

# The Interpretation of Security Council Resolutions

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When the rules and methods of interpretation in international law have been considered this has been almost exclusively in relation to treaties.<sup>1</sup> Little attention has been paid to the principles governing interpretation of other instruments, such as resolutions of international organs and conferences. Such authority as there is on the interpretation of resolutions of the United Nations Security Council (SCRs) appears to be directed primarily to a single question: whether an SCR is binding?<sup>2</sup> When SCRs are inter-

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<sup>1</sup> This article is based on a talk given at the Research Centre for International Law at the University of Cambridge on 28 April 1995. The views expressed are personal, not those of the United Kingdom Government. M.K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités", *RdC* 151 (1976), 20 et seq; I.M. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition, 1984, 114 et seq; *Oppenheim's International Law*, Vol. I, 1992, 1266 et seq; and authorities cited in these works. On the interpretation of the Charter see Pollux, "The Interpretation of the Charter", *BYIL* 23 (1946), 54 et seq; H. Kelsen, *The Law of the United Nations*, 1950, xiii et seq.; G. Ress, "Interpretation of the Charter", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 1995, 25 et seq.; L.B. Sohn, "The UN System as Authoritative Interpreter of its Law", in: *United Nations Legal Order*, O. Schachter (ed.), 1995, 169 et seq; H. Thirlway, "The Law and Procedure of the International Court of Justice 1960–1989", *BYIL* 67 (1996), 29 et seq.

<sup>2</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16 et seq. See also E. Jiménez de Aréchaga, *Voting and the Handling of Disputes in the Security Council*, 1950; J. Castañeda, *Legal Effects of United Nations Resolutions*, 1969;

preted and applied there is generally no indication of the principles of interpretation involved. In the past there were relatively few SCRs of concern outside a rather narrow circle, and those who interpreted them probably felt little need to explain their approach. But nowadays SCRs impinge directly on central issues of foreign affairs, on important interests of States, and on the lives of individuals (such as businessmen, alleged war criminals, or the victims of humanitarian crises).

The aim of this article is to offer some tentative views on the interpretation of SCRs, the result of reflecting on day-to-day practical experience rather than on theory or learned authorities. If the article stimulates further consideration of the matter it will have served its purpose.

Two central themes are, first, the need, when interpreting SCRs, to have particular regard to the background, both the overall political background and the background of related Council action; and, second, the need to understand the role of the Council under the Charter of the United Nations, as well as its working methods and the way SCRs are drafted.

In principle, before interpreting an SCR one needs to know the applicable rules of interpretation. Yet such rules have not been codified, nor have they emerged clearly from judicial pronouncements or other authorities. They are even more uncertain than the rules of treaty interpretation prior to the Vienna Convention on the Law of Treaties. Under customary international law (at least before the adoption of the Vienna Convention) there was no generally accepted approach to the interpretation of treaties. But there was a wealth of judicial pronouncements and learned writings. That is not the case with SCRs. And such general principles of interpretation as exist in international law need to be applied to different kinds of instruments having regard to their particular nature. Thus, the authorities tend to distinguish between the interpretation of treaties and the interpre-

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J. Castañeda, "Valeur Juridique des Resolutions des Nations Unies", *RdC* 129 (1970), 205 et seq; R. Higgins, "The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?", *ICLQ* 21 (1972), 270 et seq.; R.A. Brand, "Security Council Resolutions: When Do They Give Rise to Enforceable Legal Rights?", *Cornell Int'l L.J.* 9 (1976), 298 et seq.; S.A. Tiewal, "Binding Decisions of the Security Council within the Meaning of Art. 25 of the UN Charter", *IJIL* 15 (1975), 195 et seq.; E. Jiménez de Aréchaga, "International Law in the Past Third of a Century", *RdC* 159 (1978), 9 et seq., (119-123); K. Herndl, "Reflections on the Role, Functions and Procedures of the Security Council of the United Nations", *RdC* 206 (1987), 322 et seq; S.D. Bailey/S. Daws, *The Procedure of the UN Security Council*, 3rd edition, 1998.

tation of unilateral acts or even between different kinds of treaties, e.g. constituent instruments and others.<sup>3</sup>

The principal judicial authority on the interpretation of SCRs is a brief passage in the ICJ's 1971 *Namibia* Advisory Opinion:

“The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council”.<sup>4</sup>

The Court did not here refer to the Vienna Convention on the Law of Treaties, adopted some two years earlier, though in other decisions in the 1970s — when considering treaties — it did rely upon that Convention's rules on interpretation as reflecting the rules of customary international law, as did other international tribunals. It might be thought that the Court's remarks in *Namibia* tend more towards the policy-oriented approach of McDougal and others than that of the Vienna Convention. In any event, the Court was not necessarily making a general statement about the interpretation of SCRs, but was dealing with the question whether particular SCRs had binding effect. But its remarks in this case may offer some guidance to the more general issues.

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<sup>3</sup> S.Sur, *L'interprétation en droit international public*, 1974; R. Bernhardt, “Interpretation in International Law”, in: R. Bernhardt (ed.), *EPIL* Vol. II (1995), 1416 et seq.; J.-D. Sicault, “Du Caractère Obligatoire des Engagements Unilatéraux en Droit International Public”, *RGDIP* 83 (1979), 633 et seq. On the International Court's approach to the interpretation of declarations under Article 36 para. 2 of its Statute (the Optional Clause), see Sh. Rosenne, *The Law and Practice of the International Court, 1920–1996*, 1997, 809–15. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports 1996, 66 et seq., 76; W. Lang, “Les règles d'interprétation codifiées par la Convention de Vienne sur le Droit des Traités et les divers types de traités”, *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 24 (1973), 113 et seq.; Sh. Rosenne, *Developments in the Law of Treaties*, 1989, 224 et seq.; H.G. Schermers/ N.M. Blokker, *International Institutional Law*, 3rd edition, 1995, 829 et seq.; C.F. Amerasinghe, “Interpretation of Texts in Open International Organizations”, *BYIL* 65 (1994), 175 et seq.

<sup>4</sup> ICJ Reports 1971, 53.

SCRs have of course been considered in other cases before the International Court, but in no other case has it explained its approach to interpretation. The decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia of 2 October 1995 in the *Tadić* case<sup>5</sup> sheds some light. The Appeals Chamber made no reference to the Vienna Convention at any point in its extended consideration of the approach to interpretation of its Statute, which was adopted by an SCR though (unlike the Rwanda Statute) it is not annexed to an SCR. Nor are the cases on the interpretation of the resolutions and decisions of other international organs helpful.<sup>6</sup>

SCRs may be considered by national courts or the European Court of Justice but again there is no useful guidance on rules of interpretation. As already noted, most studies of the resolutions of international organisations have focused on their legal effects.<sup>7</sup> This is an aspect of interpretation, but the studies in question have not attempted to set out the applicable rules of interpretation. Moreover, they have generally not concentrated on SCRs in particular. There are, of course, some important studies of particular SCRs or groups of SCRs, which may give hints as to how the writers think SCRs should be interpreted, but again no attempt has been made at a systematic approach.<sup>8</sup>

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<sup>5</sup> *The Prosecutor v. Dusko Tadić a/k/a "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Former Yugoslavia since 1991, Case No. IT-94-1-AR72: *ILM* 35 (1996), 32 et seq.; *ILR* 105 (1997), 419 et seq.

<sup>6</sup> Amerasinghe, see note 3, 204 et seq. See *Lanner v. Secretary-General of the Organization for European Economic Cooperation*, *ILR* 31 (1966), 479 et seq., a decision of the OEEC Appeal Board the headnote to which states that the interpretation of the resolution of the OEEC Council "was based on the *travaux préparatoires* of the resolution, on subsequent practice, and on certain broad principles laid down in the Constitutional Treaty and Staff Regulations".

<sup>7</sup> See note 2.

<sup>8</sup> See, for example, J. Fawcett, "Security Council Resolutions on Rhodesia", *BYIL* 41 (1965/66), 103 et seq.; V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law*, 1990; M.P. Vorster/N.J. Botha, "Security Council Resolution 418 (1977)", *South African Journal of International Law* 4 (1978), 130 et seq.; S.D. Bailey, *The Making of Resolution 242*, 1985; S. Sur, "La résolution 687 (3 April 1991) du Conseil de Sécurité dans l'affaire du Golfe", *AFDI* 37 (1991), 25 et seq.; G. Nolte, "Restoring Peace by Regional Action: International Legal Aspects of the Liberian Crisis", *ZaöRV* 53 (1993), 603 et seq.; P. Martin-Bidou, "Les

This article will first address the general background to SCRs: the nature of the Security Council and its place within the United Nations system; the nature of SCRs; and how they are drafted. Then it will examine who interprets SCRs and the question of authentic interpretation. Finally, it will consider what the rules of interpretation might be, taking as a starting point — but only as a starting point — arts 31 to 33 of the Vienna Convention on the Law of Treaties.

## I. The Security Council and the Drafting of SCRs

Interpretation of SCRs requires an understanding of the nature of the Security Council and its place under the United Nations Charter, and an appreciation of the nature and indeed variety of SCRs. And it also requires some knowledge of how they are drafted.

### 1. The Nature of the Security Council and its Powers and Functions under the Charter

The Security Council, a principal organ of the United Nations, is a political organ of limited competence.<sup>9</sup> With certain exceptions, its powers and functions relate to the maintenance of international peace and security (for which the Members of the United Nations have conferred upon it primary responsibility). Within this field the Members of the United Nations have conferred upon it very broad powers, including powers not enjoyed by any other international organ to adopt decisions that are legally binding for all Members of the United Nations.

While the Security Council has some of the attributes of a legislature, it is misleading to suggest that the Council acts as a legislature, as opposed to imposing obligations on States in connection with particular situations or disputes. In acting under Chapter VII of the Charter the Council makes

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mesures d'embargo prises a l'encontre de la Yougoslavie", *AFDI* 39 (1993), 262 et seq.

<sup>9</sup> The leading work on the Council is S.D. Bailey/S. Daws, *The Procedure of the UN Security Council*, 3rd edition, 1998. See also the relevant sections of the four principal commentaries on the Charter: H. Kelsen, *The Law of the United Nations*, 1950; L. M. Goodrich/E. Hambro/A.P. Simons, *Charter of the United Nations*, 1969; J.P. Cot/A. Pellet, *La Charte des Nations Unies*, 2nd edition, 1991; B. Simma, *The Charter of the United Nations: A Commentary*, 1995; *The Development of the Role of the Security Council*, Hague Academy Workshop, 1993.

recommendations and takes decisions relating to particular situations or disputes. It may impose obligations (which under Article 103 of the Charter prevail over any other treaty obligations), it may reaffirm existing rules, it may apply existing rules, it may depart from or override existing rules in particular cases, but it does not lay down new rules of general application. When establishing the Yugoslav and Rwanda Tribunals the Council was careful to keep within the laws of armed conflict (a principal concern being not to infringe the rule *nullum crimen sine lege*).<sup>10</sup> In connection with attacks on United Nations personnel, it was initially suggested that the Council should declare that such attacks were international crimes and that all States should prosecute or extradite those who commit them. This approach was set aside in favour of action by the General Assembly to adopt a Convention on the Safety of United Nations and Associated Personnel.<sup>11</sup> In connection with the requirement that Iraq compensate those who suffered loss as a result of the invasion of Kuwait the Council was again careful to keep within existing law: S/RES/687 (1991) of 3 April 1991 *reaffirmed* that Iraq was liable under international law for any direct loss, damage or injury to foreign Governments, nationals, or corporations as a result of its unlawful invasion and occupation of Kuwait. More generally, and unlike some other international organs, the Council has thus far largely avoided the temptation to issue "Declarations" purporting to state the law in general terms, though it sometimes makes general pronouncements about the law in connection with its consideration of particular cases and nowadays more frequently issues general statements concerning its own role and procedures.

The Security Council is not a judicial organ,<sup>12</sup> nor in any real sense does it exercise quasi-judicial functions,<sup>13</sup> though, like the General Assembly, it does have the power, in certain circumstances and in connection with particular situations or disputes, to establish judicial or quasi-judicial organs, such as the Yugoslav and Rwanda International Criminal Tribunals and the Iraq-Kuwait Boundary Demarcation Commission.

In essence, the Security Council is a political organ with powers and functions set forth in the Charter, in particular the power to make recom-

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<sup>10</sup> D. Shraga/R. Zacklin, "The International Tribunal for the Former Yugoslavia", *EJIL* 5 (1994), 363 et seq.; *Tadić* Decision of 2 October 1995, see note 5.

<sup>11</sup> Adopted by A/RES/49/59 of 9 December 1994.

<sup>12</sup> Herndl, see note 2, 385.

<sup>13</sup> O. Schachter, "The Quasi-Judicial Role of the Security Council and the General Assembly", *AJIL* 58 (1964), 959 et seq.; E. Lauterpacht, *Aspects of the Administration of International Justice*, 1991, 37 et seq.

mendations and to adopt binding measures for the maintenance of international peace and security.

## 2. Forms of Security Council Action

This article concentrates on SCRs, which are the principal form in which the Council acts. But there are also other forms of decisions as well as so-called Presidential statements.<sup>14</sup>

## 3. Nature of SCRs

SCRs are not legislation, nor are they judgments or “quasi-judgments”, nor are they treaties. Indeed they are for the most part very different in nature from treaties. Many SCRs are not intended to have legal effects. Where they do have legal effects this is often only within the internal legal order of the United Nations. Relatively few SCRs are intended to have external legal effects, though these are often the most significant.

A broad distinction may be made between the provisions of SCRs that take the form of recommendations and those that are mandatory. The latter either impose obligations on third parties (primarily the Member States) or authorise action by third parties that might otherwise be unlawful.

SCRs are by no means all of a kind, and the approach to interpretation may vary depending on their nature. Some are internal to the United Nations legal order, e.g. the recommendation for the appointment of a Secretary-General, recommendations concerning United Nations membership, fixing the date of a by-election to the ICJ. Others are internal to the Security Council itself, e.g. adopting or amending the Provisional Rules of Procedure or setting up subsidiary organs. And there are a small number of resolutions that deal with substantive matters in a general way, e.g., resolutions on nuclear weapons, terrorism, and attacks on United Nations personnel.<sup>15</sup> But the great majority deal with a particular situation or dispute. In such cases it is necessary to have as full a knowledge as possible of the political background and of the whole of the Council's involvement, both prior to and after the adoption of the resolution under consideration.

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<sup>14</sup> P. Tavernier, “Les déclarations du Président du Conseil de Sécurité”, *AFDI* 39 (1993), 86 et seq.

<sup>15</sup> S/RES/868 (1993) of 29 September 1993.

#### 4. How SCRs are Drafted

For the purposes of interpretation, it is also important to have some understanding of how SCRs are drafted. With few exceptions, there is no input from the United Nations Secretariat, including the Office of the Legal Counsel. This distinguishes the Council from many other international organs, even within the United Nations. Occasionally the Secretariat may intervene on a specific point of detail of direct concern to them, and they may produce routine drafts following established precedent. There is one important qualification: SCRs are frequently based on reports by the Secretary-General, part of which they may incorporate by reference, in which case the Secretariat's influence on the substance of the resolution will be considerable. Typically the Council requests the Secretary-General to submit a report, then considers and approves the report, with or without modifications, and requests the Secretary-General to implement that which it has approved.

There is no standard procedure for drafting SCRs. In particular, there is no institutional mechanism to ensure that resolutions are well drafted. As already mentioned, there is usually no input from the Office of the Legal Counsel: legal input therefore has to come from delegations. A typical draft resolution might go through five stages.

One delegation usually takes the initiative, prepares a first draft and generally keeps control of the draft throughout subsequent stages. If this is the United Kingdom the draft would normally be prepared within the Mission in New York, jointly by those responsible for the substance of the matter and the legal adviser. Such a draft would be cleared with London and any suggestions incorporated.

The draft would then usually be discussed (as a completely informal text, sometimes no more than "elements") with other Missions (not necessarily Council members) with whom the lead Mission is working closely on the particular subject. This is often the most important stage, with intensive negotiations to agree the underlying policy. Very often set groups work on particular issues, e.g. the "Friends of Georgia", the "Friends of Western Sahara", the Angola "Troika" (Portugal, Russia and United States). One or more revisions will then be prepared. This process may go on for a considerable time.

The third stage is to share the text with each of the other Council members: this may be done bilaterally or with groups on the Council (e.g., the non-aligned) or in the course of informal consultations of the whole. There will be a preliminary discussion of the major points, and all members of the Council will then seek instructions from capitals.

The fourth stage is a detailed paragraph-by-paragraph discussion by all Council members, either by the Permanent Representatives in informal



consultations or in unofficial groups of the whole. A series of new drafts may be prepared at this stage over a relatively short period.

Finally, a text will be circulated as an official Council document, first "in blue" (near final form). This may be done by one or more co-sponsors, or — and this is often the case where the text is fully agreed and supported by all Council members — by the President of the Council. There are occasionally further amendments in the light of last minute instructions, and the text may be reissued one or more times or amended orally at the formal Council meeting at which it is adopted.

Only at this last stage, when the draft is circulated as an official Council document, will it exist in the six official languages of the United Nations. The draft will almost invariably have begun in English only (though drafts often record that their original languages were French as well as English); at some point along the way they may begin to appear in French (prepared either by the French Mission or the Secretariat). In practice the negotiations, including informal consultations of the whole, will have concentrated on the English language text.

It will be seen that most of the negotiating history of a resolution is not on the public record, and indeed may be known in full only to Council members or even a limited number of them. Legal input can be somewhat haphazard. The first draft has often been prepared by or with a lawyer, but thereafter things may move very fast and it is highly desirable (though not invariably the case) that legal input is available at each stage of the drafting in order to ensure that the resolution is legally sound and as clear as possible.

This drafting process is not so different from most international negotiations, but it has implications for interpretation. SCRs cannot be interpreted as though they were domestic legislation or even necessarily in the same way as treaties. Unlike treaties most provisions of SCRs are not intended to create rights and obligations binding on States. Many are operational or internal to the United Nations or of a political nature, and they often deal with short-term matters.

An EC Council Resolution of 8 June 1993 on the quality of drafting of Community legislation states that such legislation should be "clear, simple, concise and unambiguous".<sup>16</sup> There is no equivalent resolution of the

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<sup>16</sup> OJC 166, 17.6.1993, 1; European Union, *Selected Instruments taken from the Treaties*, Book I, Vol. I (1993), 877. One international tribunal that has considerable experience of interpreting what might loosely be termed "resolutions" is the Court of Justice of the European Communities, but the context in which it operates and the kinds of "resolutions" that it has to interpret are so far removed from the Security Council that its jurisprudence is of little assistance.

Security Council. In an ideal world, each resolution would be internally consistent, consistent with earlier Council action on the same matter, and consistent with Council action on other matters. Each resolution would be concise, and avoid superfluous or repetitive material. Consistency and conciseness are elements of clarity, but the latter also requires, more generally, the precise and unambiguous use of language. It is, of course, only possible to use clear language when the policy is clear.

SCRs are frequently not clear, simple, concise or unambiguous. They are often drafted by non-lawyers, in haste, under considerable political pressure, and with a view to securing unanimity within the Council. This latter point is significant since it often leads to deliberate ambiguity and the addition of superfluous material (presumably thought at the time to be harmless).<sup>17</sup>

The techniques employed by the Council in drafting resolutions could, if they were clear and consistent, assist the process of interpretation. For example, as general practice nowadays, when the Council intends a provision to be mandatory, the resolution contains or refers to an Article 39 determination, and includes the words "acting under Chapter VII" or reference to an appropriate article thereof, as well as the word "decides". But such drafting practices as exist are not always well-known or appreciated, nor are they always applied consistently. The importance which lawyers attach to consistency of drafting has to be balanced against the need for flexibility if general agreement is to be reached, and as often as not reached swiftly.

## II. Who Interprets SCRs?

SCRs fall to be interpreted by a wide range of authorities and individuals. Above all, the Security Council and its subsidiary organs constantly interpret and apply SCRs.

Only the Security Council, or some body authorized to do so by the Council, may give an authentic interpretation in the true sense. As the Permanent Court said, "it is an established principle that the right of giving an authoritative interpretation of a legal rule (*le droit d'interpréter authentiquement*) belongs solely to the person or body who has power to modify

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<sup>17</sup> H. Freudenschuss, "Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council", *Austrian J. Publ. Int. Law* 46 (1993), 1 et seq.

or suppress it".<sup>18</sup> Such authentic interpretations are likely to be more common in the case of SCRs than in the case of treaties. They may be given in a subsequent resolution or in some other way (e.g. a Presidential statement or a letter from the President). Recent examples include the following:

- S/RES/713 (1991) of 25 September 1991 required all States to implement an embargo on deliveries of weapons and military equipment "to Yugoslavia". In light of the breakup of Yugoslavia S/RES/ 727 (1992) of 8 January 1992 reaffirmed the embargo and decided that it "applies in accordance with paragraph 33 of the Secretary-General's report (S/23363)". Paragraph 33 of the report set out the Secretary-General's Special Representative's interpretation of S/RES/713 that the arms embargo continued to apply to all the territories of the former Yugoslavia. This interpretation was reaffirmed in S/RES/762 (1992) of 30 June 1992.
- In a letter of 5 February 1992 the President of the Council recorded that the members of the Council had no objection to the German Government's intention to export two demilitarised mine-clearing tanks to Somalia, on the assumption that this did not conflict with the arms embargo imposed by S/RES/733 (1992) of 21 January 1992.
- S/RES/773 (1992) of 26 August 1992 confirmed that demarcation of the off-shore boundary was within the Iraq-Kuwait Boundary Demarcation Commission's terms of reference under S/RES/687 of 3 April 1991.
- S/RES/837 (1993) of 6 June 1993 reaffirmed that the Secretary-General was authorised under S/RES/814 (1993) of 26 March 1993 to take all necessary measures against those responsible for certain armed attacks to establish the effective authority of UNOSOM throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment.
- S/RES/970 (1995) of 12 January 1995 reaffirmed that the requirements in paragraph 12 of S/RES/820 (1993) of 17 April 1993 — that imports, exports and trans-shipments through the Serb-held areas of Croatia and Bosnia were to be permitted only with authorisation from the Government of Croatia or Bosnia — applied to all shipments across the international border between Serbia and Bosnia. This authentic interpretation was apparently considered necessary because of a contrary interpretation provided by the Legal Adviser to the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia (S/1995/6, para. 6).

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<sup>18</sup> *Jaworzina* Advisory Opinion of 6 December 1923, *PCIJ Series B*, No. 8, 37.

- S/RES/1022 (1995) of 22 November 1995 provided for the automatic suspension of the embargo on the Bosnian Serb areas upon the fulfilment of a certain condition, but the interpretation of this condition was far from clear (and indeed there were differing opinions even among Council members). The President of the Council, with the agreement of the Members of the Council, made a statement to the press announcing that the condition had been met and that the sanctions were therefore suspended.

As with any authentic interpretation the line between interpretation and amendment is not always clear. One question that may be posed is whether an authentic interpretation by the Security Council needs to take the same form as the provision that is the subject of the interpretation. But there seems no reason why an authentic interpretation of a mandatory Chapter VII provision need necessarily itself take the form of a mandatory Chapter VII provision.

The role of subsidiary organs of the Council deserves particular attention. Such organs often need to interpret particular SCRs in carrying out their functions. Obvious examples are the International Criminal Tribunals for the Former Yugoslavia and Rwanda, which are constantly required to interpret their Statutes, both when adopting and applying their Rules and when giving judgment. The United Nations Claims Commission is in a similar position. Sanctions Committees in effect interpret their respective SCRs whenever they apply them.<sup>19</sup> In all these cases the decisions of the subsidiary organs are binding to the extent provided for in the relevant SCRs. For other purposes, while their interpretations are not “authentic” they may, depending on the circumstances, be highly persuasive. The circumstances are, however, important. Sanctions Committees, for example are not judicial or quasi-judicial bodies, they do not hear detailed arguments, and the representatives of Council members who attend are in most cases not lawyers. Moreover, the Committees, which meet in private, take a very large number of decisions very rapidly, and inconsistencies or apparent inconsistencies, both within a Committee and between Committees, may well occur, sometimes for good policy reasons, sometimes not. Reasons are rarely given, the records of the Committee are marked “restricted” and are not public documents, published documentation is slight, and so it is unlikely that definitive conclusions can be drawn from their

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<sup>19</sup> M.P. Scharf/J.L. Dorsin, “Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee”, *Brook.J.Int’l L.* 19 (1993), 771 et seq.; M. Koskeniemi, “Le Comité des Sanctions (créé par la résolution 661 (1990) du Conseil de Sécurité)”, *AFDI* 37 (1991), 119 et seq.

work as to the proper interpretation of the sanctions resolution in question.

In addition to the Security Council other organs of the United Nations may, in carrying out their own functions, interpret Security Council resolutions, as may other international organisations. Castañeda gives an example of the General Assembly interpreting the word "area" in an SCR on Korea as meaning "all of Korea".<sup>20</sup> The United Nations Secretariat, in particular, is constantly required to interpret and apply SCRs.<sup>21</sup>

The ICJ and other international tribunals (including those on Yugoslavia and Rwanda) may have to interpret SCRs for the purpose of giving effect to what the Council has decided. They may do so with binding effect for the parties to the particular case.

The Governments (and sometimes the legislatures) of Member States (and indeed of non-Member States) as well as international organizations such as the European Community interpret SCRs, particularly when legislating or taking administrative action to implement them. Domestic courts (including for this purpose the European Court of Justice) likewise may be faced with cases where the interpretation of an SCR is relevant. And finally, lawyers advising private entities or individuals (e.g. companies, alleged war criminals) have to interpret certain SCRs, as do academics and other commentators.

### III. How Should SCRs be Interpreted?

It is convenient to approach the interpretation of SCRs with arts 31 to 33 of the Vienna Convention on the Law of Treaties in mind, to test how far the method set forth therein for the interpretation of treaties is or is not appropriate for SCRs. But in doing so it is salutary to bear in mind Thirlway's comment:

"It is unclear to what extent, if any, the rules as to interpretation of treaties may be applied, by extension, to the interpretation of the resolutions or decisions of international organizations. In one sense, a

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<sup>20</sup> Castañeda, see note 2, 91.

<sup>21</sup> J. Soubeyrol, "Aspects de la fonction interprétative du Secrétaire-Général de l'O.N.U. lors de l'affaire du Congo", *RGDIP* 70 (1966), 565 et seq. Rosenne points out that each principal organ of the United Nations is *par inter pares*, having no power to change the meaning of a decision of another principal organ, but not being prohibited from interpreting a decision of another if that is necessary for the purposes of a decision: see note 3, 114.

resolution represents, like a treaty, a meeting of wills, a coming-together of the (possibly opposing) aspirations of the States whose representatives have negotiated its drafting. In another sense, it is a unilateral act, an assertion of the will of the organ adopting it, or a statement of its collective view of a situation".<sup>22</sup>

As already indicated, at the beginning of this article, there is little authority on the interpretation of non-treaty texts. In one of its earliest judgments the United Nations Administrative Tribunal indicated that it would adopt the ICJ's approach to treaty interpretation in its interpretation of staff regulations and rules:

"In the view of the Administrative Tribunal, the construction of a rule or regulation must respond to the following requirements: (1) the interpretation must be a logical one; (2) it must be based upon an attempt to understand both the letter and the spirit of the rule under construction, and (3) the interpretation must be in conformity with the context of the body of rules and regulations to which it belongs, and must seek to give the maximum effect to these rules and regulations. ... In its interpretation of staff rule 145 and of the Statute of the Tribunal the Tribunal shares the opinion of the International Court of Justice that in cases like those before this Tribunal, full use must be made of the principle that the legal text must remain effective rather than ineffective: *ut res magis valeat quam pereat*".<sup>23</sup>

## 1. The Terms of the Resolution

On any view, the first step is to decide what are "the terms of the resolution to be interpreted". The form of SCRs is nowhere laid down but usually they consist of unnumbered preambular paragraphs and numbered operative paragraphs. Annexes are rare, but where they exist they are an integral part of the resolution (e.g. the Statute of the Rwanda Tribunal, annexed to S/RES/955 (1994) of 8 November 1994; the list of oil-related equipment in S/RES/883 (1993) of 11 November 1993). There are no titles.

The preambles to SCRs may assist in interpretation, by giving guidance as to their object and purpose, but they need to be treated with caution

<sup>22</sup> Thirlway, see note 1, 29.

<sup>23</sup> *Howrani and 4 others*, UNAT Judgment No. 4 (1951), Judgments of the United Nations Administrative Tribunal (JUNAT) Nos 1-70, 8. See also *Crawford*, UNAT Judgement No. 61 (1955), JUNAT Nos 1-70, 331.

since they tend to be used as a dumping ground for proposals that are not acceptable in the operative paragraphs. And there is no conscious effort to ensure that the object and purpose of each operative provision is reflected in the preamble.

Unlike most treaties, SCRs are often not self-contained. They may refer to, and incorporate by reference, other documents, such as reports of the Secretary-General. An important example is S/RES/827 (1993) of 25 May 1993 establishing the International Criminal Tribunal for the Former Yugoslavia, by which the Council adopted the Statute of the Tribunal contained in a report of the Secretary-General. SCRs concerning peace-keeping operations frequently define their mandate and other matters by reference to reports of the Secretary-General.

Unlike most treaties, SCRs are often part of a series and it is only possible to understand them as such. In its *Namibia* Advisory Opinion, the International Court said that “[b]efore analysing [resolution 276], it is necessary to refer briefly to resolutions 264 and 269, since these two resolutions have, together with resolution 276, a combined and cumulative effect”.<sup>24</sup> But the Council does not always make the relationship to earlier resolutions clear, in particular to what extent they are superseded or revoked. Usually resolutions reaffirm or recall earlier resolutions on the same matter (either specifically or in general terms), and sometimes they expressly terminate or suspend the provisions of earlier resolutions, e.g. in the case of sanctions.<sup>25</sup> Sometimes it will be clear on the face of it when a provision terminates: peace-keeping mandates are almost invariably extended until a certain date.

Finally, two subsidiary points concerning the text. First, it is not entirely clear which publication is authoritative. The documentation of the Council is somewhat obscure, but probably the most authoritative text is that published under the symbol S/RES/= immediately following adoption. The texts printed in the annual volume entitled *Resolutions and Decisions* are occasionally edited in a way that does not reflect the intentions of the drafters. (This is usually of no significance, but can be disturbing: e.g. S/RES/727 (1992) of 8 January 1992 as published in *Resolutions and Decisions* refers simply to “the report of the Secretary-General”, where earlier in the resolution there is a reference to two reports. The text as adopted contained the document number of the report in question.)

Second, there are six official and working languages of the Security Council, and resolutions of the Council are adopted and published in all

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<sup>24</sup> See note 2, 51.

<sup>25</sup> See also S/RES/1031 (1995) of 15 December 1995, which states expressly that earlier authorizations of the use of force are terminated.

six. In principle, all six language versions are authentic. All six language versions are available immediately prior to adoption, though some language versions may be heavily corrected on editorial grounds after adoption: since the negotiations will have taken place on the English text, corrections to the English text are only of the most minor kind, such as uncontentious punctuation, spelling, or the consistent use of abbreviations. In practice, as explained above, resolutions are drafted and negotiated in one or two languages, English or occasionally French, and the document which is voted on may indicate an original language or languages. In considering any divergencies between the six language versions, the rules in article 33 of the Vienna Convention may assist, though it would be even more unrealistic in the case of an SCR than in the case of a treaty to ignore the fact that some versions are mere translations — often unchecked translations (and in the case of the Chinese and Russian versions likely to have been finalized by a single delegation) — of the version or versions in which the draft was negotiated.<sup>26</sup>

## 2. The General Rule of Interpretation

Having determined “the terms of the resolution to be interpreted”, the Vienna Convention approach would suggest that the resolution is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. While the application of any such general rule involves a single process, the various elements will, for convenience, be examined in turn. Before doing so, however, it should be recalled that in its *Tadić* Decision of 2 October 1995 the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia considered at some length its general approach to the interpretation of the jurisdictional provisions of its Statute.<sup>27</sup> After considering briefly the “literal interpretation” of the Statute and at more length its “teleological interpretation”, the Appeals Chamber proceeded to an extended “logical and systematic interpretation”. While the Statute is obviously an instrument with special characteristics, the approach of the Appeals Chamber is of interest, given the paucity of other authorities.

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<sup>26</sup> Sh. Rosenne, “On Multi-Lingual Interpretation”, *Is.L.R.* 6 (1971), 360 et seq., reprinted in: J. Norton Moore (ed.), *The Arab-Israeli Conflict*, Vol. II, 1974, 906 et seq. Rosenne points out that in the case of requests for advisory opinions only the English and French texts of the resolutions and other materials are transmitted to the Court, see note 3, 995.

<sup>27</sup> See note 5, paras. 71 to 78 et seq.



### **a) Good Faith**

The requirement of good faith in interpretation applies to the interpretation of resolutions as it does to treaties. This is reinforced by Article 2 para. 2 of the Charter, in accordance with which all Members shall fulfil in good faith the obligations assumed by them in accordance with the Charter.

### **b) Ordinary/Special Meaning**

According to the Vienna Convention terms should be interpreted in accordance with their ordinary meaning, with a special meaning being given to a term only if it is established that "the parties" so intended. There are no parties to a resolution, only the Council, but subject to this point, the ordinary meaning/special meaning distinction is no more than common sense, which should apply equally to the interpretation of SCRs. The terms used in SCRs, to the extent that they are standard, will presumably bear the same meaning in each resolution, e.g. similar terms for the description of arms embargoes or trade sanctions. But given the way SCRs are drafted, and the fact that for the most part they are intended to have political and not legal effect, it would be a mistake to approach the text as if it were drawn up with the care and legal input of a treaty. Moreover, SCRs tend not to be particularly detailed, and it may be necessary to imply certain terms, e.g. an exception for supplies to diplomatic missions of third countries in the case of sanctions resolutions. Inconsistencies in the use of terms and ungrammatical constructions are not uncommon, and it is misleading to pay undue attention to such matters, to analyse them under a microscope as one might English legislation or even a treaty. On the other hand one cannot ignore such matters; they may be deliberate and important. But how does an outsider know? Or even an insider some time later?

### **c) Context**

The terms of a resolution are to be interpreted "in their context". What, in the case of an SCR, would be the context in the narrow technical sense? Here, the Vienna Convention, in so far as it elaborates on context, is not of much assistance since, as already mentioned, there are no parties to an SCR. Clearly the context of the terms of the resolution includes the whole text of the resolution, including its preamble and any annexes, but what more?

The Vienna Convention refers to "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty". The equivalent of this would be any agreement relating to

the resolution which was made in connection with the adoption of the resolution between all the members of the Council or at least all those who voted for the resolution. Such an agreement is likely to be very rare, since it is happily not the practice of the Security Council to have recourse, when adopting resolutions, to separate documents or separate agreements. In so far as such agreements would have effect for non-members of the Council they would need to be available to them. One example is the statement made by the President of the Council on behalf of the members of the Council immediately prior to the adoption of *S/RES/743* (1992) of 21 February 1992 establishing the United Nations Protection Force (UNPROFOR) in Croatia. In his report the Secretary-General had recommended that UNPROFOR be established under Chapter VII, so that the Government of Croatia could not withdraw consent prior to the expiry of the mandate at the end of a year. *S/RES/743* contains a preambular paragraph recalling Article 25 of the Charter, but — for political reasons — does not contain the words “acting under Chapter VII”. At the time of the adoption of this resolution by the Council the President of the Council stated, during the formal meeting and with the agreement of all Council members, that the reference to Article 25 in the preamble meant that the decisions contained in the resolution were binding.

The Vienna Convention also refers, as part of the context, to “any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty”. There is no example of such an instrument in connection with an SCR.

#### **d) Object and Purpose**

The Vienna Convention provides that a treaty shall be interpreted in the light of its object and purpose. Likewise, one would expect an SCR to be interpreted in the light of its object and purpose. But where do we look for the object and purpose of a resolution? The preamble may be helpful, although as already indicated it needs to be read with caution. The background documents (e.g. Secretary-General's reports) are likely to be very important. Equally, one may need to look at statements made by Council members (and by others) in the Security Council before and after adoption. One may need to look at other statements made, including those made to the media, though these are likely to be less significant than formal statements on the record. In short, one needs to look at all the circumstances of the adoption of a resolution in order to determine its object and purpose. For example, as regards the comprehensive trade sanctions imposed upon the Federal Republic of Yugoslavia by *S/RES/757* (1992) of 30 May 1992, both the terms of the preamble and many of the statements

made in the Security Council upon adoption made it clear that the purpose was not to punish the people of Yugoslavia but rather to induce the authorities to behave responsibly.

In its *Tadić* Decision of 2 October 1995 the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, after noting that a literal interpretation of the jurisdictional provisions of its Statute did not lead to a clear result, said that “in order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and purpose behind the enactment of the Statute”. It found the object and purpose in the terms of the SCR adopting the Statute, but also in the statements and SCRs leading up to the establishment of the Tribunal as well as in the report of the Secretary-General containing the Statute and the statements of Security Council members regarding their interpretation of the Statute (see also para. 92). It summarized its approach and conclusion in the following words:

“In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 (of the Statute) as well as customary international law, the Appeals Chamber concludes that, under Article 3 of the Statute, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict”.<sup>28</sup>

### e) Other Matters to be Taken into Account

Article 31 of the Vienna Convention provides that there shall be taken into account, together with the context, three other matters: subsequent agreements, subsequent practice, and any relevant rules of international law.

The equivalent in the case of an SCR to “any *subsequent agreement* between the parties regarding the interpretation of the treaty or the application of its provisions” is, it may be thought, a subsequent resolution of the Security Council or other formal act by the Council regarding the interpretation or application of the resolution. Examples have already been given of such authentic interpretation by the Council. One question is whether a subsidiary organ of the Council composed of all the members of the Council, such as a Sanctions Committee or the Compensation Commission, may likewise give an authentic interpretation of a resolution. This will depend on whether the subsidiary organ is authorised to give such interpretations. But whether it is or not, an interpretation given by such organ in the course of its application of a resolution may, as indicated

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<sup>28</sup> See note 5.

above, depending on the circumstances be an important indication of the understanding of the members of the Council about the resolution.

The Vienna Convention refers to “any *subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. Again, this is a kind of authentic interpretation. It might be possible to demonstrate subsequent practice establishing the agreement of the Council or of the members of the Council to a particular interpretation, but again there may be doubt as to whether this falls within the general rule or is a supplementary means of interpretation. In fact, the subsequent practice of bodies such as the Sanctions Committees or even the views of the authors of a resolution may play an important role.

Lastly, as part of the general rule, the Vienna Convention would have the interpreter take into account “any relevant rules of international law applicable in the relations between the parties”. The role of international law in the work of the Council has been the subject of some illuminating studies.<sup>29</sup> In this context, it has to be borne in mind that Article 103 of the Charter provides that in the event of a conflict between obligations under the Charter (which include the obligation to accept and carry out the decisions of the Council) and obligations under any other international agreement obligations under the Charter prevail. Thus, e.g., in the case of the sanctions resolutions concerning the former Yugoslavia it was made clear, both in letters from the Sanctions Committee and eventually in subsequent resolutions, that the obligation to prevent traffic on the Danube overrode obligations under the Danube Convention. Issues of this kind arose in the *Lockerbie* Interim Measures Orders.<sup>30</sup>

The extent to which SCRs should be interpreted taking into account applicable rules of international law, whether general international law or particular treaties, depends in the last analysis on the intentions of the Security Council (as evidenced by the text of the resolution and the surrounding circumstances). If it appears that the Council was intending to lay down a rule irrespective of the prior legal obligations of States, in general or in particular, then that intention would prevail; if, conversely, it appears that the Council was intending to base itself on existing legal rules or an existing legal situation, then its decisions ought certainly to be interpreted taking those rules into account. The United Nations Charter is, of course, of fundamental importance, both for the rules of law it

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<sup>29</sup> J. Kahng, *Law, Politics and the Security Council*, 1984; R. Higgins, “The Place of International Law in the Settlement of Disputes by the Security Council”, *AJIL* 54 (1970), 118 et seq.; A. Prandler, “The Security Council and International Law”, *Acta Juridica Academiae Scientiarum Hungaricae* 16 (1–2) (1974), 177 et seq.; Herndl, see note 2, 385.

<sup>30</sup> ICJ Reports 1993, 2.

contains and its Purposes and Principles and because it is the basis for all the Security Council's activities.

### 3. Supplementary Means of Interpretation

Article 32 of the Vienna Convention permits recourse to supplementary means, including preparatory work and the circumstances of a treaty's conclusion, in order to confirm the meaning resulting from the application of the general rule or to determine the meaning when the interpretation according to the general rule leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result.

How relevant is the distinction made by the Vienna Convention between the general rule and supplementary means in the case of SCRs? Even in the case of treaties the distinction is not in practice as clear as the Vienna Convention might suggest, and it is even less clear in relation to SCRs. Indeed, given the importance of the historical background for the interpretation of SCRs any serious interpretation of an SCR has to have regard to the circumstances of the adoption of the resolution and such preparatory work as is available.

#### a) Preparatory Work

In the case of an SCR there may be little difference between the search for the context or object and purpose and an examination of the *travaux préparatoires*. As already indicated, SCRs are rarely self-contained, but often refer to earlier SCRs and to reports<sup>31</sup> and letters. All Security Council documents referred to in the resolution or referred to at the beginning of the meeting or series of meetings at which the resolution is adopted would need to be considered as part of the *travaux préparatoires* of an SCR, though they would also have been considered in the search for context and object and purpose. These would include reports of the Secretary-General, which are often very important, letters requesting the holding of the meeting, such drafts of the resolution as are put forward formally as "S" documents, amendments that are put forward formally and accepted or rejected at the meeting, the verbatim record of the debate at the meeting, including statements made before or after the vote. It is not often that Council members make formal statements of interpretation before or after adoption — normally these statements are political — but it does happen. The similar points of interpretation made by the United States, United

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<sup>31</sup> See note 5, paras 86 and 87.

Kingdom and French representatives upon adoption of the Yugoslav Tribunal Statute were accorded considerable weight by the Appeals Chamber in its *Tadić* Decision of 2 October 1995.<sup>32</sup>

It is a commonplace that the *travaux préparatoires* are frequently of little use in the case of the interpretation of treaties, but when they exist they may well be more useful in the case of SCRs. On the other hand, the fact that so much of the preparatory work takes place behind the scenes, in informal consultations of some or all Council members, without published records, means that much material that could be useful is simply not available.<sup>33</sup> This is not a new phenomenon or one confined to SCRs. SCRs have never been drafted in public, and even when lengthy debates used to take place these were largely procedural and polemical and shed little light on the resolution eventually adopted. Even at codification conferences, “the most difficult problems are resolved not by a debate, but by corridor negotiations that the records do not reflect at all or insufficiently”.<sup>34</sup>

### b) The Circumstances of the SCR’s Adoption

The second “supplementary means” mentioned in article 32 of the Vienna Convention is “the circumstances of [the treaty’s] conclusion”. Again, in the context of an SCR the circumstances of the adoption of the resolution are likely to have been fully examined in the search for the context and object and purpose.

### c) Other Supplementary Means

Other supplementary means, not mentioned expressly in the Vienna Convention, may be important in connection with the interpretation of SCRs, e.g. statements made in the Council after adoption, subsequent

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<sup>32</sup> See note 5, paras 75, 88, 143.

<sup>33</sup> There are no official records of informal consultations. The Secretariat take notes for their own internal purposes as well as sound recordings, but these are not available to others, and in any event would not give a complete picture since even informal consultations are often only the tip of the iceberg. The reports of individual Council members may in due course become available as part of their public records, but those need to be treated with caution. Even more caution is needed with the notes or recollections of individual delegates.

<sup>34</sup> Yasseen, see note 1, 85. The Third United Nations Conference on the Law of the Sea, 1973–82, is a good example of the phenomenon. The temptation for “those who were there” to write their memoirs, as it were, is seen here too.

practice of States that is not sufficient to establish “the agreement of the parties” regarding interpretation but which sheds light on the interpretation placed upon the resolution by more or less directly involved States. Thus one may need to have regard to the legislation enacted in the various countries in implementing a resolution. For example, in order to interpret the obligation upon States to comply with orders of the Yugoslav Tribunal it may be helpful to see how the various States that have enacted legislation have themselves given effect to that obligation.

A further “supplementary means” could be the writings of learned authors. These could, e.g., be international or government officials who were directly involved (who have the benefit of inside knowledge); but equally they may be academic writers (who may have the benefit of objectivity). However, writings on SCRs have thus far been relatively sparse. Perhaps this will change, especially in such fields as international criminal law and sanctions.

The following are offered by way of tentative conclusions:

(a) The aim of interpretation should be — to adapt Lord McNair on treaties — to give effect to the intention of the Council as expressed by the words used by the Council in the light of the surrounding circumstances.

(b) The interpreter will, even if this is not expressly stated, seek to apply the general principles of interpretation as they have been elaborated in relation to treaties. The interpreter is likely to turn to the rules in articles 31 to 33 of the Vienna Convention, especially the general rule in article 31.1 and the supplementary means referred to in article 32.

(c) But caution is required. SCRs are not treaties: indeed the differences are very great. Nor are SCRs necessarily all of the same nature. SCRs must be interpreted in the context of the United Nations Charter. It becomes highly artificial, and indeed to some extent is simply not possible, to seek to apply all the Vienna Convention rules *mutatis mutandis* to SCRs.

(d) In the case of SCRs, given their essentially political nature and the way they are drafted, the circumstances of the adoption of the resolution and such preparatory work as exists may often be of greater significance than in the case of treaties. The Vienna Convention distinction between the general rule and supplementary means has even less significance than in the case of treaties. In general, less importance should attach to the minutiae of language. And there is considerable scope for authentic interpretation by the Council itself.