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What's in a Name? Labels and the Statute of the International Criminal Tribunal for the Former Yugoslavia

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Abstract
The ICTY has interpreted its Statute as a 'treaty'. This was not the intention of the UN Secretariat and the Security Council, and is not consistent with other treatments of the Statute. While the Statute literally satisfies the definition of 'treaty' in the 1969 Vienna Convention, this shows only the generality of that definition. The adoption of more precise labels for the Statute and other multi-state instruments adopted by international organizations through representational mechanisms would avoid confusion and promote better understanding of the rules that govern them.

Key words
ICTY; treaty; UN Security Council; Vienna Convention definition

One of Molière's characters was famously astonished to learn that he had for 40 years been speaking prose.[1] The UN Security Council may be equally astonished to learn that it has for 50 years been adopting treaties. But while M. Jourdain was gratified by his discovery, the Security Council's example suggests a cautionary footnote to the customary definitions of treaties. Those definitions permit some consensual inter-state instruments to be labelled as treaties that bear little resemblance to the usual domestic law contract models. The origins of such instruments are better described as legislative, and their validity and interpretation are principally governed by rules associated with the legislative process by which they were adopted.

An illustration of the resulting confusion is provided by the characterization given by the International Criminal Tribunal for the former Yugoslavia (ICTY) to its governing Statute. In an important judgment in 1999, the ICTY's Appeals Chamber acknowledged that the Statute is 'legally a very different instrument from an international treaty', but nonetheless decided that it was 'permissible' to interpret the statute using principles formulated by the International Court of Justice (ICJ) for interpreting treaties.[2] No explanation was offered as to why the analogy was 'permissible', but in fact the Appeals Chamber merely applied the familiar principle

* Convington and Burling, London.
1. M. Jourdain in J.-B. Molière, *Le bourgeois gentilhomme* (1670), Act 2, Scene 4.
2. *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A, 15 July 1999, para. 282. Specifically, the Appeals Chamber applied the ICJ's Advisory Opinion in Competence of the General Assembly for the Admission of a State to the United Nations, [1950] ICJ Rep. 8.

that the Statute's words should be given their natural and ordinary meaning. The same result could readily have been reached without any reference to treaty law.

This was taken farther in October 2001, however, when the former Yugoslav president Slobodan Milošević argued before an ICTY trial chamber that his detention was unlawful. In part, Milošević claimed that his extradition to The Hague had been unlawful as a matter of domestic Yugoslav law. The trial chamber denied the claim.[3] It offered independent reasons for the denial, but the relevant fact for present purposes is that it treated the ICTY Statute as a treaty, and hence applied Article 27 of the 1969 Vienna Convention on the Law of Treaties.[4] Article 27 provides that domestic law does not excuse a state from performing obligations imposed by a treaty to which it has acceded.[5]

In September 2004 the trial chamber went still farther in explaining its decision to assign defence counsel to Milošević. It now stated that the Statute had been treated as a treaty from 'the earliest days' of the Tribunal,[6] and again applied the Vienna Convention, this time to interpret Articles 20 and 21 of the Statute.[7] The net result of all this is that, without any articulated analysis, the Tribunal has moved from an acknowledgement that the Statute is 'legally very different' from a treaty to a perception that the Statute has been regarded as a treaty from the Tribunal's 'earliest days'.

The questions addressed here are (i) whether the Statute may in fact properly be characterized as a treaty and, (ii) if it may, what this suggests about the customary definitions of treaties. In summary, it is argued that the Statute was never intended as a treaty, and indeed was adopted by the Security Council by a mechanism which was expressly selected because it was regarded as preferable to the adoption of a treaty. Further, the Statute has not subsequently been registered as a treaty. Nonetheless, the Statute is a binding and consensual inter-state instrument that is not governed by any system of municipal law, and it may therefore be said to satisfy the Vienna Convention's definition of treaties. This, however, merely reflects the definition's breadth and generality. Characterizing the Statute as a treaty obscures the manner of its adoption and invites confusion about the rules that principally govern its validity and interpretation. Although any reconsideration of the Convention's definition would be impractical, and is not suggested here, the adoption of differentiating sub-labels for different forms of consensual instruments binding on states would promote a clearer understanding of the origins and proper interpretation of those instruments. Juliet to the contrary notwithstanding, there is much in a name.[8]

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3. *Prosecutor v. Milošević*, Decision on Preliminary Motions, Case No. IT-99-37-PT, 8 Nov. 2001.
4. 'Vienna Convention' and 'Convention' are used here to refer to the 1969 Vienna Convention on the Law of Treaties, *UN Treaty Series*, vol. 1155, at 331. References to the 1986 Vienna Convention include the year of its adoption.
5. *Supra* note 3, para. 47.
6. For this, the trial chamber cited the Appeals Chamber's judgment in *Tadić*, *supra* note 2, as well as the Appeals Chamber's judgment in *Prosecutor v. Delalić et al.*, Judgment, Case No. IT-96-21-A, 20 Feb. 2001, paras. 67–73. In fact, the latter reference is inapposite, because the Appeals Chamber there applied the Vienna Convention to interpret the Geneva Conventions, which are unquestionably treaties, and not to interpret the Statute.
7. *Prosecutor v. Milošević*, Reasons for Decision on Assignment of Defence Counsel, Case No. IT-02-54-T, 22 Sept. 2004.
8. W. Shakespeare, *Romeo and Juliet*, 2. 2. 43.

1. THE STATUTE'S ORIGINS AND ADOPTION

The Statute was adopted in 1993 by UN Security Council Resolution 827.[9] The resolution was based on a report from the Secretary-General which had proposed the Statute in draft.[10] In turn, the report and draft statute had been prepared by the Secretariat in response to an earlier Security Council resolution.[11] The earlier resolution declared that an international criminal tribunal should be created to prosecute violations of international humanitarian law in the former Yugoslavia, and instructed the Secretary-General to offer proposals for a tribunal's creation.

The Secretary-General's report noted that the Security Council had not prescribed how or on what legal basis a tribunal was to be established. It observed that 'in the normal course of events' the appropriate answer would have been a treaty.[12] A treaty providing for the creation of a tribunal might have been prepared by the General Assembly or a specially convened conference, and then opened to all states for ratification. A specially convened international conference was, for example, the mechanism subsequently used for the adoption of the 1998 Rome Statute for the International Criminal Court (ICC).[13] The Secretary-General's report noted, however, that the use of such a mechanism with respect to a Yugoslav tribunal would have required 'considerable time', and would have offered no guarantee that ratifications would be obtained from all of the states whose adherence was necessary to make a treaty effective.[14] Both concerns have since been confirmed by events surrounding the creation of the ICC.[15] The Secretary-General also opposed any involvement of the General Assembly in drafting or reviewing the Yugoslav tribunal's proposed statute, on the ground that this too would have been inconsistent with the 'urgency' expressed in Resolution 808.[16]

Instead, the Secretary-General proposed that an international criminal tribunal for the former Yugoslavia should be established by decision of the Security Council under Chapter VII of the UN Charter.[17] Chapter VII authorizes the Security Council

9. UN Doc. S/RES/827 (25 May 1993).
10. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Res. 808, UN Doc. S/25704 (3 May 1993).
11. UN Doc. S/RES/808 (22 Feb. 1993). Other Security Council resolutions regarding the former Yugoslavia preceded Res. 808. In particular, the Secretary-General had previously created and received reports from a Commission of Experts which examined evidence of violations of international humanitarian law. The events are summarized in the Secretary-General's report, *supra* note 10, paras. 4–10. For the Commission's work, see, e.g., Final Report of the Commission of Experts Established Pursuant to Security Council Res. 780 (1992), UN Doc. S/1994/674 (27 May 1994).
12. Report, *supra* note 10, para. 19.
13. For the adoption of the 1998 Rome Statute, see, e.g., M. Arsanjani, 'The Rome Statute of the International Criminal Court', 93 AJIL 22 (1999); L. Sadat, 'The Evolution of the ICC: From The Hague to Rome and Back Again', in S. Sewall and C. Kaysen (eds.), *The United States and the International Criminal Court* (2000), 31.
14. Report, *supra* note 10, para. 20.
15. Consideration of a permanent international war crimes tribunal began soon after the creation of the UN, but it was not until 1998 that the Rome Statute was adopted. See Sadat, *supra* note 13, at 36–41. Lengthy negotiations were required, but even so seven nations (including the United States) voted against the Rome Statute, and 21 others abstained. See Arsanjani, *supra* note 13. The Rome Statute did not enter into force until July 2002, when the requisite number of ratifications and accessions had been obtained.
16. Report, *supra* note 10, para. 21. Res. 808 expressed 'grave alarm' at continuing reports of violations of international humanitarian law, and requested the Secretary-General to provide a report and proposals 'at the earliest possible date'.
17. Ibid., para. 22.

to adopt various actions in response to threats to peace, breaches of the peace, and acts of aggression. Under Article 41, those actions may include measures 'not involving the use of armed force'.[18] The Secretary-General's report observed that a decision by the Security Council under Article 41 of Chapter VII, unlike the drafting of a treaty by the General Assembly or a special conference, would be expeditious. It would also be immediately effective, since all UN member states are obliged by Article 25 of the Charter to 'accept and carry out' measures adopted by the Security Council under Chapter VII.[19]

The report observed that such a decision would establish a subsidiary organ of the UN within the meaning of Article 29 of the Charter,[20] but noted that the Council had previously made decisions resulting in the creation of subsidiary organs.[21] Further, although a tribunal created by the Security Council as an enforcement measure under Chapter VII would appear to make the tribunal subject to the Council's continuing supervision, the Secretary-General's report suggested that the tribunal's performance of its judicial functions should nonetheless be outside the Council's control.[22] On the other hand, since the tribunal's creation would be a measure adopted under Chapter VII, the Secretariat anticipated that the tribunal's 'life span' would be 'linked' to peace and security in the former Yugoslavia.[23]

The Secretary-General's report included a draft statute, together with commentary and explanations. Three weeks after its presentation, the report was 'approved' by the Security Council in Resolution 827.[24] The resolution also 'adopted' the

18. The second and final sentence of Art. 41 states that such measures 'may include' interruptions of economic relations and means of communication, and a severance of diplomatic relations. Art. 41 does not expressly authorize the establishment of criminal tribunals, but the Secretary-General evidently construed the 'may include' language to make the listed measures only illustrative.
19. Report, *supra* note 10, para. 23.
20. It has been argued that the Tribunal's creation cannot be a 'delegation' of the Security Council's Art. 29 powers, because the Council has no judicial powers that may be delegated. The Council could, however, use its authority under Art. 7(2) to establish a tribunal, which would be a subsidiary organ within the meaning of Art. 29. D. Sarooshi, *The United Nations and the Development of Collective Security* (1999), 97–8, and n. 52.
21. Report, *supra* note 10, para. 27. As an example, the Secretary-General's report referred to Security Council Res. 687, adopted 3 April 1991, which created a Special Commission to inspect Iraqi weapons production and development sites.
22. Ibid., para. 28. The Tribunal has described itself as a 'satellite' of the Security Council, rather than an 'integral part' of the Council, and has claimed to have a 'complete and independent character'. *Prosecutor v. Blaškić*, Decision on the Objection of Croatia to the Issuance of a Subpoena, Case No. IT-95-14-PT, 18 July 1997, at 11. Commentators have argued that there are important limits (which have been variously described) on the extent to which the Security Council may properly delegate its authority under Chapter VII. E.g. M. Bothe, 'Les limites des pouvoirs du Conseil de sécurité', in R.-J. Dupuy (ed.), *The Development of the Role of the Security Council* (1993), 67, 73; Sarooshi, *supra* note 20, at 32–46.
23. Any such 'linkage' has proved to be largely theoretical. The Tribunal's 'lifespan' is not defined in the Statute, the Secretary-General's report, or any Security Council resolution. Regardless of events, however, the Tribunal's life expectancy, in one form or another, is likely to be lengthy. First, some accused have not yet been brought into the Tribunal's custody, and some years of further proceedings are therefore likely. Milošević's trial alone has already proved to be very lengthy, and appellate proceedings will presumably follow any judgment in his case. Second, the Tribunal has imposed sentences of imprisonment in excess of 40 years, and Art. 28 of the Statute provides that issues of parole or commutation, which may arise at any time during the sentences, are to be decided by the Tribunal's president after consultation with its judges. Notwithstanding this, the Security Council has asked for reports every six months regarding the Tribunal's progress toward a Completion Strategy. UN Doc. S/RES/1534 (26 March 2004). The first such report was in May 2004. Previously, the Tribunal's president had said that it is working towards completion in 2007 or 2008. Press release, JdH/P.I.S./662-e (6 March 2002).
24. UN Doc. S/RES/827 (25 May 1993).

proposed statute without change. In addition, the resolution instructed all UN member states to co-operate with the new tribunal and to take whatever measures might be necessary under their domestic laws to implement the Statute. In adopting the Statute, member states of the Security Council recognized that the creation of an ad hoc criminal tribunal represented a 'historic'[25] and unprecedented use of Chapter VII.[26] Although no member state argued in the Council's publicly reported debates that a treaty would have been preferable, one state expressed relevant concerns. In one reported debate, the Brazilian representative argued that the Council's powers under Chapter VII should be 'construed strictly' and exercised with 'extreme caution'.[27] In a subsequent reported session, he expressed regret that the proposed statute had not been placed before the General Assembly.[28] Presumably these or other concerns may also have been expressed in unreported discussions.

Whatever may have been the doubts about using Chapter VII, the Security Council soon re-employed the same formula. In November 1994, by another decision under Chapter VII, the Security Council adopted the Statute for the International Criminal Tribunal for Rwanda (ICTR).[29] The text of the Rwanda Statute was adapted from ICTY's Statute, and provided that the two tribunals would have the same prosecutor and appellate chamber.[30] The two statutes also include identical articles regarding genocide and related offences[31] and regarding the criminal responsibilities of superiors and government officials.[32] Some other provisions of the two statutes are significantly different, however, and reflect differences in the nature of the two conflicts.[33]

There have been five subsequent amendments to the ICTY Statute. All were adopted by Security Council resolutions. In 1998 the Security Council established

25. The descriptor was used by the representatives of both the United States and Spain. See UN Doc. S/PV.3175 (22 Feb. 1993), reprinted in D. Bethlehem and M. Weller (eds.), *The 'Yugoslav Crisis' in International Law: General Issue, Part I* (1997) 204, 206. The representative of New Zealand preferred to describe the resolution as 'momentous'. Ibid., at 207.
26. E.g. statement of the representative of Spain, UN Doc. S/PV.3175 (22 Feb. 1993), reprinted in Bethlehem and Weller, *supra* note 25, at 206–7 ('this is the first time the Security Council has decided to establish a tribunal to try those deemed responsible for grave violations of international humanitarian law perpetrated in an armed conflict ... We understand that some may harbor certain doubts about the competence of the Council to take this step').
27. Statement of the representative of Brazil, UN Doc. S/PV.3175 (22 Feb. 1993), reprinted in Bethlehem and Weller, *supra* note 25, at 202–3.
28. Statement of the representative of Brazil, UN Doc. S/PV.3217 (25 May 1993), reprinted in Bethlehem and Weller, *supra* note 25, at 281–2.
29. UN Doc. S/RES/955 (8 Nov. 1994).
30. Rwanda Statute, Arts. 12(2) and 15(3).
31. ICTY Statute, Art. 4, and Rwanda Statute, Art. 2.
32. ICTY Statute, Art. 7, and Rwanda Statute, Art. 6.
33. For example, the Yugoslav Statute expressly authorizes prosecutions for violations of the laws or customs of war, while the Rwanda Statute does not. Art. 5 of the Yugoslav Statute authorizes the prosecution of various crimes against humanity 'when committed in armed conflict, whether international or internal in character, and directed against any civilian population'. In contrast, Art. 3 of the Rwanda Statute condemns similar crimes, but only if committed 'as part of a widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds'. Art. 2 of the Yugoslav Statute authorizes prosecutions of 'grave breaches' of the 1949 Geneva Conventions, and provides what appears to be a closed list ('namely') of forbidden breaches. In contrast, Art. 4 of the Rwanda Statute authorizes the prosecution of 'serious violations' of Common Art. 3 of the 1949 Conventions, but also refers to the 1977 Additional Protocol II to the 1949 Conventions, and provides that the punishable offences 'shall include, but shall not be limited to' a series of differently described violations.

an additional trial chamber for ICTY and authorized the election of three additional judges.[34] In 2000 it authorized the appointment of *ad litem* judges and enlarged the membership of the appellate chamber.[35] In 2002 it clarified the treatment of judges holding dual nationality[36] and modified the provisions for the election of judges.[37] In 2003 it amended the Statute to clarify the roles of *ad litem* judges.[38]

2. Does the Statute satisfy the Vienna Convention definition?

Many definitions of 'treaty' have been offered, but most have satisfied only their draftsmen. One of the most influential was offered by Lord McNair prior to the Vienna Convention. He suggested that a treaty may be defined as 'a written agreement by which two or more States . . . create or intend to create a relation between themselves operating within the sphere of international law'.[39] Beginning earlier,[40] the International Law Commission (ILC) debated several definitions over a period of nearly two decades.[41] Many commentators, writing both before and after the Vienna Convention, have offered their own variations.[42]

So numerous and varied have been the proposals, and so controversial have been the issues, that Judge Jessup once impatiently observed that the 'notion that there is a clear and ordinary meaning of the word "treaties" is a mirage'.[43]

The mirage has since been given substance by the 1969 Vienna Convention.

Although many states have never ratified it,[44] and the Convention was never intended as a comprehensive codification, its terms broadly reflect customary international law.[45] Brownlie notes that a 'good many' of the Convention's provisions are declaratory of customary law, and that others are presumptive evidence of 'emergent' rules.[46] Aust adds that the Convention's terms are relied on even by states that have not ratified it, and notes that the ICJ has never ruled that any of the Convention's terms do not reflect customary law.[47] Moreover, although the UN appears to have avoided any formal definition of 'treaty', the Summary of Practice

34. UN Doc. S/RES/1166 (13 May 1998).
35. UN Doc. S/RES/1329 (30 Nov. 2000).
36. UN Doc. S/RES/1411 (17 May 2002).
37. UN Doc. S/RES/1431 (14 Aug. 2002).
38. UN Doc. S/RES/1481 (19 May 2003).
39. A. McNair, *The Law of Treaties* (1961), 4 (footnotes omitted). His definition also included agreements between international organizations, which were excluded from the Vienna Convention but are now covered by the parallel 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.
40. S. Rosenne, *Developments in the Law of Treaties, 1945–1986* (1989), 2. For an example of the debated proposals, see (1956) II *Yearbook of the International Law Commission*, at 104.
41. For accounts of the discussions, see, e.g., K. Widdows, 'What is an Agreement in International Law?', (1979) 50 BYIL 117; Rosenne, *supra* note 40; I. Brownlie, *Principles of Public International Law* (1998) 607.
42. E.g. A. Cassese, *International Law* (2001), 126 (a treaty is a 'merger of the wills of two or more international subjects for the purpose of regulating their interests by international rules').
43. *South West Africa* (First Phase), [1962] ICJ Rep. 402.
44. A. Aust, *Modern Treaty Law and Practice* (2000), 6.
45. Ibid., at 14. It has rightly been noted that the Convention's limited scope means that it only partly codifies customary law. A. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), 5–21. The omissions may, however, be disregarded for present purposes.
46. Brownlie, *supra* note 41, at 608.
47. Aust, *supra* note 44, at 10–11. See also *Namibia (Advisory Opinion)*, [1971] ICJ Rep. 16, at 47.

of the Secretary-General as Depositary of Multilateral Treaties refers to the Vienna Convention's definition.[48] For present purposes, therefore, the Convention's definition may be used as a template.

The Convention defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[49] To facilitate discussion, the definition's elements may be restated to include (i) an agreement, (ii) whatever its designation or title, (iii) made between states (iv) in writing,[50] (v) in one or more instruments, provided that they are 'related', (vi) with an international character, and (vii) governed by international law.

The Statute certainly satisfies elements (ii), (iv), (v), and (vi). First, its denomination as a 'statute' is irrelevant. As the ILC has observed, an 'extraordinarily varied nomenclature' has been used, apparently haphazardly, to denominate international agreements.[51] Instruments labelled by such varied terms as 'compact', 'terms of reference', and 'agreed minute' have all been accepted as treaties. Indeed, 'statute' has historically been a tolerably common designation.[52] Second, the Statute is in writing. Third, it is international in character. It was adopted by an organ of the UN to govern a subsidiary UN organ in response to perceived breaches of international humanitarian law and threats to international security. The offences for which the tribunal is authorized to impose punishment are based on international law.[53] Among other sources, they derive from the Geneva, Hague, and Genocide Conventions. Whether or not one agrees that international humanitarian law is 'impressively codified, well understood, [and] agreed upon',[54] there is no doubt that the Tribunal acts within a substantial framework of rules derived from international law. Fourth, the Statute is 'related' to the Charter pursuant to which it was adopted and which is itself undeniably a treaty. Further, although the Convention definition does not expressly require it,[55] the Statute is not merely hortatory. It imposes binding obligations on UN member states.[56]

48. UN Doc. ST/LEG/7/Rev. 1 (1999).
49. Art. 2(1)(a). Art. 1(a) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations, or between International Organizations, contains a similar definition. The International Law Commission's commentary to the 1969 Convention notes that 'treaty' was intended as a 'generic term covering all forms of international agreements in writing concluded between States', whether in one or multiple documents, and whether 'formal' or not. (1966) II *Yearbook of the International Law Commission* 173, at 188.
50. The writing requirement limits the Vienna Convention's scope of application, but Art. 3 of the Convention provides that the limitation is without prejudice to the legal validity of agreements which are not in writing.
51. (1966) II *Yearbook of the International Law Commission*, at 188.
52. Ibid., at 22. See also McNair, *supra* note 39, at 22 et seq. For a survey of names, including some 28 instruments which use the designation 'statute', see D. Myers, 'The Names and Scope of Treaties', (1957) 51 AJIL 574, 576, 582–3. An earlier version of the Vienna Convention definition debated by the International Law Commission expressly included 'statute' as a permissible designation. (1962) II *Yearbook of the International Law Commission*, at 161.
53. UN Doc. S/PV.3175 (22 Feb. 1993), reprinted in Bethlehem and Weller, *supra* note 25, at 204.
54. Ibid. (statement of then-Ambassador Albright).
55. The International Law Commission's commentary to the draft convention suggests that an intention to create obligations may be an implicit requirement of the definition. (1966) II *Yearbook of the International Law Commission*, at 189. See also Aust, *supra* note 44, at 17.
56. The existence of 'obligations' is shown, for example, by para. 4 of Res. 827, in which the Security Council 'decides' that 'all States shall cooperate fully with the International Tribunal and its organs ... and shall

Moreover, although this is again not directly addressed by the Convention definition, it is immaterial under customary law that the Statute lacks the usual language and formalities of treaty making. For example, the ICJ has held that a treaty was created by the signed minutes of a meeting between foreign ministers, in which they agreed on behalf of their states to take various steps.[57] There, too, the usual language and formalities of consensual treaty making were missing. Similarly, the ICJ has seen no reason why, depending on its terms and the circumstances in which it was agreed to, a joint communiqué issued by two disputing states could not constitute an agreement to submit the dispute to the Court's jurisdiction.[58] Finally, a treaty need not necessarily be signed by the states on which it is binding.[59]

All this supports the ICTY's conclusion that its Statute may be characterized as a treaty, but it still leaves points (i), (iii), and (vii) from the restated Convention definition. So is the Statute an 'agreement' made 'between States' that is 'governed' by international law?

2.1. An agreement between states

A threshold objection to characterizing the Statute as an agreement between states is that it may be said to constitute an act, not of states acting individually, but rather of an institution acting for and with the consent of its member states. Analogously, acts of municipal legislatures are usually not regarded as agreements among individual legislators, although they could also be said to have that character, but instead as institutional actions. But both characterizations are true, and each is a function of what we elect to emphasize. When we wish to emphasize that legislatures are representational mechanisms, and may adopt legislation only collectively, we use an institutional focus. But when we wish to emphasize the complex political bargaining that may underlie legislation, we focus on the multiplicity of agreements that are reached, sometimes individually, among legislators. Indeed, individuals may sometimes be so important in a legislature's composite decisional process that historians may assign them principal responsibility for a particular outcome.[60]

We are more accustomed to adopting an institutional focus with respect to domestic legislation than with respect to the acts of international organizations. This may be because states enjoy powers of independent action that individual legislators and citizens commonly do not. It may also reflect the fact that, unlike members of municipal legislatures, states do not routinely represent other states. One state, one vote remains the predominant rule. Both explanations have exceptions, however, and the exceptions are increasingly important. An institutional focus is therefore

take any measures necessary under their domestic law to implement the provisions of the present resolution and the statute'. Obligations imposed by the resolution and Statute are binding on all UN member states pursuant to Art. 27 of the Charter.

57. *Qatar v. Bahrain (Jurisdiction and Admissibility)*, [1994] ICJ Rep. 112.
58. *Aegean Sea Continental Shelf (Judgment)*, [1978] ICJ Rep. 39, para. 96. The Court found that there had not been any such agreement in that case.
59. Aust, *supra* note 44, at 24. See also Arts. 12 and 13 of the Vienna Convention; and McNair, *supra* note 39, at 7 and 123.
60. E.g. R. Caro, *Master of the Senate: The Years of Lyndon Johnson* (2002) (crediting then-Senator Johnson with the passage of the US Civil Rights Act of 1957).

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not without international precedent. For example, as described below, the European Court of Justice has characterized actions taken by the European Union's Council as institutional acts, and not as agreements reached between the Union's member states.[61] Nonetheless, nothing compels the use of an institutional focus, and the process by which the Statute was adopted may readily be described in contractual terms.

The Statute may certainly be characterized as an agreement at least between the states that were members of the Security Council in 1993. The expression of their agreement took the form of affirmative votes for Resolution 827. To be sure, this mechanism differs from the usual contractual model.[62] The result was not expressed as an agreement, and became binding only when two conditions were satisfied: a sufficient number of affirmative votes cast and no veto interposed by one of the Council's permanent members. But these may be regarded merely as variations in the methods of expressing a willingness to be bound, and in the preconditions that states may impose on the effectiveness of their expressions of consent. In multilateral treaty making, it is common for states to decide that they will be bound only if a prescribed minimum number of states accede to an instrument.[63] This was true of the Vienna Convention itself.[64] Even the veto power has analogies, since states may decide, formally or otherwise, not to accede to an instrument unless certain other states also agree. In any case, the veto powers derive from the UN Charter, which itself is a consensual instrument. At least with respect to the Security Council's member states in 1993, therefore, the Statute may plausibly be said to reflect an 'agreement ... between States'.

But what of the UN members that were not members of the Security Council in 1993? The Secretariat's proposed statute was not formally presented to them even for review, and certainly was not opened to them for accession. Both the Secretary-General's report and the Council debates make it clear that these omissions were deliberate.[65] Given this, how can those other states be said to have agreed?[66] The simplest answer is that, by virtue of their accession to the UN Charter, they have consented to the Security Council's powers and are, for purposes of the exercise of those powers, represented by the Council's members.[67] This is expressly stated by the

61. *Infra* at text accompanying notes 87 and 88.
62. The absence or presence of what Fitzmaurice once called 'contractual reciprocity' may, as he observed, have implications for a party's rights to terminate or suspend treaty obligations, but its absence does not mean that a treaty may not exist. (1957) II *Yearbook of the International Law Commission* 53, at para. 120.
63. For example, the Convention on the Safety of United Nations and Associated Personnel provided that 22 ratifications were necessary before it entered into force. GA Res. 49/59, 49th Session, Supp. No. 49, at 299, UN Doc. A/49/59 (1994). See also Arsanjani, *supra* note 13, at 29 n. 15. Similarly, Art. 126 of the 1998 Rome Statute of the International Criminal Court provided that 60 ratifications or accessions were necessary to bring the Statute into force. Ibid., at 42.
64. Vienna Convention, at Art. 84(1) (Convention would come into force only with the 35th ratification or accession).
65. *Supra*, text accompanying notes 12 to 24.
66. The situation of the states arising from the former Yugoslavia is particularly relevant. Five such states have been admitted to UN membership since Yugoslavia's dissolution. Four had been admitted by the time of the Security Council resolution adopting the Statute. The fifth, the Federal Republic of Yugoslavia, was not admitted until 1 Nov. 2000. Its implicit 'agreement' must therefore be retrospective.
67. Art. 23 of the Charter provides that, of the 15 member states of the Security Council, ten are selected for two-year terms by vote of the General Assembly.

Charter. Although it has been disputed whether the Security Council's powers have been delegated to it by the member states, or instead flow from the Charter itself,[68] Article 24(1) of the Charter provides that all member states 'agree' that, in performing its duties in connection with the maintenance of international peace and security, the Security Council 'acts on their behalf'.[69] Further, even if the entitlements of the Council's permanent members stem from the Charter rather than exist by delegation, the Council's non-permanent members are elected to rotating two-year terms by the General Assembly.[70] They are therefore representatives of the full UN membership. Their representational character is not diminished by the political fact that the elections may be affected by informal log-rolling or a desire for regional balance. Such practices are found in virtually every representational situation. Given these facts, decisions by the Security Council under Chapter VII may be said to reflect agreements made by implication between all member states of the UN, provided always that those decisions are made pursuant to, and within the scope of, the powers granted to the Council by the Charter.

Customary international law recognizes the possibility of treaty making through multiple instruments. The Vienna Convention's definition expressly permits such treaty making.[71] So too have other suggested definitions.[72] It may be that the Convention's draftsmen envisioned multiple parts of one treaty, rather than successive documents in which an earlier instrument evidences consent for the adoption of a later one. There is, however, nothing in the Convention's text or history that precludes the latter arrangement.

Nor is there anything that precludes representational consent. Article 11 of the Vienna Convention provides that a state's consent to be bound by a treaty may be validly expressed, not simply by signature, ratification, or accession, but also by 'any other means if so agreed'.

For example, there could be no objection in principle under customary international law if (say) five states were to agree that two of their number would thereafter negotiate an agreement that would be binding on them all. If consent to the arrangement has been unconditionally and freely given, the negotiated agreement should be binding on each of the five states.

In essence, this is precisely what occurs under the UN Charter and in all international institutions with representational decision making. Consistent with

68. Compare B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1994), 404, with Sarooshi, *supra* note 20, at 26–8.
69. In the Security Council debate before the adoption of Res. 827, the Brazilian representative referred specifically to Art. 24(1) of the Charter to emphasize that the Council's powers originate from a delegation of powers from the entire membership, and that the Council acts on behalf of all member states. UN Doc. S/PV.3175, at 6–7.
70. UN Charter, Art. 23. See also S. Bailey and S. Daws, *The Procedure of the UN Security Council* (1998), 141–53.
71. Vienna Convention, Art. 1(a).
72. For example, Sir Hirsch Lauterpacht suggested to the International Law Commission that 'agreements constitute treaties regardless of their form and regardless of whether they are expressed in one or more instruments'. Quoted in Widdows, *supra* note 41, at 127. The draft Fitzmaurice code presented to the International Law Commission in 1956 defined 'treaty' as a 'single formal instrument', but subsequently noted that the same rules may apply *mutatis mutandis* to a 'complex' of related instruments. (1956) II *Yearbook of the International Law Commission* 104.

Article 11 of the Vienna Convention, therefore, accession to the Charter is a 'means' of expressing consent to actions subsequently taken by the Security Council within the scope of the powers granted to it by the Charter.[73] On this basis, the Statute is an 'agreement ... between States' even with respect to those UN member states that did not participate in the Security Council's adoption of Resolution 827.

2.2. Governed by international law

The final requirement of the Convention's definition is that an instrument must be 'governed by international law'. The ILC's commentary suggests that this element of the definition was a compromise.[74] While the Commission agreed that the requirement excludes instruments 'regulated' by domestic law, some Commission members evidently believed that the restriction was tautological. They argued that every inter-state agreement is, because of the nature of its parties, subject to international law 'at least in the first instance'.[75] Others evidently disagreed, and argued that there may be situations in which states consent to the regulation of an inter-state agreement by some system of domestic law. Waldock, for example, writing before the Convention about a definition closely similar to the one ultimately adopted, observed that the phrase 'serves to exclude from the concept of a treaty an agreement between States which they wish to conclude under the national law of one of them'.[76] His examples were leases of land and commercial contracts. The ultimate result of the debate was a requirement which some Commission members evidently believed to be unnecessary, and which others regarded as meaningful only exceptionally. Further, although stated positively, the essence of the requirement is negative: a treaty may not be an instrument governed by any system of domestic law.

This Statute is not 'regulated' by any system of domestic law. Its validity and interpretation are determined by the Security Council's resolution, and more generally by the UN Charter. While the decisions of the Security Council are not as such international law, they are not regulated by any domestic law. Their validity depends on the Charter. Correspondingly, while only parts of the Charter are included in international law, and while the parts of the Charter which usually are said to have been subsumed into international law do not include Chapter VII, Chapter VII is not governed by any domestic law. On the contrary, the Charter is an international agreement, and as such its interpretation is governed by international law. If the Convention's definition means that an inter-state agreement is deemed to be governed by international law unless its history and terms clearly require that its governance must be by some domestic law system, this Statute satisfies the requirement.

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73. Milošević and others have argued that the Security Council did not have authority under Chapter VII of the UN Charter to adopt the Statute, and Milošević urged the trial chamber to which his case is assigned to refer the issue to the ICJ. In the same decision in which it treated the Statute as a treaty for purposes of the extradition issue, the trial chamber declined to do so. *Supra* note 3.
74. (1966) II *Yearbook of the International Law Commission*, at 188–9.
75. Ibid., at 189.
76. H. Waldock, 'General Course on Public International Law', (1962) 106(2) *Recueil des cours* 1, at 73.

In sum, the Statute satisfies the Vienna Convention's definition. The Statute was based on the consent of the states on which it is binding, expressed either directly through affirmative votes in the Security Council or implicitly through accession to the UN Charter. It is in writing, has an international character, imposes obligations within a framework of international law, and is not governed by any domestic legal system. Its validity is determined by the Charter, which is an international agreement that must be interpreted in accordance with international law. But does the fact that the Statute satisfies the Convention's definition mean that it may usefully be characterized as a treaty?

3. The evidence from international practice

Notwithstanding the Convention definition, there are important differences between the Statute and international agreements that conform more closely to domestic law contract models. At the outset, as described above, neither the Secretariat nor the Security Council believed that the Statute was a 'treaty'. On the contrary, they consciously avoided a treaty mechanism because they preferred the swiftness and universality that were thought to be obtainable only through Chapter VII. If it is correct that an instrument's origins and terms are important in determining whether it is a treaty, as the ICJ has said,[77] the Statute's origins do not support such a characterization.

Moreover, the Statute has not been registered in the UN Treaty Series. This is significant because UN member states are obliged to register 'every treaty and every international agreement' adopted after the Charter, and because the UN itself has an ex officio obligation to register every treaty and international agreement to which it is party, or for which it is the depository.[78] An obligation to register treaties with the Secretariat is also imposed by Article 81(1) of the 1986 Vienna Convention. Pursuant to these obligations, amendments to the Charter have been registered, for example, but not the underlying resolutions of the General Assembly.[79] Similarly, although subsidiary agreements with the Netherlands regarding the Tribunal's personnel and facilities have been registered, the Statute itself has not.

Nonetheless, non-registration is not decisive. While international agreements are broadly defined for purposes of the Charter's registration obligation,[80] and non-registration may have significant consequences under Article 102 of the Charter, a failure to register an instrument does not prove that the instrument was not intended to be a treaty. Nor does non-registration mean that, if a treaty was intended, the instrument is without legal and practical force. While the fact of registration or not may be one signal of the parties' intentions, neither Article 102 of the Charter nor Article 81(1) of the 1986 Vienna Convention provides that registration is a

77. *Aegean Sea Continental Shelf*, *supra* note 58, para. 96; *Qatar v. Bahrain*, *supra* note 57, para. 23.
78. UN Charter, Art. 102; Res. 97(I) of the General Assembly (14 Dec. 1946), as modified by General Assembly Resolutions Nos. 364 B (IV) (1 Dec. 1949), 482 (V) (12 Dec. 1950), and 33/141 A (18 Dec. 1978). For a discussion of Art. 102, see Simma, *supra* note 68, at 1103 et seq.
79. Simma, *supra* note 68, at 1106.
80. Ibid., at 1105.

precondition to validity. An unregistered treaty is not void. The Charter provides that non-registration merely prevents reliance on the instrument before organs of the UN.[81] This may have important consequences, but an unregistered agreement may still be binding in other contexts and for other purposes.[82] Indeed, many international agreements are apparently not registered, despite both the possible disadvantages and the longstanding registration obligations.[83]

While these factors are not decisive, they are cautionary signals. The warnings grow more urgent if one considers the implications for the classification of other instruments if the Statute may properly be characterized as a treaty. If it is, all binding decisions made by the Security Council within the scope of its powers under Chapter VII should equally be 'treaties'. Whenever the Council establishes a subsidiary organ under Article 29, adopts economic sanctions or other measures not involving force under Article 41, or authorizes blockades or other forcible measures under Article 42, its actions may also be regarded as agreements at least between the Council's own member states. Further, those decisions are also actions that, under Article 24(1) of the Charter, all other UN member states have 'agreed' are taken 'on their behalf'. If, therefore, the Statute is an 'agreement between States' by virtue of the Security Council's delegated powers, all of the Council's other binding decisions under Chapter VII should also be such 'agreements'. While non-binding resolutions and other steps adopted by the Security Council might be distinguished on the ground that they are merely hortatory, there is no obvious basis for distinguishing between the Council's binding decisions.

Similarly, if the Statute is a treaty, other binding actions adopted by other international institutions and organizations should equally be treaties, provided only that those actions are adopted within the scope of authority delegated by the member states to the institution by a predecessor instrument. This includes, for example, actions adopted by the European Union, as well as a great variety of other specialized and regional institutions. The extent, form, and precise terms of delegated consent undoubtedly differ – and must be sought from the terms of the instrument from which consent is derived – but the essential nature of the mechanism does not. In each case states are deemed, by virtue of a predecessor agreement, to have consented to actions subsequently adopted by representational institutions acting on their behalf. Provided that some binding representational formula has been adopted, the variations become matters merely of detail. Accordingly, if the Statute is properly regarded as a treaty, treaties should also exist whenever multinational institutions have taken binding actions based on representational powers delegated by their member states.

81. Art. 102(2) provides that parties to unregistered agreements may not 'invoke that treaty or agreement before any organ of the United Nations'. For a discussion of the article and implementing UN regulations, see Simma, *supra* note 68, at 1113–15.

82. For discussions, one of which antedates the Charter obligation, see M. Hudson, 'Legal Effect of Unregistered Treaties in Practice', (1934) 28 AJIL 546; M. Brandon, 'The Validity of Non-registered Treaties', (1952) 29 BYIL 186; B. Lillich, 'The Obligation to Register Treaties and International Agreements with the United Nations', (1971) 65 AJIL 771.

83. E.g. P. Reuter, *Introduction to the Law of Treaties* (1989), 42, 55.

This is not, however, consistent with international practice. Without formality and usually without articulation, states regularly distinguish between multinational legislation and agreements that more closely approximate domestic law contract models. This is shown first by state practices regarding the approval under domestic law of measures adopted by multinational organizations. If such measures were regarded as treaties, they would in some states be subject to rules of domestic law governing the ratification of treaties. In the United States, for example, this may require the advice and consent of the Senate pursuant to Article II, section 2 of the Constitution. A complex, evolving, often contested, and sometimes inconsistent practice has grown up around the constitutional provision,[84] but that practice has not included the submission to the Senate of measures adopted by the Security Council under Chapter VII. The Tribunal's Statute, for example, was never submitted to the Senate for approval.[85] Nor is the Statute included in the United States' compilation of treaties in force. Similarly, there is no practice of submitting for Senate approval other representational actions adopted by other international organizations of which the United States is a member.

As described above, a further source of evidence is international practice regarding the registration of instruments. Just as the Statute has not been registered as a treaty, although various subsidiary agreements with the Netherlands have been, so too states have generally adhered to a practice of not registering instruments adopted on a representational basis by organizations acting pursuant to delegated powers.[86] Conversely, instruments have been registered when they have been adopted by member states of an organization outside the powers delegated by those states to that organization.

The European Union illustrates both practices. For example, an instrument regarding the placement in Luxembourg of certain services of the European Communities was registered as an international agreement, while numerous other Community directives, regulations, and decisions have not been. The Luxembourg instrument was registered because it was not formally an act of the European Council, but instead was an agreement reached by member states while meeting 'within the Council'.[87] If the instrument had instead been a formal act of the Council, it would not have been registered because, as a judgment of the European Court of Justice subsequently explained, a measure that is 'in the nature of a Community decision' is not an 'international agreement'.[88]

These facts are neither decisive nor entirely consistent. As described above, it appears that some inter-state agreements governed by international law are not in fact registered as treaties. Moreover, practices under domestic law rules requiring the approval of treaties are too complex and varied to permit their use as a basis

84. For a general account, see Congressional Research Service, 'Treaties and other International Agreements: The Role of the United States Senate', Senate Print 106–71, 106th Cong., 2d Session (2001).
85. In contrast, there seems no doubt that the 1998 Rome Statute for the International Criminal Court requires Senate ratification. For a discussion see, e.g., R. Wedgwood, 'The Constitution and the ICC', in S. B. Sewall and C. Kaysen, *supra* note 13, at 119.
86. Simma, *supra* note 68, at 1106.
87. Ibid., at 1106 n. 20.
88. *Case 38–69 Commission v. Italy*, [1970] ECR 47, para. 11.

for definitional decisions. Nonetheless, both factors suggest a widespread international practice of treating inter-state agreements based on contractual models differently from instruments adopted by multinational institutions on the basis of representational powers. The differences may not be invariable, but they are common and striking. They suggest a discontinuity between the Vienna Convention's broad definition and actual international practice.

4. The consequences of discontinuity

The trial chamber's ruling on Milošević's extradition claim illustrates that the discontinuity has consequences. Because the Statute satisfies the Vienna Convention's definition of treaties, the trial chamber believed that it was free to apply the Convention as one basis for its ruling that Milošević had not been wrongly extradited. Nonetheless, treating the Statute as a treaty is unhelpful and potentially misleading. The characterization does not accurately reflect the actual manner of, or the intended basis for, the Statute's adoption. It disregards the fact that the Statute has not been registered as a treaty, and ignores the widespread international practice of distinguishing inter-state agreements, which are generally registered, from consensual instruments adopted by international organizations pursuant to delegated powers, which are generally not registered. More important, treating the Statute as a treaty obscures the fact that its validity and interpretation are principally governed not by public international law as such, but instead by the UN Charter and the rules which have developed around the Charter. Accordingly, the appropriate source of rules for measuring the obligations of states under the Statute is the Charter, and not the Vienna Convention. The trial chamber's characterization of the Statute caused it to search for the right rule in the wrong place.

The confusions created by the characterization problem are also illustrated by the process by which ICTY moved from the Appeals Chamber's initial acknowledgement that the Statute is 'legally very different' from a treaty to the trial chamber's recent assertion that the Statute has been treated as a treaty from the Tribunal's 'earliest days'.[89] Without any articulated explanation or analysis, an analogy has become a characterization. This is hardly surprising. Ambiguous labels invite mischaracterizations, and mischaracterizations in turn encourage misapplications of law.

5. The advantages of differentiating labels

The basic difficulty, as Arnold McNair saw 70 years ago, is that a single word is used to encompass a wide variety of instruments performing a broad range of functions.[90] He argued that some treaties resemble domestic law conveyances, others perform functions similar to domestic law contracts, and still others are not unlike domestic law charters of incorporation. Still others, no less consensual but differing in purpose

89. See page 78, *supra.*
90. A. McNair, 'The Functions and Differing Legal Character of Treaties', 1930 BYIB 101.

from the rest, he described as 'law-making'.[91] His plea, unheeded by the Vienna Convention[92] and still widely ignored, was that we should 'free ourselves from the traditional notion that the instrument known as the treaty is governed by a single set of rules'.[93] The issue now, closely related to his plea, is whether we should also free ourselves from the notion that the single label of 'treaty' may usefully be applied to every form of consensual instrument binding on states.

It is undoubtedly true that differentiated labels would provoke questions of shading and degree. States enter into binding consensual instruments in many forms and by a variety of mechanisms, and the variations are unlikely to be neatly captured by any system of labels, however artfully constructed. But this is not a complete answer. The use of a single word to describe every manner of inter-state consensual instrument may avoid definitional uncertainties, but it is also uninformative and potentially misleading. Surely understanding would be promoted if labels more precisely signalled important differences as and when they exist, particularly when those differences are reflected in actual international practice. Green and blue fall along a single spectrum, merging gradually one into the other, but still we find it convenient and useful to distinguish them.

It is also true that distinctions between 'law-making' and other treaties have been criticized as 'fictional' and without 'practical value'.[94] Those criticisms were, however, directed against earlier efforts to distinguish between treaties which do, and those which arguably do not, create 'law'. Such distinctions may certainly be artificial. Most would now agree that that every agreement creates 'law', if only between the parties and for the duration of the agreement. In contrast, there is nothing artificial about distinguishing between inter-state agreements which adhere to domestic law contract models and those which are adopted by multinational organizations on a representational basis. Such a distinction derives not from dubious judgements about whether a particular instrument makes 'law', but instead from significant differences in both the methods by which the two forms of instrument are adopted and the sources of rules that principally govern their validity and interpretation. Consensual international instruments adopted by multinational organizations on a representational basis are common and important, and what now is 'fictional' is treating them as indistinguishable from treaties based on traditional contract models. Surely the law's terminology should reflect not yesterday's simplicities, but today's international practice.

If it is prose we speak, it is time we acknowledged it.

91. Ibid., at 112.
92. The adoption in 1986 of the parallel Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations may, however, be regarded as a partial acknowledgement of Lord McNair's argument.
93. Ibid.
94. H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), 157, 159. For a similar suggestion that distinctions between 'law-making' and other treaties may have more 'sociological' than legal significance, see Reuter, *supra* note 83, at 20.

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