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The Security Council and International Criminal Law

I. Introductory Remarks

This year (2007) is the 110th anniversary of the birth of the Romanian diplomat, jurist and scholar, Vespasian Pella[1]. Pella was especially known as an international criminal law expert, deeply interested in the possibility of an international criminal court. He was a pioneer, ahead of his time[2]. Indeed, in envisaging that States themselves could bear criminal liability under international law, he was ahead of our own time[3].

I would suppose that international law – especially treaty law – may have a special importance in Romanian public consciousness, given the history of this region. International law continues to be important, not least in relations with Romania's neighbours[4]. I recall the role played by Romania's representatives in the Sixth (Legal) Committee of the General Assembly in the 1970s and 1980s[5]. In the 1980s, for example, a particular interest of Romanian delegates was good-neighbourliness between States, an item not received with great enthusiasm by others and which was given what one might call a 'decent burial' in 1991[6]. In fact, as we have learnt, good neighbourly relations are important in South-East Asia, and not only here.

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[1] This article is a slightly revised version of a talk given on 14 May 2007 to the Romanian Branch of the International Law Association.

[2] Among his writings of particular relevance to the topic of this lecture are: "La répression de la piraterie", 15 Hague Recueil (1926-V), p. 145; "La répression des crimes contre la personnalité de l'Etat", 33 Hague Recueil (1930 - III), p. 671; "Les Conventions de Genève pour la prévention et la répression du terrorisme et pour la création de la Cour pénale internationale", 18 *Revue de droit pénale et criminologie*, p. 402 (1938).

[3] Article 4 of the International Law Commission's draft Code of Offences Against the Peace and Security of Mankind would have provided for the criminal responsibility of States. So too would article 19 of the International Law Commission's first-reading draft articles on State responsibility. That provision was not acceptable on policy grounds, but also on technical legal grounds. It was dropped on second reading (though its shadow lives on in the provisions in the final draft articles on serious breaches of *jus cogens* norms).

[4] For example, the case concerning *Maritime Delimitation in the Black Sea*, brought by Romania against Ukraine at the International Court of Justice.

[5] The Romanian representatives to the Sixth Committee at this time included Dr Ioan Voicu and Mr Dumitru Mazilu; the latter was the subject of the International Court of Justice's Advisory Opinion of 15 December 1989: *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, ICJ Reports, 1989, p. 177.

[6] General Assembly resolution 46/62, adopted without a vote on 9 December 1991.

Romania has been a member of the European Union since 1 January 2007. We should not lose sight of the fact that public international law is the foundation of European Community law. The European Community is based on treaties. It has international legal personality. It is an important actor within the system of public international law. Given the special features and difficulty of European Union law, it is all too easy to overlook the importance of public international law for the Community legal order. It is important that Romanian international lawyers continue, despite the need to devote much effort and attention to European Union law, to participate actively in international forums such as the Sixth Committee of the UN General Assembly, the Council of Europe's *Ad Hoc* Committee of Public International Law Advisers (CAHDI), and its European Union counterpart, COJUR. Romania is well represented in these bodies by lawyers from the Foreign Ministry. Contacts are equally important at the non-governmental level. It is good to see that Romania has so active a Branch of the International Law Association.

I shall cover three issues in this paper. *First*, how is it that the UN Security Council, whose function is the maintenance of international peace and security, comes to be involved with international criminal law at all? *Second*, the Council's role in relation to genocide, war crimes, and crimes against humanity, as well as the crime of aggression. *Third*, Council activity in the field of international terrorism[7].

II. The Security Council's powers in respect of international criminal law[8]

1. The nature of the Security Council

The Security Council is the principal organ of the United Nations upon which, in order to ensure prompt and effective action, the Members of the Organization have conferred primary responsibility for the maintenance of international peace and security. Its powers and functions are those set out in the Charter, as developed in practice. I do not find it particularly illuminating to seek to describe the Council as an executive, a legislature, or as a quasi-judicial body. Domestic law terms are not particularly helpful in the context of public international law[9].

The Council is much misunderstood. I should like to dispel at least three myths. *First*, it is not the case that a resolution adopted under Chapter VII of the Charter is

[7] Relevant aspects of the international law on the use of force, in particular self-defence against non-State actors, and Council authorization of the use of force in the fight against terrorism, were covered in the talk I gave at the Faculty of Law, University of Bucharest, on 15 May 2007: see "The Law on the Use of Force: Current Challenges", *Singapore Yearbook of International Law*, 11, 2007.

[8] See *A. Aust*, The Security Council and International Criminal Law, 33 *Netherlands Yearbook of International Law*, p. 23, 2002; *M. Matheson*, Council Unbound: The Growth of UN Decision Making and Postconflict Issues after the Cold War, 2006, p. 199-232; *J. Boulden*, Terrorism, in: *T. Weiss, S. Daws* (eds.), The Oxford Handbook on the United Nations, 2007, p. 427-436.

[9] For a more detailed account, see the 2006 Hersch Lauterpacht Memorial Lectures "The Security Council and International Law", on the website of Lauterpacht Centre for International Law, University of Cambridge.

thereby legally binding[10] – though the converse may be true, a resolution not adopted under Chapter VII will (in any event, generally) not be legally binding[11]. *Second*, it is not the case that when the Council acts under Chapter VII, this invariably, or even commonly, implies the use of armed force. The taking or authorizing of armed force is only one of a range of measures under Chapter VII. *Third*, the fact that a resolution adopted under Chapter VII contains mandatory provisions, that is to say, imposes legal obligations upon States, does not mean that States are entitled to use force to enforce the resolution, any more than the fact that a State is in breach of a treaty means that force may be used against it. Only if there is some other basis for the use of force for that purpose, such as Council authorization, may States do so.

Article 103 of the Charter, a cornerstone of the Charter, reads:

In the event of a conflict between the obligations of Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.

Combined with article 25, article 103 means that the Security Council has the power to adopt legally binding decisions with which States must comply in all circumstances.

2. International criminal law

The term 'international criminal law' has no precise meaning[12]. It is a useful way of referring to aspects of public international law that concern crimes with an international dimension. As with other specialized areas of international law – for example, international environmental law, international human rights law, the international law of the sea – it is important to see international criminal law as part of mainstream international law. It is not some autonomous subject, though it may usefully form a specialized part of a general course on international law, or be the subject of a post-graduate course for those who have already studied international law.

International criminal law has developed greatly since Vespasian Pella's day. When I first studied international law in the 1960s, and when I began working as a legal adviser in the British Foreign and Commonwealth Office in the 1970s, criminal law hardly appeared on the horizon. We were aware of the difficult questions of extraterritorial criminal jurisdiction that had long interested international lawyers. We studied the various possible bases of jurisdiction: territorial, active personality, passive personality, protective, universal. The 'effects doctrine' was highly contested. Occasionally the question of immunity from criminal proceedings would arise in relation to a misbehaving diplomat, but there was not much more.

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[10] The Council's powers under Chapter VII are expressly stated to be to 'make recommendations, or decide what measures shall be taken' (Article 39).

[11] S/PV.5682, p. 6 (UK).

[12] See *R. Cryer, H. Friman, D. Robinson, E. Wilmshurst*, An Introduction to International Criminal Law and Procedure, 2007, p. 1-16, where the term is used to refer to the law relating to those crimes within the jurisdiction of international criminal courts, and is distinguished from 'transnational criminal law' (which includes international judicial cooperation, extradition etc). In the present article, the term encompasses both.

This all changed very early in the 1970s, under the impact of international terrorism: hijackings and other attacks on civil aircraft, attacks against diplomats, the Munich Olympics, the taking of hostages, and corresponding activity in the UN General Assembly. A series of counter-terrorism treaties was negotiated over the coming decades. This continues. One of the first treaty negotiations I was involved in was the Sixth (Legal) Committee's work on the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. One of my last negotiations for the Foreign and Commonwealth Office (in which incidentally the Romanian delegation was very active) was as head of the UK Delegation to the Conference, held under the auspices of the International Maritime Organization, at which the 2005 Protocols to the Convention on the Suppression of Unlawful Acts at Sea were adopted.

3. The powers of the Council in the field of international criminal law

Until the late 1980s, the Security Council's role in relation to international criminal law was rather limited. Since then, the Council has become very active in relation to the prosecution of crimes of international concern, in particular the crime of genocide, war crimes and crimes against humanity, as well as international terrorism. In addition to the establishment of the two *ad hoc* international criminal tribunals (for the former Yugoslavia in 1993 and for Rwanda in 1994), the Council has been active in relation to the formation of a 'hybrid' criminal court (the Special Court for Sierra Leone) and has played a significant role in relation to the International Criminal Court. In the field of terrorism, it has facilitated the surrender of accused persons, demanded their prosecution, assisted with national prosecutions, and imposed far-reaching obligations on States. This has included action in the related field of weapons of mass destruction.

So how it is that an organ whose responsibility is international peace and security finds itself dealing with criminal law? Surely these are separate matters? There is a well-known distinction between countering terrorism through the use of force and countering terrorism by means of law enforcement (as the United Kingdom did throughout the Northern Ireland troubles, now happily a thing of the past). The first point to note is that the Council has so far not sought to deal with 'international criminal law' in its widest sense, but only with two specific areas that may well threaten international peace and security: (i) those crimes of grave international concern which are also covered by the Statute of the International Criminal Court – genocide; war crimes; and crimes against humanity; and (ii) international terrorism. And even in these two fields it has not sought an exclusive role. Its powers in respect of the former are reasonably self-evident: in the words of the Rome Statute, such crimes 'threaten the peace, security and well-being of the world'[13]. Such crimes occur largely in situations where international peace and security are anyway threatened. The latter should not surprise anyone with a regard for history[14]. And it is clear that particular acts of terrorism may threaten international peace and security; and it is becoming increasingly clear that the general phenomenon of terrorism does so too.

[13] Third preambular paragraph.

[14] Archduke Franz Ferdinand at Sarajevo on St Vitus' Day, 1914.

III. The Security Council's role in relation to genocide, war crimes, crimes against humanity and aggression

The establishment by the Security Council of the International Criminal Tribunal for the former Yugoslavia was a turning point in the development of international criminal law. This was followed shortly by the International Criminal Tribunal for Rwanda, and the Security Council's role in relation to the various 'mixed' tribunals, such as the Special Court for Sierra Leone.

The relationship between the Security Council and the International Criminal Court has been a difficult one. That is not surprising given US opposition to the Court[15]. I would recall the Council's controversial decisions to shield certain peacekeepers from the jurisdiction of the Court. These are not entirely a thing of the past. On a more positive note, the Council's decision in March 2005 to refer the situation in Darfur to the Court was important in itself, and a sign of a more pragmatic approach to the Court on all sides.

I now turn to the ongoing debate concerning the Security Council, the crime of aggression and the International Criminal Court[16]. The Statute adopted at Rome in 1998 provides that the Court has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression[17]. It further provides that the Court shall exercise jurisdiction over the crime of aggression *only* when a provision is adopted 'defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime'. It states that '[s]uch a provision shall be consistent with the relevant provisions of the Charter of the United Nations'. The provision is to be adopted 'in accordance with articles 121 and 123 of the Statute[18]. Article 121 provides for the adoption and entry into force of amendments. Article 123 concerns Review Conferences, and provides that the key provisions of article 121 apply to the adoption and entry into force of any amendment considered at a Review Conference. Article 121 paragraph 3 provides that the adoption of any amendment on which consensus cannot be reached shall require a two-thirds majority of States Parties. But the key provisions are on the entry into force of amendments. Paragraph 4 provides that, '[e]xcept as provided in paragraph 5, an amendment shall enter into force for all States parties one year after' seven-eighths of them have ratified it (any State that has not accepted the amendment may, within one year of its adoption, withdraw from the Statute with immediate effect). Paragraph 5, on the other hand, provides that "[a]ny amendment to articles 5, 6, 7 and 8 [that is, the list of crimes and the statutory definitions of the first three of them] shall enter into force only for those States which accept them". "In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by that amendment when committed by that State Party's nationals or on its territory". Given the clarity of these provisions it is

[15] In fact, only two of the five permanent members (France and the UK) are currently (October 2007) parties to the Statute.

[16] *M. Politi, G. Nesi* (eds.), The International Criminal Court and the Crime of Aggression (2004); *R. Cryer*, n. 12 above, p. 262-280.

[17] Art. 5 (1).

[18] Art. 5 (2).

not obvious why the January 2007 'Discussion Paper presented by the Chairman' on the crime of aggression[19] says that the question as to whether the amendments are adopted under article 121 (4) or 121 (5) requires further discussion. They clearly fall under paragraph 5.

Two main issues have been discussed in the various meetings about the crime of aggression: the definition of the crime, and the role of the Security Council. Before turning to these, I should first make the rather obvious point that the crime of aggression is qualitatively different from the other crimes within the jurisdiction of the ICC. It seems to be recognised in the negotiations that have taken place since the adoption of the Rome Statute that important provisions of the Statute (articles 25 and 28 come to mind) cannot apply in the case of the crime of aggression as they do to the other crimes within the jurisdiction of the Court. If any crime would be appropriate for treatment as a crime of the State itself, would it not be the crime of aggression?[20]

Much effort was devoted over many years to attempting to define 'aggression', culminating in the General Assembly resolution of 1974. In recent times much effort has been devoted to defining the 'crime of aggression'. In particular, should the crime only encompass acts of a certain gravity, such as a war of aggression?[21] The term 'aggression' is not the same as 'armed conflict' (despite the French version of article 51 of the UN Charter). Nor is not the same as the unlawful use of force contrary to article 2 (4) of the UN Charter.

But what is the crime of aggression? The January 2007 "Discussion Paper proposed by the Chairman"[22] is not very instructive. Paragraph 1 of the annex, version (a), reads:

> [...] a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person (leads) (directs) (organizes and/or directs) (engages in)[23] the planning, preparation, initiation or execution of an act of aggression/armed attack [which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United nations] [such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof].

Is this language clear enough for a criminal offence? Perhaps more important, and certainly more relevant to this talk, is the procedural aspect of the matter – what the Rome Statute refers to as 'the conditions under which the Court shall exercise jurisdiction with respect to this crime', and which have to be 'consistent with the relevant provisions of the Charter'.

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[19] ICC-ASP/5/SWGCA/2.

[20] As a recent book puts it, "aggression is necessarily a crime of the State, committed by high-level State officials": *R. Cryer* etc., n. 12 above, p. 5.

[21] At Nuremberg, and in the 1974 Definition of Aggression, only a war of aggression was considered to be a crime.

[22] ICC-ASP/5/SWGCA/2.

[23] Variant (b) has as an alternative for these terms in brackets "orders or participates actively in".

Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court[24].

Then four options are set out: (1) the Court may proceed with the case; (2) the Court may not proceed with the case; (3) the Court may, with due regard to articles 12, 14 and 24 of the UN Charter, request the General Assembly to make such a determination, and in the absence of such a determination the Court may proceed with the case; and (4) the Court may proceed if it ascertains that the ICJ has made a finding in contentious proceedings that an act of aggression has been committed by the State concerned[25].

It seems unlikely that any proposal will achieve real consensus that does not provide that an investigation may not proceed unless the Security Council has decided that aggression has occurred. Any other outcome is unlikely to be accepted by the permanent members. It is important to respect the primary responsibility of the Security Council, and to secure the cooperation of the permanent members for the International Criminal Court. Consider what would have happened – to the project for the ICC – if some of the more extreme proposals (that is, those without the necessary procedural safeguards) had been in place at the time of Iraq in 2003 or Kosovo in 1999.

There is a view that it may prove to have been a mistake, at least a tactical one, on the part of those who strongly support the establishment of an international criminal court to have included the crime of aggression in the Statute from the outset. It has inevitably politicized the project. But that is water under the bridge. To move on and now include in the Statute a provision defining the crime and 'the conditions under which the Court shall exercise its jurisdiction with respect to this crime' may compound the problem.

IV. The Security Council and terrorism

I turn finally to the role of the Security Council in the field of international terrorism. When the Council came into existence in 1946, I doubt if anyone thought that it would play a significant role in a field like this. It was set up to keep the peace between States, and that is mostly what it concentrated on in the early years, though without much success given the Cold War. More recently it has turned its attention increasingly to internal conflicts, such as those in the former Yugoslavia, Somalia, Haiti, Côte d'Ivoire and elsewhere. Still more recently, and especially since the 1990s, it has devoted a great deal of attention to the fight against terrorism. The Council's counter-terrorism work is a good example of how its mandate has expanded from what was originally envisaged in the Charter. It also illustrates some of the principal features of the Security Council that distinguish it from other international bodies. I would highlight in particular the speed with which it can act, as an organ of limited membership; and its power, when acting under Chapter VII of

[24] Para. 4.
[25] Para. 5.

the Charter of the United Nations, to impose international legal obligations on States, obligations that under article 103 of the Charter prevail over all other international obligations (except, perhaps, those arising under peremptory norms of international law, otherwise known as *jus cogens*). It is, of course, the only international body which can authorize the use of force which would otherwise be unlawful. The Security Council is, on paper at least, a very powerful body.

International organisations have been dealing with questions of terrorism since at least the time of Vespasian Pella and the League of Nations. In the wake of the assassination of King Alexander of Yugoslavia, in Marseilles in October 1934, the League adopted in 1937 a Convention on Terrorism and a second Convention that would have established an International Criminal Court to try terrorists. (Neither entered into force.) Among the most active organisations in the field have been the International Civil Aviation Organization, the International Maritime Organization, as well as the Council of Europe, the Organization of American States and the African Union. As noted earlier, for example, the IMO in 2005 adopted two Protocols to the 1988 Rome Convention on the Suppression of Unlawful Acts at Sea, which greatly strengthened the original Convention by providing for the boarding of ships on the high seas, very much in line with arrangements under the Proliferation Security Initiative (PSI).

My aim is to describe the role that the UN Security Council has played in the fight against terrorism, and to consider what are its advantages (and disadvantages) as compared with other international bodies. We should always bear in mind that it is only one element of a complex network of national, regional and international efforts. It cannot do everything. The Security Council itself has referred to the need for 'a sustained comprehensive approach involving the active participation and collaboration of all States, international and regional organizations, and [...] redoubled efforts at the national level.' One of the outstanding features of the fight against terrorism is its complexity. Almost all international and regional organisations have a role to play, as do most Ministries and agencies at the national level. This has brought many more people into direct contact with the work of the Security Council than was the case only a few years ago.

It is common, these days, to contrast the 'law enforcement' approach to fighting terrorism and the 'armed conflict' approach. The one involves the police, financial regulatory bodies, the courts. The other involves armed force. The Security Council plays its part in both these approaches, within its core function of maintaining international peace and security. So it has assisted in bringing terrorist suspects to justice; equally it has endorsed the taking of military action in self-defence against transnational terrorist groups such as Al Qaida in Afghanistan. It is not a matter of *either* law enforcement *or* armed force. The one should be routine; the other exceptional. Both may be needed.

Terms like 'terrorism' and 'terrorist' have no universally agreed meaning, and are overused. It is all too easy to designate some person or some organisation, or even a State, as 'terrorist', with all the emotional undercurrents that go with the term. Despite its historical origins, I shall not use the term 'terrorism' to include so-called 'State terrorism'. However strongly one feels about the actions of certain States, it is generally misleading, in legal terms, to describe such actions as 'terrorist'. There are rules within international law that govern the acts and omissions of States, including

the law of armed conflict, international human rights law and the law on State responsibility.

We also need to be aware that the experience of terrorism varies from one part of the world to another – though possibly less so now than in even the recent past. It is important, of course, not to view terrorism from the perspective of only one region. The UN General Assembly reaffirmed in its 2006 Counter-Terrorism Strategy that 'terrorism cannot and should not be associated with any religion, nationality, civilization or ethnic group'. Also, the Security Council has stressed that there is a need 'to enhance dialogue and broaden he understanding among civilizations in an effort to prevent the indiscriminate targeting of different religions and cultures'.

1. The Council's general approach to terrorism

On 13 April 2007, in a statement condemning the terrorist attack targeting Iraq's democratically elected Council of representatives (Parliament), the Security Council summarised its basic approach to the fight against terrorism (this largely repeated its earlier statement of 20 December 2006). The Council reaffirmed that 'terrorism constitutes one of the most serious threats to international peace and security, and that any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed.' That has become standard language, both for the Security Council but also – and this is important for the Council's legitimacy – for the plenary organ of the United Nations, on which all States are represented, the General Assembly. The language reflects article 39 of the UN Charter, the opening provision of Chapter VII, and so affirms the Council's jurisdiction, in appropriate cases, to take action against terrorism under Chapter VII. In both statements, the Council goes on to reiterate 'its determination to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.' It is thus asserting its specific role, while not claiming exclusivity as against the General Assembly. And the Council further reaffirms 'the need to combat by all means, in accordance with the Charter of the United Nations threats to international peace and security caused by terrorist acts'[26]. At the same time, it is significant that the Council reminds States 'that they must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law'[27]. This reflects the General Assembly's view that 'effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing'[28]. The reference to these human rights obligations does, however, embrace the provisions contained in international treaties for derogation in time of emergency, as well as the Security Council's own powers, under article 103 of the Charter, to suspend these obligations in certain circumstances.

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[26] A/RES/60/288, annex, section IV, chapeau; see also S/PRST/2006/56.

[27] Language also reflected in the GA Global Strategy.

[28] A/60/825, para. (5).

2. The Council's involvement over time

There are three broad periods in the Security Council's counter-terrorism activity. Up to about 1989, the Council's involvement was largely of a general kind, and did not include binding measures. In the 1990s, the Council adopted measures on a case-by-case basis. From 1999 onwards, and especially after 9/11, the Council, while continuing to act case-by-case as required, also reverted to a general approach, but now with binding measures.

(i) Up to 1989

In the first stage, until the 1990s, it was initially chiefly the General Assembly that dealt with terrorism within the United Nations, drawing up (or attempting to draw up) international conventions for the prosecution or extradition of those suspected of committing certain terrorist crimes. The General Assembly, particularly its Sixth (Legal) Committee had struggled with issues such as the definition of terrorism (code for the familiar problem that one person's freedom fighter is another person's terrorist). It did so from the moment Secretary-General Waldheim asked for terrorism to be put on the Assembly's agenda in the wake of the attacks on Israeli athletes at the Munich Olympics in September 1972. The Assembly succeeded in adopting a series of international conventions on sectoral aspects of terrorism, based on *aut dedere aut judicare*, including attacks on diplomats, the taking of hostages, the financing of terrorism and, most recently, on nuclear terrorism. And it eventually succeeded in adopting a strong Declaration against Terrorism in 1994, supplemented in 1996. But its efforts to reach agreement on a comprehensive convention on international terrorism have so far, after many years, been to no avail. Again, the problem is one of "legal definition and scope of the acts covered by the convention"[29]. Appropriately, it was the General Assembly that adopted, on 8 September 2006, the United Nations Global Counter-Terrorism Strategy, which is intended to be "a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter terrorism"[30]. In doing so the Assembly reaffirmed "its role under the Charter, including on questions of international peace and security".

Even during this first period, the Security Council was also involved to a degree, though much less centrally than in later years. In September 1948, the Council referred to the killers of the UN Mediator in Palestine, Count Folke Bernadotte of Sweden, as 'a criminal gang of terrorists'. In September 1970, when there was a spate of aircraft hijackings, the Council adopted resolution 286 (1970), in which it appealed for the immediate release of all passengers and crew, and called upon States 'to take all possible legal steps to prevent further hijackings'. In the mid-1980s, the Council again condemned hijackings, hostage-taking and other forms of terrorism. In 1989, the Council adopted resolution 635 (1989) on the marking of plastic explosives for the purpose of detection, which reads in part:

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[29] A/RES/60/288.
[30] A/RES/60/228.

Determined to encourage the promotion of effective measures to prevent acts of terrorism,

Calls upon States to cooperate in devising and implementing measures to prevent all acts of terrorism;

Urges ICAO to intensify its work on devising an international regime for the marking of plastic explosives for the purpose of detection.

This cautious approach in the wake of Lockerbie may be contrasted with the dramatic development of what has been called Council 'law-making' just 13 years later, following 9/11.

(ii) The 1990s: case-by case

In December 1988, Pan Am Flight 103, en route from London to New York, exploded over Lockerbie, in the south-west of Scotland, killing all on board and a number of persons on the ground. The President of the Security Council quickly made a statement strongly condemning the destruction of Pan Am 103 and calling on all States to assist in the apprehension and prosecution of those responsible. Some two years later, and following the destruction of a French aircraft, UTA flight 772 over Niger, the Council adopted resolution 731 (1992), in which it urged Libya to provide a full and effective response to the French, UK and US requests that it cooperate in establishing fully in establishing responsibility for these terrorist acts. This resolution was not adopted under Chapter VII of the Charter. Two months later, however, in the absence of Libyan cooperation, the Council, acting under Chapter VII, adopted resolution 748 (1992) in which it determined that Libya's failure to demonstrate its renunciation of terrorism and in particular its failure to respond to the requests for cooperation constituted a threat to international peace and security. The Council proceeded to impose a legal obligation on Libya to comply with the requests of France, the UK and the USA (overriding, as the ICJ held, any rights that Libya might have under the Montreal Convention), and at the same time an obligation on all States to impose certain sanctions on Libya. In the end, the sanctions were suspended in 1999 (upon the surrender of the two suspects to face a Scottish trial in the Netherlands), and then terminated in 2003 (when Libya had met all the Council's demands).

The Lockerbie case is by no means the only example of the Security Council taking action to require the surrender of terrorist suspects. In June 1995 there was an attempted assassination, in Ethiopia, of President Mubarak of Egypt by persons who then took refuge in Sudan. The Council's action was modelled to some extent on its action over Libya. First, in a resolution (not under Chapter VII – and so not legally binding), the Council called on Sudan to undertake immediate action to extradite the three suspects to Ethiopia for prosecution. When Sudan failed to do so, on 26 April 1996 the Council, acting under Chapter VII, determined that Sudan's non-compliance constituted a threat to international peace and security, and imposed legal obligations on Sudan to extradite and imposed diplomatic and travel sanctions. Then in August 1996 the Council decided to impose aviation sanctions against Sudan. These sanctions were maintained until, five years later, the Council was satisfied that Sudan was making sufficient efforts to fight terrorism, whereupon they were lifted

The third occasion on which the Council demanded the surrender of terrorist suspects was following the attacks on the United States embassies in Nairobi and Dar es Salaam on 7 August 1998, with heavy loss of life, and the US indictment of Osama bin Laden and his associates for these crimes. The Security Council had first demanded 'that the Taliban stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice'. When this had no effect, the Council, acting under Chapter VII, demanded "that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country from where he would be brought to justice, and imposed sanctions on the Taliban. The Council imposed further sanctions on the Taliban (resolution 1333 (2000) and strengthened the monitoring in 1363.

(iii) From 1999: General and binding measures against terrorism

It was in 1999 that the Security Council began to tackle terrorism as a general phenomenon, rather than just case-by-case. Resolution 1269 (1999) of 19 October 1999 was a landmark. It dealt with terrorism in a comprehensive manner, calling upon States to take a series of steps. The Council emphasised its own determination to contribute to the efforts to combat terrorism and its readiness to take necessary steps in accordance with its responsibilities under the Charter in order to counter terrorist threats to international peace and security.

The most dramatic development in the practice of the Council took place in the immediate aftermath of the attacks of September 2001. In resolution 1373 (2001) of 28 September 2001, the Council took upon itself what has been described as a largely legislative role in imposing on States obligations set out in the 1999 Financing of Terrorism Convention, which at the time had not yet entered into force, and which many States had not yet signed or ratified. By the same resolution, the Council set up the Counter-Terrorism Committee (CTC), an important and innovative subsidiary organ, whose task is to support and monitor States in their implementation of the obligations laid down by the Security Council. This it does, *inter alia*, through a reporting system. By resolution 1535 (2004), the Council established the CTC Executive Directorate, thus reinforcing the UN Secretariat's capacity to service the CTC and to assist States in their compliance.

The Council now has three Committees dealing with aspects of counter-terrorism, the 1373 Committee, the CTC, and the 1540 Committee. In its Statement of 20 December 2006, the Council encouraged the three committees to "present a consolidated message from the Council on its efforts to fight terrorism", and to avoid duplication and to continue to strengthen the sharing of information.

Resolution 1624 (2005) is an interesting example of caution on the Council's part. It seeks to address what is sometime called the glorification of terrorism. This is a sensitive matter, given the importance attached to freedom of expression. In the lengthy preamble to the resolution, the Council condemns the incitement to terrorist acts and repudiates attempts at the justification or glorification (*apologie*) of terrorist acts that may further terrorist acts. In the operative part, however, it calls upon States to prohibit incitement to commit terrorist acts, and did not refer to attempts at justification or glorification. Moreover, the resolution is not under Chapter VII and so is not in any event legally binding.

V. Conclusions

I have attempted to give a brief overview of the Security Council's role in international criminal law the position as it is today. But experience suggests that the Security Council's role is never static. It will continue to surprise (as it did after 9/11). I would draw three conclusions.

First, the Council's action in the field of international criminal law has been limited in its scope. It has been limited to genocide, war crimes and crimes against humanity on the one hand, and terrorism on the other. There are large areas of crime of international concern that the Council has not (or not yet) touched on, except in its role in the international administration of territory (examples include drugs, people trafficking, and corruption). Presumably these are not (or not yet) seen as threats to international peace and security calling for action by the Council.

Second, within this limited field the Security Council has been highly innovative, both in specific cases and in general terms: the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, as well as the Lockerbie and other cases.

But, *third*, even within the field of international criminal law in which it operates, including terrorism, the Council needs to act with restraint, if it is to maintain its legitimacy. This is more a matter of policy than of law. The question is often asked, what is the proper division of labour between the Security Council and the General Assembly (or other international bodies)? That is, it seems to me, an over-simplistic question. There is no *a priori* answer. It all depends on circumstances and on timing, on what is appropriate on a particular occasion and for a particular purpose. The legal powers of the Council are unique. It could, for example, have set up the International Criminal Court (as some indeed proposed), yet it did not. Its legitimacy, or moral authority, may be questioned, even when it acts unanimously. The General Assembly and other international bodies composed of all States, or all States in a region, provided they act by consensus, may have greater legitimacy. But for the most part their legal powers are very limited. Perhaps the most satisfactory cases are where the Security Council and the General Assembly act in harmony, complementing each other, as I believe they generally do in the field of international criminal law.