents novel infractions. The Statute prosecutes “persons committing or ordering to be committed serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977”.⁶⁸ While common article 3 of the Geneva Conventions prohibits certain acts during conflicts that are not of an international character, it refrains from criminalizing the said acts because, at the time of its adoption, a majority of States rejected the idea of the concept of war crimes being applied to non-international conflicts.⁶⁹ Consequently, although these acts are prohibited by the Geneva Conventions, they were not actually criminalized, making it

⁶⁴ Art. 2 and 3 ICTY Statute.

⁶⁵ DENIS, N 148, p. 114.

⁶⁶ DAVID Eric, “Le Tribunal International pénal pour l’ex-Yougoslavie“, *Revue belge de droit international*, vol. VI, 1992, p.576.

⁶⁷ DAVID Eric, “Le Tribunal International pénal pour l’ex-Yougoslavie“, *Revue belge de droit international*, vol. VI, 1992, p.577.

⁶⁸ Art. 4, Statute of the ICTR.

⁶⁹ DENIS, N 149, p. 115.

impossible for someone to be tried for their disrespect – that is, of course, before the adoption of the ICTR Statute.⁷⁰

The Secretary-General seemed to only recognize this innovation after the adoption of the Statute of the ICTR. The Secretary-General affirmed that the Security Council “included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments *regardless of whether they were considered part of customary international law* or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime.”⁷¹ And regarding Article 4 of the statute, the Secretary-General stated that the particular article “includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and *for the first time criminalizes common article 3 of the four Geneva Conventions*”⁷².

Consequently, we can assert that contrary to the Security Council and the Secretary-General’s claim at the adoption of the Statutes of the two *ad hoc* international criminal tribunals, the latter do not only assemble a list of already-existing international law, but also modify general existing international criminal law. In which case the Security Council would have created new law and played the role of legislature⁷³.

With this in mind, an obvious question arises in regards to the legitimacy of an organ such as the Security Council to criminalize infractions States did not agree to criminalize. But also, another problem arises in regards to the application of the principle of *nullum crimen sine lege*. This principle prohibits tribunals from prosecuting an individual on the basis of an act committed at a time when such an act was not regarded as an infraction. Since common article 3 to the Geneva Conventions and of Additional Protocol II was only criminalized after the conflicts in the former Yugoslavia and Rwanda, it would mean that the tribunals could not prosecute individuals on the basis of violations to the article committed during the conflicts.⁷⁴ In

⁷⁰ DENIS., N 149, p. 115.

⁷¹ UN Security Council, *Report of the secretary-general pursuant to paragraph 5 of Security Council Resolution 955 (1994)*, paragraph 12, 13 February 1995, S/1995/134, (emphasis added).

⁷² Report of the secretary-general pursuant to paragraph 5 of security council resolution 955 (1994), paragraph 12, (emphasis added)

⁷³ DENIS, N 137, p. 107.

⁷⁴ DENIS, N 150, p. 116.

their defense, individuals could argue that the Geneva Conventions and the Additional Protocol II are only binding to States and Parties to a conflict and therefore do not constitute crimes for which they can be held responsible in the case of a violation.⁷⁵

To remedy this, the ICTY decided to follow the example of the Nuremberg Tribunal, which, when faced with the question of individual criminal responsibility, resolved that the charge of individual criminal responsibility could not be impeded by the absence of treaty provisions on the punishment of breaches. The Nuremberg Tribunal concluded that for there to be individual criminal responsibility in the absence of specific treaty provisions on the punishment of breaches, there had to be a clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals.⁷⁶ Which is why the ICTY proceeded to examine State practices.⁷⁷ The Court examined the Military Manual of Germany which criminalized certain offenses committed against persons protected by common article 3.⁷⁸ The Court also looked at the "Interim Law of Armed Conflict Manual" of New Zealand, as well as the American and the British military codes.⁷⁹ It then looked at how national legislations implemented the Geneva Conventions, noting that "some of [them] go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts".⁸⁰ One of such countries is Belgium, which regards grave breaches to the Geneva Conventions and the Additional Protocols as constituting international war crimes. Another example is the former Yugoslavia. The Court examined the country's criminal code and pointed out the fact that the two Additional Protocols to the Geneva Conventions had been

⁷⁵ ICTR, *The Prosecutor v. Jean-Paul Akayesu*, judgment, case n° ICTR-96-4-T, 2 September 1998, paragraph 611.

⁷⁶ International Military Tribunal, *The Trial of German Major War Criminals*, judgment, Nuremberg, Germany, Part 22, 1 October 1946, paragraph 445-447; see also ICTY, *Prosecutor v. DUSKO TADIC*, judgment, Appeal on Jurisdiction, case n° IT-94-1-AR72, 2 October 1995, paragraph 128.

⁷⁷ DENIS, N 150, p. 116.

⁷⁸ ICTY, *Prosecutor v. DUSKO TADIC*, judgment, Appeal on Jurisdiction, case n° IT-94-1-AR72, 2 October 1995, paragraph 131.

⁷⁹ ICTY, *Prosecutor v. DUSKO TADIC*, judgment, Appeal on Jurisdiction, case n° IT-94-1-AR72, 2 October 1995, paragraph 131.

⁸⁰ ICTY, *Prosecutor v. DUSKO TADIC*, judgment, Appeal on Jurisdiction, case n° IT-94-1-AR72, 2 October 1995, paragraph 132.

directly applicable by the former Yugoslavian courts.⁸¹ To help establish an *opinio iuris*, The ICTY also took into consideration Security Council resolutions⁸² where the Council called for the individual criminal responsibility of those responsible for breaches to international humanitarian law in an internal conflict context.⁸³ All of this led the Court to conclude that “customary international law imposes criminal liability for serious violations of common Article 3 as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.”⁸⁴ This would then mean that there is no violation of the principle of *nullum crimen sine lege*.

While the approach of the ICTY is comprehensible, one must wonder if the analysis of a few States’ criminal code is really enough to establish an *opinion iuris*.

The ICTR also addresses the problem of the *nullum crimen sine lege* principle by examining the customary character of Art. 4 of its Statute which, as mentioned above, criminalizes serious violations of common article 3 to the Geneva Conventions and of Additional Protocol II.⁸⁵ The Court recalls the ICTY’s reasoning in the Tadic judgment but goes a little further by pointing out the fact that the Geneva Conventions and the Additional Protocol II had already been ratified by Rwanda and were thus in force in the country force at the time of the conflict. Also serving as an argument for the ICTR was the fact that at the time of the conflict the offenses listed under Art. 4 of the ICTR Statute were regarded as crimes under Rwandan law. Therefore, according to the Court, Rwandan nationals were conscious or should have been conscious at the time of the conflict that committing such acts was a violation of Rwandan law and consequently, they could be tried for such violations.⁸⁶

⁸¹ ICTY, *Prosecutor v. DUSKO TADIC*, judgment, Appeal on Jurisdiction, case n° IT-94-1-AR72, 2 October 1995, paragraph 132.

⁸² These are resolutions concerning conflict in Somalia. See UNSC Res 794 (3 December 1992) UN Doc S/RES/794 ; UNSC Res 814 (26 March 1993) UN Doc S/RES/814.

⁸³ ICTY, *Prosecutor v. DUSKO TADIC*, judgment, Appeal on Jurisdiction, case n° IT-94-1-AR72, 2 October 1995, paragraph 133.

⁸⁴ ICTY, *Prosecutor v. DUSKO TADIC*, judgment, Appeal on Jurisdiction, case n° IT-94-1-AR72, 2 October 1995, paragraph 134.

⁸⁵ DENIS, N 150, p. 117.

⁸⁶ ICTR, *The Prosecutor v. Jean-Paul Akayesu*, judgment, case n° ICTR-96-4-T, 2 September 1998, paragraph 617.

b. Amendment of an international treaty

Another interesting case where the Security Council intervened in an innovative way is in the adoption of Resolution 1422 (2002)⁸⁷ and Resolution 1487 (2003)⁸⁸. The former, Resolution 1422 (2002), was adopted nearly two weeks after the entry into force of the Rome Statute which establishes the International Criminal Court (ICC). This resolution was adopted because the United States government threatened to exercise its veto power against the renewal of the mandate for all peacekeeping operations if the ICC was not prohibited from prosecuting American peacekeeping officials. It was a threat which the United States government managed to carry out concerning peacekeeping operations in Bosnia & Herzegovina, putting a lot of pressure on the Security Council.⁸⁹ The United States drafted a first resolution proposition for the Security Council which permanently exempted American peacekeeping officials from ICC prosecution. This first proposition was rejected by fellow States. A second resolution proposition was made and after much deliberation from the Security Council, Resolution 1422 was adopted on July 12th 2002.⁹⁰ This resolution declares:

“the United Nations Security Council [...] requests, consistent with the provisions of Article 16 of the Rome Statute, 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 twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.”⁹¹

The resolution also goes as far as to urge Member States not to take any action inconsistent with paragraph 1, thereby binding the said States with a general obligation.⁹² The resolution’s mandate being only valid for a year, it was necessary for it to be renewed and thus Resolution 1487 (2003) was adopted. However, the

⁸⁷ UNSC Res 1422 (12 July 2002) UN Doc S/RES/1422.

⁸⁸ UNSC Res 1487 (12 June 2003) UN Doc S/RES/1487.

⁸⁹ Coalition for the international criminal court, “Chronology of the adoption of Security Council resolutions 1422/1487” http://www.iccnw.org/documents/FS-1422and1487Chronology_26March2008.pdf (consulted 10 February 2014)

⁹⁰ DENIS, N 157-158, p. 124-125.

⁹¹ UNSC Res 1422 (12 July 2002) UN Doc S/RES/1422, paragraph 1.

⁹² UNSC Res 1422 (12 July 2002) UN Doc S/RES/1422, paragraph 3.

resolution failed to be renewed a third time in 2004 because the United States did not have the support necessary from the rest of the Security Council membership.⁹³

The Council judged its action to be consistent with Art. 16 of the Rome Statute. This certain point that has posed certain problems. By adopting Resolution 1422 (2002) and Resolution 1487 (2003), the Security Council limits the ICC's powers to investigate and to prosecute. One must then ask if Art. 16 really makes room for the Council to limit the ICC's powers in such a way. If one answers the question by the negative then the Council would've given a new interpretation to the article and thus amended the terms of the treaty, which in itself would be the creation of new law.⁹⁴

Firstly, Art. 16 of the Rome Statute reads as follows:

“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

At first sight, it may appear as if the Council's interpretation is consistent with that of the Rome Statute. However, the context and history of the Rome Statute shows otherwise.⁹⁵ Resolutions 1422 (2002) and 1487 (2003) both inflict a general limitation to the ICC's powers to investigate and prosecute, contrary to a case-by-case limitation. The general limitation targets all future situations in which United Nations peacekeeping officials from non-member states are involved instead of just targeting a specific situation or conflict.⁹⁶ While this interpretation doesn't contravene the literal meaning of Art. 16 of the Rome Statute, it poses several problems in relation to the purpose of the article and its place within the general framework of the Rome Statute.⁹⁷ The ICC's aim is to ensure the prosecution of the perpetrators of the most serious crimes in international law and, in so doing, help to guarantee international

⁹³ Coalition for the international criminal court, “Chronology of the adoption of Security Council resolutions 1422/1487” http://www.iccnw.org/documents/FS-1422and1487Chronology_26March2008.pdf (consulted 10 February 2014)

⁹⁴ DENIS, N 158, p. 125.

⁹⁵ STAHN Carsten, “The ambiguities of Security Council Resolution 1422 (2002)”, *European Journal of International Law*, n° 1, vol. 14, 2003, p. 88.

⁹⁶ DENIS, N 164, p. 129.

⁹⁷ STAHN Carsten, “The ambiguities of Security Council Resolution 1422 (2002).”, pp. 88-89.

peace and security. So if one were to understand Art. 16 of the Rome Statute in the sense that it gives the Council the authority to generally and indefinitely suspend the ICC's competence to prosecute, this interpretation would completely disrupt the ICC's purpose and render it meaningless. Therefore, it is better to understand Art. 16 of the Rome Statute as an exception to the ICC's competence, permitting the Council to intervene only in specific situations.⁹⁸ This was also the thought of the Canadian representative during the Security Council debate before the adoption of resolution 1422 (2002) in July. The representative urged the Council not to “purport to alter [this] fundamental provision”⁹⁹, after reminding the Council that “history makes clear that recourse to article 16 is on a case-by-case basis only, where a particular situation—for example the dynamic of a peace negotiation—warrants a 12-month deferral”.¹⁰⁰ The historical background referred to dates back to the International Law Commission's Draft Statute for an International Criminal Court in 1994. Art. 23 of the Draft Statute declared that “[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.”¹⁰¹ This article is where Art. 16 of the Rome Statute finds its origin. Art. 23 of the Draft Statute, having been amended several times, finally resulted in Art. 16 of the Rome Statute.¹⁰²

With all the above in mind, it is clear that the interpretation given to Art. 16 of the Rome Statute is not the interpretation intended by the drafters. And that the article's purpose is to enable the Security Council to stop the Prosecutor of the ICC from continuing investigations in a specific case.

Another problem arises from the adoption of Resolutions 1422 (2002) and 1487 (2003) by the Security Council. Although the Council, at the adoption of these resolutions, declared itself to be acting under Chapter VII of the UN Charter, it is debatable whether Chapter VII of the Charter allows for such a use of Security

⁹⁸ DENIS, N 165-166, p. 130.

⁹⁹ U.N. Security Council, 57th year. *Report of the 4568th Meeting*. 10 July 2002, (S/PV.4568), p.4.

¹⁰⁰ U.N. Security Council, 57th year. *Report of the 4568th Meeting*. 10 July 2002, (S/PV.4568), p.4.

¹⁰¹ International Law Commission, Draft Statute for an International Criminal Court. '*Report of the International Law Commission on the Work of its 46th Session*' (2 May -22 July 1994) UN Doc A/49/10.

¹⁰² STAHN Carsten, “The ambiguities of Security Council Resolution 1422 (2002), p.89.

Council powers. The representative of Germany was of the opinion that the “Security Council would do itself and the world community a disservice if it passed a resolution under Chapter VII of the UN Charter, to, in effect amend an important treaty ratified by 76 States”.¹⁰³ Also pointing out that “Chapter VII of the United Nations Charter requires the existence of a threat to the peace, a breach of the peace or an act of aggression — none of which, in [his] view, is present in this case”.¹⁰⁴ A similar critique was made by the representative of South Africa, who stated that that “the Council’s mandate leaves no room either to reinterpret or even amend treaties that have been negotiated and agreed by the rest of the United Nations membership”.¹⁰⁵

Thus, not only did the Security Council create new law by changing the interpretation of Art. 16 of the Rome Statute, thereby amending an international treaty. In so doing, it also acted beyond the powers given to it by Chapter VII of the UN Charter since the Council has clearly “not been empowered to rewrite treaties”.¹⁰⁶

In sum, we see here that the Council does not directly admit to acting the role of a legislator – and might not even intend to - but the result of its adoption of the Statutes of the *ad hoc* international criminal courts and its novel interpretation of Art. 16 of the Rome Statute has led to new criminalization and the amendment of an international treaty. The consequences in both of these cases are undesirable, as we have seen. In both instances the Council goes against the will of the Member States. Regarding the *ad hoc* international tribunals, the Council criminalizes infractions which a majority of States voted against their incrimination. And regarding Art. 16 of the Rome Statute, the Council amended an international treaty on the contents of which States had previously agreed, and in the process overstepped its mandate under Chapter VII of the UN Charter.

¹⁰³ U.N. Security Council, 57th year. *Report of the 4568th Meeting*. 10 July 2002, (S/PV.4568), p.9.

¹⁰⁴ U.N. Security Council, 57th year. *Report of the 4568th Meeting*. 10 July 2002, (S/PV.4568), p.9

¹⁰⁵ U.N. Security Council, 57th year. *Report of the 4568th Meeting*. 10 July 2002, (S/PV.4568), p.6.

¹⁰⁶ U.N. Security Council, 57th year. *Report of the 4568th Meeting*. 10 July 2002, (S/PV.4568), p.3 (Canadian representative).

What happens when the Council overtly creates general binding obligations on Member States? Are the results also of the same nature? This is what we ask ourselves at this stage of our study.

III. Cases where the Security Council makes use of direct legislative powers

Resolution 1373 (2001)¹⁰⁷ was adopted by the Security Council on September 28, 2001 following the terrorist attacks of September 11, 2001 in an attempt to help the advancement of the fight against terror.¹⁰⁸ The expectation placed on the Council after the fear-inducing terrorist attacks of September 11 lead the Council to take rapid measures under Chapter VII of the UN Charter. The draft of the resolution was set before the Council on the 27th of September, only leaving room for about 24 hours of deliberation. The text was adopted unanimously the next morning. The meeting on the 28th of September lasted only for five minutes, with no formal discussions.¹⁰⁹ Through the resolution the Security Council demanded that States adopt certain measures in order to contribute to the fight against terrorism and in so doing, imposed a certain amount of obligations on all Member States. States were to criminalize the financing of terrorism, freeze funds that would be used for the purpose of terrorism and refrain from supporting terrorists in any way.¹¹⁰

Because of the devastating events of September 11 and the reigning idea at the time that immediate measures need to be taken in order to fight terrorism, there was very little opposition to Resolution 1373 (2001).¹¹¹ In fact, Resolution 1373 (2001) was actually welcomed by Member States, some of which declared that it was a landmark

¹⁰⁷ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

¹⁰⁸ ROSAND, p. 546.

¹⁰⁹ HUSABØ Erling Johannes, BRUCE Ingvild, *Fighting terrorism through multilevel criminal legislation: Security Council Resolution 1373, the EU framework decision on combating terrorism and their implementation in Nordic, Dutch and German criminal law*, Martinus Nijhoff Publishers, Leiden, Boston, 2009, p. 15.

¹¹⁰ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

¹¹¹ CRONIN, HURD, p.90.

decision and an historic event.¹¹² This can be surprising when considering the fact that the resolution was a clear case of Security Council legislation, seeing as the Council imposed general obligations that were binding on all States and that had no limit in time.¹¹³

The case is however different for Resolution 1540 (2004)¹¹⁴ which was adopted on the 28th of April 2004. Through this resolution, the Council once again imposed rules of a general nature on all Member States¹¹⁵ in order to ensure that States do all they can to prohibit the proliferation of weapons of mass destruction and their means of delivery amongst non-State actors.¹¹⁶ Like Resolution 1373 (2004), it was adopted unanimously.¹¹⁷ However, unlike Resolution 1373 (2004), it was subject to a lot of debate at the time of its adoption. This can be explained by the fact that the political climate had long changed since Resolution 1373 (2004), possibly due on the Iraq war. Also, the resolution was adopted shortly after the Proliferation Security Initiative to which few States had agreed. Suspicion arose that resolution 1540 was a guise to universalize the Proliferation Security Initiative. And States also feared that adopting such a resolution under Chapter VII of the Charter could trigger military enforcement action. Moreover, while there existed a threat of non-State actors acquiring weapons of mass destruction, there had never been a concrete realization of the treat. The most outspoken States on the issue of Resolution 1540 (2004) were Pakistan, India, Brazil, Algeria, South Africa, Indonesia, Iran, Egypt, Mexico and Cuba.¹¹⁸

The above shows us that although the Security Council overtly plays the role of legislator, this role can be accepted by the international community in the face of an urgent unusual situation. Such an extreme circumstance like that of the days after September 11 2001 called for immediate action. Legislation provided by the Security Council was called for in order to make sure that States did their parts to prohibit a reoccurrence of September 11 2001. In the face of a dire circumstance, legislation by the Council brings about positive results. The need had nothing to do with any secret

¹¹² TALMON Stefan, "The Security Council as World Legislature", *The American Journal of International Law*, n° 1, vol. 99, 2005, p.177.

¹¹³ ROSAND, pp. 567-568.

¹¹⁴ UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540.

¹¹⁵ TALMON, p. 178.

¹¹⁶ UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540.

¹¹⁷ TALMON, p. 178.

¹¹⁸ CRONIN, HURD, pp.92-93.

agenda the Council might have and this also promoted its acceptance, contrary to the case of Resolution 1540 (2004) where the Council was suspected of pursuing its own agenda. This idea of a dire situation making the Security Council's action more acceptable can also be seen in the case of the creation of the ICTR where no State objected the establishment of the tribunal¹¹⁹.

IV. Why the Council should avoid legislating

We established that legislation may fall within the powers of the Security Council under Chapter VII of the UN Charter. However, the use of legislative powers by an organ such as the Security Council poses raises certain issues.

Firstly, it would be wrong to assume that because a State is a member of the UN it has agreed to give blanket powers to the Security Council. When members joined, it was inconceivable that such situations would arise where the Council would need to legislate.¹²⁰ In light of this, the Security Council should only legislate when absolutely necessary.

Secondly, legislation not being the center of its functions, the Council does not have the expertise necessary to be a legislator.¹²¹ This is evident in the lack of precision of terms in the Council's resolutions. The Council made an attempt to better define its terms in Resolution 1540 (2004) in a footnote but the terms of the definitions themselves still remain vague.¹²²

Thirdly, it seems quite disproportionate that a non-representative organ such as the Council should legislate on behalf of the all the United Nations Member States. Traditionally, States freely negotiate treaties for themselves. This means that they are only bound by a treaty by choice. When the Security Council legislates, States are bound by law they did not consent to be bound by. This would not so much be an issue if a representative organ such as the General-Assembly took on the role.¹²³

¹¹⁹ DENIS, p.143.

¹²⁰ COICAUD, p. 326.

¹²¹ CRONIN, HURD, p. 83-84.

¹²² See TALMON, p. 189.

¹²³ ROSAND, p. 575.

What is more, the Security Council (unlike the General Assembly) usually meets behind closed doors and so it is an organ which lacks transparency.¹²⁴

Also, there is the sure risk of Security Council members using legislative powers for their own personal interests.¹²⁵ This was obviously the case when the United States – a State nonparty to the Rome Statute - pressured the Council into adopting Resolution 1422 (2002) which prohibited the ICC from prosecuting UN peacekeeping officials from States nonparty to the Rome Statute.

Lastly, decisions by the Security Council cannot be reviewed by the International Court of Justice. The system of the United Nations cannot be compared to a domestic system where there is a clear separation between the executive, legislative and judicial bodies. Therefore it does not provide for a judicial review of Council decisions which can be very problematic when considering that, as mentioned, Council members may seek their own interests.¹²⁶

Conclusion

It is clear that through the years, the United Nations Security Council has adopted a legislative role – first indirectly making use of legislative powers and then later making direct use of the said powers. In the wake of urgent and exceptional circumstances, the Council’s legislative powers are welcomed by the international community. But in the absence of an emergency, States are less open to the Council legislating, most likely due to the risks associated with having a non-representative organ legislate. Therefore legislation by the Council must be restricted to cases where it is absolutely necessary, otherwise traditional law-making processes such as the adoption of an international treaty or the development of customary international law should have the upper hand. All of the risks mentioned associated with the Security Council’s legislating powers, when carefully taken into consideration, give cause for concern. The risks associated with the said powers could prove in the future to be only theoretical. Time will tell how the Security Council will make use of its legislative powers in the future.

¹²⁴ TALMON, p. 187.

¹²⁵ CRONIN, HURD, p.84.

¹²⁶ CRONIN, HURD, p.84.

Bibliography

Published works:

ALBARET Mélanie et al., *Les grandes résolutions du Conseil de sécurité des Nations Unies*, Dalloz, Paris, 2012.

COICAUD Jean-Marc, HEISKANEN Veijo, *The legitimacy of international organizations*, United Nations University Press, Tokyo, 2001.

CRONIN Bruce, HURD Ian, *The UN Security Council and the politics of international authority*, Routledge, Oxen, New York, 2008.

DENIS Catherine, *Pouvoir normatif du Conseil de sécurité des Nations Unies: portée et limites*, Bruylant: Editions de L'Université de Bruxelles, Bruxelles, 2004.

HUSABØ Erling Johannes, BRUCE Ingvild, *Fighting terrorism through multilevel criminal legislation: Security Council Resolution 1373, the EU framework decision on combating terrorism and their implementation in Nordic, Dutch and German criminal law*, Martinus Nijhoff Publishers, Leiden, Boston, 2009.

SIMMA Bruno et al. (eds.), *The Charter of the United Nations : a commentary*, 3rd ed., Volume 1 Oxford University Press, Oxford, 2012.

SIMMA Bruno et al. (eds.), *The Charter of the United Nations : a commentary*, 3rd ed., Volume 1 Oxford University Press, Oxford, 2012.

TZANAKOPOULOS Antonios, *Disobeying the Security Council: countermeasures against wrongful sanctions*, Oxford University Press, Oxford, 2011.

Unpublished works:

RICKENBACHER Michaela, *Les pouvoirs du Conseil de sécurité en vertu du Chapitre VII de la Charte des Nations Unies*, Thèse, Grade de docteur en droit, L'université de Genève, Genève, 2001.

Collective works:

VOEFFRAY François, «Le Conseil de sécurité de l'ONU : gouvernement mondial, législateur ou juge? : quelques réflexions sur les dangers de dérives» , in CAFLISCH Lucius, *La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international*, Martinus Nijhoff Publishers, Leiden, 2007, pp. 1195-1209.

Electronic sources:

CHESTERMAN Simon, "The UN Security Council and the Rule of Law", *New York University Public Law and Legal Theory Working Papers*, 15 December 2008, http://lsr.nellco.org/cgi/viewcontent.cgi?article=1103&context=nyu_plltwp (consulted on November 23 2013).

DAVID Eric, « Le Tribunal International pénal pour l'ex-Yougoslavie », *Revue belge de droit international*, vol. VI, 1992, p. 565. <http://rbdi.bruylant.be/public/modele/rbdi/content/files/RBDI%201992/RBDI%201992-2/Etudes/RBDI%201992.2%20-%20pp.%20565%20-%20598%20-%20Eric%20David.pdf>, (consulted on 22 November 2013).

ROSAND Eric, "The Security Council As "Global Legislator": Ultra Vires or Ultra Innovative?" *Fordham International Law Journal*, n° 3, vol. 28, 2004, pp. 542 – 590. <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1964&context=ilj>, (consulted on November 22 2013).

STAHN Carsten, "The ambiguities of Security Council Resolution 1422 (2002)", *European Journal of International Law*, n° 1, vol. 14, 2003, <http://www.ejil.org/pdfs/14/1/410.pdf>, (consulted on December 5 2013).

TALMON, Stefan, "The Security Council as World Legislature", *The American Journal of International Law*, n° 1, vol. 99, 2005, pp. 175-193. [http://users.ox.ac.uk/~sann2029/AJIL%2099%20\(2005\),%20175-193.pdf](http://users.ox.ac.uk/~sann2029/AJIL%2099%20(2005),%20175-193.pdf) (consulted on 10 November 2013).

Coalition for the international criminal court, "Chronology of the adoption of Security Council resolutions 1422/1487" http://www.iccnw.org/documents/FS-1422and1487Chronology_26March2008.pdf (consulted 10 February 2014).

United Nations documents:

Resolutions:

United Nations Security Council, *Resolution 1373 (2001)*, UN Doc S/RES/1373 (2001), 28 September 2001.

United Nations Security Council, *Resolution 1540 (2004)*, UN Doc. S/RES/1540 (2004), 28 April 2004.

United Nations Security Council, *Resolution 827 (1993)*, UN Doc. S/RES/827 (1993), 25 May 1993.

United Nations Security Council, *Resolution 955 (1994)*, UN Doc. S/RES/955 (1994), 8 November 1994.

Reports:

UN Security Council, *Report of the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955 (1994)*, February 1995, S/1995/134.

UN Security Council, *Report of the Security-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*.

U.N. Security Council, 57th year. *Report of the 4568th Meeting*. 10 July 2002, (S/PV.4568).

International criminal tribunal for the former Yugoslavia:

ICTY, *Prosecutor v. DUSKO TADIC*, judgment, Appeal on Jurisdiction, case n° IT-94-1-AR72, 2 October 1995.

International criminal tribunal for Rwanda:

ICTR, *The Prosecutor v. Jean-Paul Akayesu*, judgment, case n° ICTR-96-4-T, 2 September 1998.

International military tribunal:

International Military Tribunal, *The Trial of German Major War Criminals*, judgment, Nuremberg, Germany, Part 22, 1 October 1946.

International law commission:

International Law Commission, Draft Statute for a n International Criminal Court. '*Report of the International Law Commission on the Work of its 46th Session*' (2 May -22 July 1994) UN Doc A/49/10.