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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

Revisiting Security Council action on terrorism: New threats; (a lot of) new law; same old problems?

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Abstract

The devastating events of 9/11 triggered the adoption of Resolution 1373 (2001) by the UN Security Council, a contentious development which was much debated and was widely seen as presaging a new type of activity by the Security Council – legislating for all UN member states. And yet, in the counter-terrorism sphere at least, the Council's legislative activity in the years following 9/11 was relatively modest. Both quantitatively and qualitatively, that activity has been far exceeded by the Council's response to the emergence of ISIL in 2014. This more recent activity is of interest beyond the confines of counter-terrorism, but has received far less scrutiny to date. This article will remedy this gap, revisiting, in light of the recent activity, the relative merits and disadvantages of making counter-terrorism law through Security Council resolutions. It makes two main contentions. The first is that – due to some factors which were anticipated in the early 2000s and many which were not – Security Council resolutions on terrorism constitute a distinctive category of international law-making and pose serious challenges for the application of organizing principles and processes of general international law. The second is that, for these reasons as well as doubts as to the necessity and efficacy of recent action, making counter-terrorism law through Security Council resolutions should be the exception rather than the norm.

Keywords: fragmentation; Security Council; soft law; terrorism; treaties

1. Introduction

The devastating events of 9/11 triggered the adoption of Resolution 1373 (2001) by the UN Security Council, a contentious development which was much debated by international lawyers and policy-makers alike.[1] It was widely seen as presaging a new type of activity by the Security Council – legislating for all UN member states. And yet, in the counter-terrorism sphere at least, the Council's legislative activity in the five years following 9/11 was relatively modest.

*The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations. Many thanks to Naureen Fink, Francesco Messineo, and the reviewers at the *Leiden Journal of International Law* for helpful comments. Very special thanks to Ken Keith. All remaining errors are the sole responsibility of the author.

[1]S. Talmon, 'The Security Council as World Legislature', (2005) 99(1) AJIL 175; E. Rosand, 'The Security Council as "Global Legislator": Ultra vires or ultra innovative?', (2004) 28(3) *Fordham International Law Journal* 542; M. Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations', (2003) 16 LJIL 593; J. E. Alvarez, 'Hegemonic International Law Revisited', (2003) 97 AJIL 873, at 874–8; P. Szasz, 'The Security Council Starts Legislating', (2002) 96 AJIL 901; L. M. Hinojosa Martinez, 'The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political, and Practical Limits', (2008) 57 ICLQ 333; and, more recently, the report of the UN Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/73/361 (2018), paras. 8–18.

By contrast, the June 2014 declaration of a 'caliphate' by ISIL triggered not just one major legislative resolution by the Council but a veritable wave of action, sustained over the following five years. Both quantitatively and qualitatively, the 2014–2019 activity far exceeded that of 2001–2006. This recent activity is of interest beyond the confines of counter-terrorism, but has received far less scrutiny to date. This article will remedy this gap, revisiting, in light of the recent activity, the relative merits and disadvantages of making counter-terrorism law through Security Council resolutions.

The first section of this article will recall the ways in which counter-terrorism law was made prior to Resolution 1373 (2001). Section 2 will outline the main critiques of the Council's legislative activity in the early 2000s. Section 3 will outline the factual context for the more recent legislative activity in the counter-terrorism sphere and will describe the new law adopted in response to those developments. Section 4 will examine some consequences of this recent activity and the challenges it poses for the application of organizing principles and processes of international law, including as relates to the distinction between soft law and binding rules; interpretation and amendment of legal rules; consistency across legal regimes; and compliance. Section 5 will consider whether the recent activity nevertheless represents a necessary and effective way of achieving the aims of the Council. In light of this analysis, the final section will revisit earlier assessments of the comparative advantages and disadvantages of making counter-terrorism law by Council resolution rather than by treaty.

This article will make two main contentions. The first is that – due to some factors which were anticipated in the early 2000s and many which were not – Security Council resolutions on terrorism constitute a distinctive category of international law-making and pose serious challenges for the application of organizing principles and processes of general international law. The second is that, for these reasons as well as doubts as to the necessity and efficacy of recent action, making counter-terrorism law through Security Council resolutions should be the exception rather than the norm.

2. The role of the Council and traditional ways of making counter-terrorism law

Under the UN Charter, in order 'to ensure prompt and effective action' by the United Nations, the Security Council has the primary responsibility for the maintenance of international peace and security.[2] To this end, its resolutions can serve a number of important functions: make determinations of internationally wrongful acts and demand cessation;[3] establish fact-finding mechanisms;[4] authorize the use of force;[5] demand that parties to a dispute take steps to reduce tensions;[6] establish special political missions[7] or peace operations;[8] establish judicial bodies or refer particular situations to such bodies;[9] and legislate to fill an identified gap in the law.[10] In addition to their legal or operational effects, which can be swiftly felt, such resolutions may also

[2]UN Charter, Art. 24.

[3]See, e.g., UN Doc. S/RES/686 (1991), relating to Iraq's invasion of Kuwait, and UN Doc. S/RES/1441 (2002), relating to Iraq's breach of earlier resolutions arising out of the invasion of Kuwait and WMD.

[4]UN Doc. S/RES/1564 (2004), para. 12, regarding reported violations of international humanitarian law and human rights law in Darfur.

[5]UN Doc. S/RES/1973 (2011), authorizing certain member states to take all necessary measures to protect civilians and civilian populated areas under threat of attack in Libya.

[6]UN Doc. S/RES/918 (1994), relating to Rwanda; UN Doc. S/RES/752 (1992) relating to Bosnia and Herzegovina.

[7]These are UN entities engaged in conflict prevention, peace-making and post-conflict peacebuilding at various locations across the globe (see dppa.un.org/en/dppa-around-world).

[8]UN Doc. S/RES/1590 (2005), establishing the United Nations Mission in Sudan.

[9]See, respectively, UN Doc. S/RES/827 (1993) (establishing the International Criminal Tribunal for the former Yugoslavia), and UN Doc. S/RES/1593 (2005) (referring the situation in Darfur to the Prosecutor of the International Criminal Court).

[10]See, e.g., Council statements regarding Res. 1540 (2004) (pertaining to WMD and non-State actors) at www.un.org/press/en/2004/sc8076.doc.htm.

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have significant political effects in that, by manifesting multilateral[11] consensus on an issue, they can generate or sustain political momentum on the international, regional, or national levels. No less importantly, the Council also serves as a forum,[12] for its 15 members as well as invited member states[13] or relevant international and regional organizations, to engage in high-level dialogue on pressing matters of international peace and security.

Traditionally, the Council did not play a significant role in making international counter-terrorism law. That is not to say that it was inactive in this area, rather that its activity was rarely intended to create binding rules applicable to all states. Prior to 9/11, Council resolutions on terrorism typically addressed particular terrorist attacks or organizations, or bilateral disputes arising from particular attacks (for example, the attempted assassination of Egyptian President Mubarak, and the Lockerbie bombing); where such resolutions imposed obligations, these related to a defined factual situation and applied for a defined period of time.[14]

Instead, in earlier decades, the vast majority of international counter-terrorism law was made through treaties. From 1963, a series of multilateral conventions were adopted relating to conduct commonly associated with terrorism: acts against the safety of civil aviation and maritime navigation, bombing, hostage-taking, activities involving nuclear material, and the financing of terrorism. These imposed a range of obligations with respect to such conduct: domestic criminalization; establishment of extra-territorial criminal jurisdiction in certain circumstances; the *aut dedere aut judicare* rule; exclusion of the conduct at issue from being considered a political offence for the purposes of extradition, and so on. There are currently 19 of these instruments.[15] The most recent was adopted in 2014. Twelve have over 150 state parties; eight have over 170.[16] There have also been a series of regional instruments adopted on counter-terrorism, by the African Union,[17] the Association of Southeast Asian Nations,[18] the Council of Europe,[19] the European Union,[20] the Commonwealth of Independent States,[21] the Organization of the Islamic Conference,[22] and the South Asian Association for Regional Cooperation.[23]

[11]If not necessarily *universal* consensus, a point returned to below regarding those critiques of Council activity which focused on questions of democratic representation. On the benefits of such manifestations of consensus, see D. DeBartolo, 'Security Council "Legislation" on Foreign (Terrorist) Fighters', (2018) 112 *Proceedings of the ASIL Annual Meeting* 303, at 305. On the Council's legislative activity specifically, Johnstone has contended that the 'democratic deliberation' leading to the adoption of such resolutions 'can legitimize outcomes that serve collective interests, even when initiated by a hegemon', See I. Johnstone, *The Power of Deliberation* (2011), at 94.

[12]See K. Herndl, 'Reflections on the Role, Functions and Procedures of the Security Council of the United Nations', (1987) *Recueil des cours* 289, at 307–8.

[13]Under Arts. 31 or 32 of the Charter.

[14]See UN Doc. S/RES/1054 (1996), relating to the attempted assassination of President Mubarak, imposing an obligation on Sudan (and deciding that all states shall take certain steps with respect to Sudan), and with a stipulated time for review of the situation by the Council (paras. 1–3, 8); and UN Doc. S/RES/748 (1992) relating to the Lockerbie bombing, imposing (i) obligations on Libya, (ii) obligations on other states that were to apply until the point where the Council determined that Libya had complied, and (iii) stipulating a date for the Council to review the situation (paras. 1–2, 3 and 13 respectively).

[15]The text of each instrument can be accessed at www.un.org/sc/ctc/resources/international-legal-instruments/.

[16]The latter category includes the 1979 Convention against the Taking of Hostages, 1316 UNTS 205 and the 1999 Convention for the Suppression of the Financing of Terrorism, 2178 UNTS 197.

[17]1999 OAU Convention on the Prevention and Combating of Terrorism.

[18]2007 ASEAN Convention on Counter-Terrorism.

[19]2005 Council of Europe Convention on the Prevention of Terrorism, CETS No. 196; 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, CETS No. 217.

[20]Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

[21]1999 Treaty of Cooperation among States members of the Commonwealth of Independent States in Combatting Terrorism.

[22]1999 Convention of the Organisation of the Islamic Conference on Combatting International Terrorism.

[23]1987 SAARC Regional Convention on Suppression of Terrorism; 2004 Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism.

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3. Resolution 1373 and the critiques

Over the course of the last two decades, however, the Council has become increasingly active, in a legislative sense,[24] in the area of counter-terrorism. There are two distinct, but related, components to the legal framework developed by the Security Council. First, the Council established a counter-terrorism sanctions regime, under which states are obliged to impose an asset freeze, travel ban, and arms embargo with respect to certain individuals and entities designated, by the Council's '1267 Committee',[25] as being associated with al-Qaida and, since 2014, ISIL.[26] Second, the Council has imposed on all states obligations to take certain measures to counter terrorism, irrespective of the affiliation of the perpetrator to any particular organization: these include obligations to criminalize participation in, support to, and financing of terrorist acts (Resolution 1373 (2001)), and travel for the purpose of committing terrorist acts or providing or receiving terrorist training (Resolution 2178 (2014)). Both components have been frequently refined by the Council. They have also been expanded: in terms of the individuals and groups to whom the repressive measures are to be applied, but also in terms of the areas of state activity identified by the Council as germane to counter-terrorism and in respect of which legal obligations have therefore been created.

The Security Council's creation of new legal obligations in the area of counter-terrorism following 9/11 was contentious, not least as it imposed binding obligations on all member states, with no stipulated end-date.[27] Some potential advantages of this new approach were noted, including that Council law-making could prove a pragmatic way to ensure a prompt normative response to an identified need, in contrast to the long and cumbersome treaty-making processes;[28] and/or could facilitate normative specificity, in contrast to the sometimes indeterminate customary law making process.[29]

Most legal commentators saw more negatives than positives, however. Talmon observed that resolutions, by their nature, are less detailed than treaties, and are secured only through political compromise, leading to general language and often a lack of clarity; that the lack of *travaux préparatoires* for Council resolutions removes a possible aid to interpretation; and that Council resolutions lacked clear deadlines for implementation.[30] Happold questioned whether the Council had acted *ultra vires*, worried that the adoption of Resolution 1373 (2001) might mark the beginning of a new state in the practice of the Council, and suggested that such legislative activity might be more palatable if it were carried out only in partnership with the General

[24]A definition proposed by Yemin is useful here: 'legislative acts have three essential characteristics: they are unilateral in form, they create or modify some elements of a legal norm, and the legal norm is general in nature, that is, directed to indeterminable addresses and capable of repeated application in time'. See E. Yemin, *Legislative Powers in the United Nations and Specialized Agencies* (1969), at 6. See, similarly, F. L. Kirgis, 'The Security Council's First Fifty Years', (1995) 89 AJIL 506, at 520.

[25]In 2011, the sanctions regime established under Res. 1267 (1999) was split in two: the existing Security Council Committee would focus on Al Qaeda, while a separate Committee was established to focus on the Taliban (UN Doc. S/RES/1988 (2011), UN Doc. S/RES/1999 (2011)). References in this paper to the '1267 sanctions regime' or '1267 Committee' are to the 'ISIL and Al-Qaeda' sanctions regime. On the development of this regime see A. Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion', (2006) 17 EJIL 881, at 881–3, 902–3; E. Cardenas, 'The United Nations Security Council's Quest for Effectiveness', (2004) 25 *Michigan Journal of International Law* 1341.

[26]UN Doc. S/RES/2170 (2014), paras. 14, 18, 19; UN Doc. S/RES/2253 (2015).

[27]See, for example, M. Wood, 'The Security Council as a Law-Maker: The Adoption of (Quasi)-Judicial Decisions', in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making* (2005), at 227, 231–2; Szasz, *supra* note 1, at 901–2; Happold, *supra* note 1, at 593–9; Alvarez, *supra* note 1, at 874; D. H Joyner, 'The Security Council as a Legal Hegemon', (2012) 43 *Georgetown International Law Review* 225, at 230–1.

[28]Bianchi, *supra* note 25, at 888; see also G. Nolte, 'Lawmaking through the UN Security Council: A Comment on Erika de Wet's Contribution', in Wolfrum and Röben, ibid., at 241; Rosand, *supra* note 1, at 544–5, 573–8.

[29]Bianchi, *supra* note 25, at 888.

[30]Talmon, *supra* note 1, at 188–92.

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Assembly.[31] Bianchi noted the issues of uneven state representation on the Council; the lack of transparency in its procedure; the absence of supervisory machinery to assess the effectiveness of state implementation of these new laws; and the fact that the Council's activity is subject to limited, if any, judicial scrutiny.[32] Alvarez analysed the adoption of Resolution 1373 (2001), and other measures taken by the Council in the early 2000s, within the prism of 'hegemonic international law'.[33] Hinojosa Martinez, noting that the Council lacked a large enough membership to be considered representative, argued that if the Council were to assume a general legislative function, 'not only would it be overlapping the [General Assembly's] modest competences, but rather it would be subverting the structural bases of the international legal order itself'.[34] Wood acknowledged that the Council was empowered to take general measures in response to a particular threat to the peace, if it considered this to be necessary, but suggested that 'the circumstances in which such general measures are considered necessary and appropriate may prove to be rare'[35] and cautioned that the Council 'needs to exercise self-restraint and use its undoubted powers responsibly and only where it really is necessary to do so in order to ensure prompt and effective action to maintain international peace and security'.[36]

4. The new threat and the new law

4.1 The new and evolving threat

ISIL declared its 'Caliphate' in mid-2014; by November 2015 the Security Council described it as constituting 'a global and unprecedented threat to international peace and security'.[37] By January 2016, the UN Secretary-General reported that ISIL had captured large swathes of territory in both Iraq and Syria, was conducting military campaigns, administering territory, and implementing a communications strategy to broaden its support, while also expanding its influence across West and North Africa, the Middle East and South and South-East Asia.[38]

The emergence of ISIL and its affiliates did constitute a new type of terrorist threat. A number of characteristics stand out: the control of extensive areas of territory, the generation of vast financial resources, the scale of impact on civilians and the institutionalization of sexual slavery and human trafficking, and the capacity to organize attacks on multiple continents. Another was highlighted in the same report of the Secretary-General, namely that more than 30,000 individuals had travelled from over 100 countries to join ISIL and its affiliates in Iraq and Syria: this phenomenon of 'foreign terrorist fighters' (FTFs) demanded 'not only global and national solutions, but also urgent action at the local level'.[39]

That threat has evolved. By 2019 ISIL remained 'by far the most ambitious international terrorist group, and the one most likely to conduct a large-scale, complex attack in the near future', but had reverted to a decentralized group, the rate of travel of FTFs to the conflict zones in the Middle East had decreased, and states' concerns had shifted to the threats posed by FTFs returning

[31]Happold, *supra* note 1.

[32]A. Bianchi, *supra* note 25, at 889, 903, 912–14.

[33]Alvarez, *supra* note 1. Indeed, in 1996, Alvarez had suggested that the Council 'could benefit from a measure of normative restraint'. See J. E. Alvarez, 'Judging the Security Council', (1996) 90 AJIL 1, at 22. For earlier discussion of the need to balance democratic representation with an effective Council see Herndl, *supra* note 12.

[34]Martinez, *supra* note 1, at 339–40, 352.

[35]M. Wood, 'The UN Security Council and International Law – First Lecture, The Legal Framework of the Security Council', *Hersch Lauterpacht Memorial Lectures*, 7 November 2006, para. 26, available at www.lcil.cam.ac.uk/press/events/2006/11/lauterpacht-lectures-2006-united-nations-security-council-and-international-law-sir-michael-wood.

[36]M. Wood, 'The UN Security Council and International Law – Second Lecture, The Security Council's Powers and their Limits', *Hersch Lauterpacht Memorial Lectures*, 8 November 2006, para. 64.

[37]UN Doc. S/RES/2249 (2015), para. 1.

[38]UN Doc. S/2016/92 (2016), paras. 4–17; see also S/RES/2199 (2015), preamble.

[39]Ibid., para. 25.

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to and through their territory.[40] By 2020, states assessed that between one half and two thirds of the more than 40,000 persons who had travelled to join the ISIL 'caliphate' were still alive, and that regional ISIL affiliates were maintaining a high tempo of attacks.[41] Other concerns related to the impending release from prison of FTFs who had received relatively short sentences upon their return to Europe, many of whom were still assessed to be dangerous,[42] and, in particular, the complex legal and operational challenges posed by the presence of large numbers of FTFs and family members in detention camps in northern Syria.[43] The laws adopted in response have reflected many of these evolutions.[44]

4.2 The news laws – unprecedented volume and breadth

Amidst extensive debates on the legality and legitimacy of Council law-making in the early 2000s, the Council's legislative activity on counter-terrorism in the years following Resolution 1373 (2001) was, in fact, relatively modest. A number of observers predicted that this would continue to be the case,[45] and until 2014, broadly speaking, it was.[46] But with the rise of ISIL and the advent of the FTF phenomenon the Council's law-making activity on counter-terrorism has sharply accelerated and diversified, as illustrated by a number of factors.

First, the sheer volume of activity. July 2019 marked five years since the emergence of ISIL. In that period, the Council adopted 16 resolutions on global counter-terrorism efforts, seven of which were adopted under Chapter VII of the Charter;[47] together, these contain over 350 operative paragraphs directed at member states.[48] Notably, at least 85 of the operative paragraphs directed at member states constitute mandatory measures decided by the Council – that is, binding obligations on member states.[49] True, some of those operative paragraphs 'reiterated' or 'reaffirmed' earlier decisions, but when such reiterations appear in resolutions introducing new substantive obligations[50] or significantly expanding the scope of existing ones (a pattern particularly notable

[40]UN Doc. S/2018/80 (2018), paras. 5–11; S/2019/103, paras. 4–10.

[41]UN Doc. S/2020/53 (2020), paras. 7, 9.

[42]Ibid., para. 47.

[43]Ibid., paras. 85–9.

[44]UN Doc. S/RES/2396 (2017); see in particular paras. 29–37 on strategies for the prosecution, rehabilitation and reintegration of returning or relocating FTFs and their family members.

[45]Martinez, *supra* note 1, at 356; J. E Stromseth, 'Imperial Security Council – Implementing Security Council Resolutions 1373 and 1390', (2003) 97 *American Society of International Law Proceedings* 41, at 45.

[46]Chesterman, Johnstone and Malone noted that 'with the change on political winds [following the adoption of resolutions 1373 and 1540], the Security Council stayed out of the business of legislating for many years', and that the adoption of Res. 2178 (2014) was, therefore, surprising. See S. Chesterman, I. Johnstone and D. M. Malone, *Law and Practice of the United Nations* (2016), at 149.

[47]The resolutions adopted under Chapter VII were: 2170 (2014); 2178 (2014); 2199 (2015); 2253 (2015); 2368 (2017); 2396 (2017) and 2462 (2019). The others were: 2195 (2014); 2249 (2015); 2309 (2016); 2322 (2016); 2341 (2017); 2354 (2017); 2370 (2017); 2395 (2017); and 2482 (2019).

[48]For this analysis, where a given operative paragraph is sub-divided into a series of sub-paragraphs calling for or deciding upon *distinct* measures (for example, para. 6 of Res. 2178 (2014)), these are counted individually (excluding the *chapeau*). Where a series of sub-paragraphs together address the same measure, as in para. 2 of Res. 2354 (2017), these are counted as one.

[49]While it is *not* the case that only those resolutions adopted under Chapter VII can contain decisions of the Council having the binding effect provided for in Art. 25 of the Charter (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 76 (1970), Advisory Opinion* [1971] ICJ Rep. 16, paras. 113–14; L. Sievers and S. Daws, *The Procedure of the UN Security Council* (2014), at 380–93; Herndl, *supra* note 12, at 322–5), the majority of Council decisions discussed in this article do indeed come in Chapter VII resolutions (see, e.g., UN Doc. S/RES/2178 (2014); UN Doc. S/RES/2368 (2017); UN Doc. S/RES/2396).

[50]See, for example, UN Doc. S/RES/2178 (2014), para. 12, which expressly extends previously-imposed obligations ('that Member States shall afford one another the greatest measure of assistance in connection with criminal investigations or proceedings relating to the financing or support of terrorist acts') to persons responsible for the conduct newly criminalized under that resolution.

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with respect to the '1267 sanctions regime'[51]), then even those reiterations will need to be carefully scrutinized to determine the precise scope of the measures henceforth to be undertaken by member states. Any material changes to existing obligations are rendered more significant by the fact that these resolutions – unlike the Council's earlier terrorism-related activity discussed above – have no geographical boundaries or sunset clauses.

The increase in recent years has been both quantitative and qualitative. To provide some context: in the five years following 9/11 (another period marked by a series of terrorist attacks, in multiple countries, perpetrated by one major terrorist organization and its affiliates), the Council adopted a similar number of resolutions specifically on counter-terrorism (19). However, these contained only 78 operative paragraphs directed at member states, 29 of which constituted binding measures. In other words, when compared to its activity following 9/11, the Council's resolutions in response to ISIL directed five times as many operative paragraphs at states and imposed three times as many legal obligations.

To provide further context: in the same period from mid-2014 to mid-2019 when the Council was so active on counter-terrorism, it adopted just six resolutions on its agenda item 'Protection of civilians in armed conflict' (none of which were under Chapter VII),[52] and only one on 'Non-proliferation of weapons of mass destruction'.[53] The Council's activity on counter-terrorism since the emergence of ISIL thus significantly exceeds both what it is has done on this issue previously, and what it has been doing on other topics of eminent importance to international peace and security in the same period. The (political) causes for this, and some (legal and practical) consequences, will be examined below.

A second point is the breadth of topics addressed by these recent resolutions:[54] prosecuting, countering the financing of, and preventing the travel of FTFs;[55] sanctions (travel bans, asset freezing and arms ban) on designated individuals and groups;[56] new methods of terrorism financing and measures to counter these;[57] the link between terrorism and organized crime;[58] aviation security;[59] international co-operation in criminal matters, including extradition and mutual legal assistance;[60] protecting critical infrastructure from terrorist attack;[61] countering terrorists' narratives,[62] misuse of information and communications technology,[63] and access to small arms and light weapons;[64] the use of national and international watch-lists and databases;[65] the use of biometrics;[66] border

[51]First, in terms of the entities to whom the sanctions regime applies (see UN Doc. S/RES/2170 (2014), paras. 14, 18–19, Ann. and then UN Doc. S/RES/2253 (2015), para. 2, on the addition of ISIL). Second, in terms of the forms of economic activity to be covered (UN Doc. S/RES/2199 (2015), paras. 1–2 on the generation of oil revenue and para. 17 on the trade in cultural property). Third, in revising the procedures for listing and de-listing (UN Doc. S/RES/2253 (2015), paras. 43–74, as well as Ann. II on the Office of the Ombudsperson). Fourth, in introducing specific measures with respect to particular individuals (UN Doc. S/RES/2253 (2015), para. 70; S/RES/2368 (2017), para. 76).

[52]UN Doc. S/RES/2175 (2014), UN Doc. S/RES/2222 (2015), UN Doc. S/RES/2286 (2016), UN Doc. S/RES/2417 (2018), UN Doc. S/RES/2474 (2019), and UN Doc. S/RES/2475 (2019).

[53]UN Doc. S/RES/2325 (2016).

[54]See also V. J. Proulx, 'A Postmortem for International Criminal Law? Terrorism, Law and Politics, and the Reaffirmation of State Sovereignty', (2020) 11 *Harvard National Security Journal* 151, at 211.

[55]UN Doc. S/RES/2178 (2014).

[56]UN Doc. S/RES/2253 (2015); UN Doc. S/RES/2368 (2017).

[57]UN Doc. S/RES/2199 (2015), paras. 1–2, 17; UN Doc. S/RES/2462 (2019).

[58]UN Doc. S/RES/2195 (2014); UN Doc. S/RES/2482 (2019)

[59]UN Doc. S/RES/2309 (2016).

[60]UN Doc. S/RES/2322 (2016).

[61]UN Doc. S/RES/2341 (2017).

[62]UN Doc. S/RES/2354 (2017).

[63]UN Doc. S/RES/2396 (2017), para. 21.

[64]UN Doc. S/RES/2370 (2017).

[65]UN Doc. S/RES/2396 (2017), para. 13.

[66]Ibid., para. 15.

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management;[67] the prevention of radicalization in prisons;[68] and strategies for the prosecution, rehabilitation and reintegration of FTFs and their family members.[69] Some of these issues had been referred to in earlier resolutions, but the resolutions adopted since 2014 have seen far more detailed treatment, including through binding obligations, leading to a significantly more prescriptive approach.

Addressing the complex phenomenon that is terrorism properly requires a multi-faceted approach: not just repressive measures but also steps to prevent radicalization and mobilization. But terrorism is not the only complex matter on the agenda of the Council, and its approach to this topic is materially different to its approach to other complex matters. Adding to the point made above on the comparative *frequency* of resolutions, many of the recent counter-terrorism resolutions are significantly more elaborate than resolutions which: established international transitional administrations over territory;[70] established a no fly zone, authorized 'all necessary measures' to protect civilians and extended a sanctions regime;[71] or established a peacekeeping operation.[72] As will be discussed below, when combined with other dimensions of the Council's recent activity (including the unclear content of some rules, and shifting normative value of others), this breadth of topics increases the risk of incoherence and even normative conflict across different bodies of international law. Such breadth and volume, and thus such risks, were not anticipated in the critiques of the early 2000s.

5. Why does this matter?

These developments raise a series of questions regarding important dimensions of contemporary international lawmaking: the development and impact of soft law; interpretation and amendment of legal rules; normative fragmentation; and compliance. In respect of each, the distinctive character of the Council's recent activity on counter-terrorism complicates the application of organizing principles and processes of general international law in ways which were not fully anticipated in the earlier critiques.

5.1 Soft law and/or binding rules?

It has recently been noted that the Council's resolutions on terrorism 'also rely on the assistance of "soft law" mechanisms to ensure their effective and enforceable implementation'.[73] While this may be the intention, in practice the impact of the soft law components may be more mixed, not least as the relationship between these elements and the binding components is often unclear and fluid.

To be clear, the contention here is not that soft law[74] is necessarily more or less advantageous as a method of developing multilateral responses to terrorism – there may be clear advantages to employing soft law, including in facilitating agreement, dealing with uncertainty, and lowering 'sovereignty costs'.[75] Rather, the issue is that the Council's recent activity on counter-terrorism utilizes both hard and soft law simultaneously, in a manner which can obscure the important distinctions between the two.

[67]UN Doc. S/RES/2178 (2014), paras. 8–9, 11; UN Doc. S/RES/2396 (2017), paras. 2–16.

[68]UN Doc. S/RES/2396 (2017), paras. 40–41.

[69]Ibid., para. 29–41.

[70]Whereas Res. 1272 (1999) (East Timor), contained 18 operative paragraphs, and Res. 1244 (1999) (Kosovo) contained 20, Res. 2253 (2015) and 2368 (2017) on the 1267 sanctions regime both have over 100 operative paragraphs.

[71]UN Doc. S/RES/1973 (2011) relating to Libya – 29 operative paragraphs.

[72]UN Doc. S/RES/2100 (2013), establishing MINUSMA (Mali) – 35 operative paragraphs.

[73]Proulx, *supra* note 54, at 194.

[74]On soft law, generally, see F. Francioni, 'International "soft law": a contemporary assessment', in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice – Essays in Honour of Sir Robert Jennings* (1996), at 167–78; D. Thürer, 'Soft Law', (2009) MPEPIL; D Shelton (ed.), *Commitment and Compliance—The Role of Non-Binding Norms in the International Legal System* (2000); W. M. Reisman 'The Concept and Function of Soft Law in International Politics', in E. G. Bello (ed.), *Essays in Honour of Judge Taslim Olawale Elias*, vol. I (1992), at 135–44.

[75]See K. W. Abbott and D. Snidal, 'Hard and Soft Law in International Governance', (2000) 54 *International Organization*, at 421–56.

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In its Advisory Opinion in *Namibia,* the International Court of Justice (ICJ) was required to determine whether in Resolution 276 the Council had made a decision (under Article 25 of the Charter) as opposed to a recommendation or request. It stated as follows:

> In view of the nature of the powers under Article 25, the question whether they have in fact been exercised, is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.[76]

Being able to make this determination is important. In his 2006 Lauterpacht lectures, Wood noted a number of reasons why: Governments need to know whether they are obliged to do or abstain from a particular act, for purposes of domestic and international litigation as well as statements before Parliament; states need to know whether other states are under a legal obligation to act in a certain way; to make determinations, where necessary and in view of Article 103 of the Charter, on the prioritization of obligations ;[77] and for domestic law implementation. Wood also observed that the requisite clarity is often lacking, however, due to time and political pressures under which resolutions are adopted, unexplained changes in drafting practices, and the Council's inconsistent use of language.[78]

Looking to the activity we are discussing here, several points can be made. First, the universal and indefinite nature of the recent resolutions broadens the category of states affected by them, which heightens the importance of being able to determine what is and what is not binding (and when). Second, whereas the resolution at issue in *Namibia* comprised nine operative paragraphs and pertained to one particular situation, applying the contextual factors identified by the ICJ in that case may be more difficult with respect to a counter-terrorism resolution such as Resolution 2253 (2015), comprised of 99 operative paragraphs (and two annexes) and applicable in respect of individuals and entities across the globe.

Third, whereas typically 'soft law rules have not – or not entirely – passed through all stages of the procedures prescribed for international law-making; they do not stem from a formal source of law and thus lack binding legal force',[79] the soft law we are considering here *does* stem from a formal source of law (namely the competence of the Security Council, under Article 25 of the Charter, to adopt decisions binding on all member states) and *has* gone through the procedures prescribed for law-making of this nature (by being included in a resolution adopted by the Council

[76]*Namibia*, *supra* note 49, at para. 114. Similarly, in the *Kosovo* Advisory Opinion, the Court noted differences between Council resolutions and treaties, observing that interpreting the former may require that additional factors be taken into account: 'The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolution'. See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403, para. 94.

[77]For illustration of this at the international level, see *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections*, Judgment of 27 February 1998, [1998] ICJ Rep. 155, para. 43 (where the Court rejected the respondent's argument that, in view of Arts. 25 and 103 of the Charter, Security Council Res. 731 (1992) constituted a legal impediment to the admissibility of the Application, on the basis that this resolution 'was a mere recommendation without binding effect'). See also V. Gowland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case', (1994) 88 AJIL 643, at 647–8.

[78]Wood, *supra* note 35, paras. 34–8.

[79]Thürer, *supra* note 74, para. 9, according to whom, the others features of soft law are: that it generally expresses common expectations concerning the conduct of international relations as it is often shaped by international organizations; it is created by subjects of international law; and that, despite its legally non-committal quality, it is characterized by a certain proximity to law, and above all by its capacity to produce legal effects.

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in a manner consistent with Article 27 of the Charter[80]). Indeed, often these soft law norms are pronounced in resolutions which also include binding components (sometimes in the same operative paragraph[81]); many are included in resolutions adopted under Chapter VII.[82] This compounds the factors noted by Wood, above, further complicating the task of distinguishing soft law from binding rules in the recent Council resolutions on terrorism in ways not envisaged in the earlier critiques of Council law-making.

To take one example: how to characterize an operative paragraph in which the Council, in a resolution adopted under Chapter VII, 'strongly urges' all member states 'to implement' the standards of the Financial Action Task Force (FATF) on Combatting Money Laundering and the Financing of Terrorism?[83] The paragraph in question is quite specific: it identifies the particular elements of the FATF standards to be applied, including the appropriate evidentiary standard of proof for targeted financial sanctions. The paragraph does not use mandatory language, however:[84] on its face this is not a *decision* of the Council. But it seems far weightier than what is usually characterized as 'soft law'. And as to the contextual aids to interpretation mentioned above, this particular resolution has 105 operative paragraphs, and three annexes.

In any event, even if the character of a given provision as soft law rather than binding obligation is clear at first, it may not stay that way for long: in some cases, the Council's initial 'calls' for a particular action by member states have swiftly developed, by the time of a later resolution, into a mandatory decision by the Council that states *shall* take such action.

One example relates to advance passenger information (API). In September 2014, the Council *called* on member states:

> to require that airlines operating in their territories provide advance passenger information to the appropriate national authorities in order to detect the departure from their territories, or attempted entry into or transit through their territories, by means of civil aircraft, of individuals designated by the [1267 Committee].[85]

This resolution was adopted under Chapter VII, but the operative paragraph in question was hortatory, not mandatory. The benefits of API were then flagged in a number of other Council documents (not resolutions).[86] In September 2016 the Council reiterated the call (with respect to the same individuals) in Resolution 2309 (2016).[87] A month later, the International Civil Aviation Organization (ICAO) adopted an amendment to Annex 9 of the Chicago Convention on Civil Aviation, making the collection of API an international standard for states party to that instrument (though not yet a binding rule of international law).[88] Two months thereafter, acting

[80]Which provides, *inter alia*, that decisions of the Council on non-procedural matters 'shall be made by an affirmative vote of nine members including the concurring votes of the permanent members' (UN Charter, Art. 27(3)).

[81]See, for examples, UN Doc. S/RES/2396 (2017), paras. 11–13.

[82]Binding decisions of the Council tend to be incorporated in resolutions that are expressly adopted under Ch. VII, though technically this is not a pre-requisite (see *supra* note 49).

[83]UN Doc. S/RES/2368 (2017), para. 17.

[84]On the terms used by the Council when taking decisions see Sievers and Daws, *supra* note 49, at 382–3.

[85]UN Doc. S/RES/2178 (2014), para. 9.

[86]See UN Doc. S/PRST/2014/23, at 3; also, UN Doc. S/2015/377 (a May 2015 report noting gaps in current member state practice in this area, and making recommendations to improve this situation), and UN Doc. S/2015/939, Guiding Principle 19.

[87]UN Doc. S/RES/2309 (2016), para. 6(g).

[88]With some limited exceptions (none of which are relevant to the present discussion), states party to the Chicago Convention are under no legal obligation to implement the 'international standards and recommended practices' that may be adopted by ICAO under Art. 37; the only obligation is for the state party which, at any time, deems implementation of a given standard or recommended practice not to be practicable, to notify ICAO of this fact (Art. 38). On the law-making powers of ICAO generally, and the legal effect of the standards and recommended practices it adopts, see further T. Buergenthal, *Law-Making in the International Civil Aviation Organization* (1969), at 57–122. For details of the API standard see www.icao.int/WACAF/Documents/Meetings/2018/FAL-IMPLEMENTATION/an09_cons.pdf, at 9.5; UN Doc. S/2018/80, para. 54.

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under Chapter VII, the Security Council decided, in furtherance of Resolution 2178 (2014) and the standard established by ICAO 'that Member States *shall* require airlines operating in their territories to provide API to the appropriate national authorities . . . ', in order to detect not just persons designated by the 1267 Committee, but also FTFs more generally.[89]

That the Council's resolutions, both the binding and non-binding components, can play a role in the development of international law is not a new observation – Higgins addressed this half a century ago.[90] What has been different in the counter-terrorism sphere in recent years is the *pace* at which this happens, and that can be traced to two factors. First, these resolutions, unlike those adopted by the Council in previous years and on other topics, are of general scope rather than addressed to discrete situations. And second, the apparent perception among Council members between 2014–2019[91] that the adoption of multiple resolutions, on an ever-increasing range of topics, constitutes a necessary and effective contribution to multilateral counter-terrorism efforts. The result, whereby 'soft law' coalesces into binding international rules within a handful of years, has few parallels in other areas of international law.[92]

The development of soft law on counter-terrorism has also been impacted by the work of other entities, including the General Assembly,[93] the Global Counterterrorism Forum,[94] and the FATF. While a detailed discussion of each of these is beyond the scope of the present article,[95] the relationship between FATF recommendations and Security Council resolutions on the financing of terrorism is worthy of further discussion, and will be considered next.

5.2 Interpreting (amended) Council resolutions

In one important area of counter-terrorism law the Council has materially changed the scope of obligations imposed under its own earlier resolution to bring them in line with standards developed by another body. In Resolution 1373 (2001), the Council had decided that all states shall take measures including:

[89]UN Doc. S/RES/2368 (2017), para. 11 (emphasis added). The Council did so notwithstanding its observation, in the preamble of this resolution, that many ICAO member states had not yet implemented the ICAO standard on API (ibid., preamble).

[90]R. Higgins, 'The United Nations and Lawmaking: The Political Organs', (1970) 64 AJIL, at 37–48, 40–6.

[91]In addition to the five permanent members, between 2014 and 2019 there were 36 elected members of the Council; the non-permanent members are elected for two year terms, though occasionally two states from the same regional grouping may choose to divide the two-year term between them (details available at www.un.org/securitycouncil/content/security-council-members).

[92]The process of soft law subsequently developing into binding *treaty* rules has often taken decades. A notable example is the 1948 Universal Declaration of Human Rights, the bulk of which attained binding force in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, both adopted in 1966 and which entered into force ten years later. For an example of swifter development, the General Assembly's 1963 Declaration on Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, in Res. 1962 (XVIII) was followed, just over three years later, by the Treaty on Principles Governing the Activities in the Exploration and Use of Outer Space (610 UNTS 205).

[93]Between mid-2014 and mid-2019 the General Assembly adopted 26 resolutions on terrorism (including eight in a single GA session between 2017 and 2018, see research.un.org/en/docs/ga/quick/regular/72).

[94]An international forum of 29 states (including all five permanent members of the Security Council) and the EU seeking to 'strength[en] the international architecture for addressing 21st century terrorism' by preventing, combating, and prosecuting terrorist acts and countering incitement and recruitment to terrorism (see www.thegctf.org/About-us/Background-and-Mission).

[95]On the impact of various 'soft law' instruments for human rights compliance in states' counter-terrorism measures see *Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism*, 29 August 2019, A/74/335; K. Huszti-Orban and F. Ní Aoláin, 'The Impact of "Soft Law" and Informal Standard-Setting in the Area of Counter-Terrorism on Civil Society and Civic Space', University of Minnesota Human Rights Centre, 2020.

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- criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, *in order to carry out terrorist acts* (para. 1(b));
- prohibit their nationals or any persons and entities within their territories from making any funds … available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts … (para. 1(d)).[96]

With this resolution the Council imposed on all UN member states some of the obligations arising from the 1999 Convention on the Suppression on the Financing of Terrorism. Article 2 of that Convention requires that states parties criminalize the willful collection or provision of funds with the intention or knowledge that they are to be used *in order to carry out specific acts* of terrorism (defined according to earlier counter-terrorism instruments, listed in an annex, and/or a free-standing definition included in the Convention).[97] Resolution 1373 (2001) departed from the 1999 Convention on the issue of providing a definition of terrorism, but remained consistent with that Convention in that it required the act of financing to be linked to a specific act of terrorism.

Subsequent to this resolution, however, international standards in this area evolved, particularly under the influence of FATF, a 35-member inter-governmental body established by the G-7 to set standards and promote effective implementation of measures to combat money laundering, and (since 2001) the financing of terrorism and WMD. Its Recommendations, first issued in 1990 and revised frequently since then, are recognized as international standards in these areas. FATF, and its regional derivatives, conduct mutual evaluations of states and issue detailed, influential[98] and public reports on compliance with the FATF standards. From 2004 onwards, FATF had recommended that terrorism financing offences should *not* require that the funds or other assets (i) were actually used to carry out or attempt a terrorist act, or (ii) be linked to a specific terrorist act.[99] As the accompanying guidance observes, in this regard FATF's Recommendation 5 deliberately went beyond the obligations contained in the 1999 Convention.[100] While its expertise is not doubted, FATF cannot easily be situated within traditional international law-making processes:[101] it was not established by treaty, has no formal authority to oversee the implementation of any international legal instrument, and does not propose treaties for adoption by its 'member jurisdictions'.[102] Separately, concerns have been raised regarding the extent to which human rights concerns are reflected in its processes and products.[103]

[96]UN Doc. S/RES/1373 (2001), paras. 1(b), 1(d) (emphasis added).

[97]Financing Convention, *supra* note 16, Art. 2(1)(a)–(b).

[98]Huszti-Orban and Ní Aoláin, *supra* note 95, at 12.

[99]FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations*, at 11, 35.

[100]FATF, *Criminalising Terrorist Financing: Recommendation 5*, October 2016, paras. 18–20, available at www.fatf-gafi.org/media/fatf/documents/reports/Guidance-Criminalising-Terrorist-Financing.pdf. On FATF generally see I. Bantekas, 'The international law on terrorist financing', in B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2014), 121, at 125–7.

[101]For an earlier discussion of FATF's role in 'soft legalization' see Abbott and Snidal, *supra* note 75, at 439–40.

[102]In addition to its 35 member jurisdictions, FATF is also comprised of two regional organizations (the European Commission and the Gulf Cooperation Council) and has nine 'associate members', known as FATF-style regional bodies (FSRBs), which, in turn, include a number of jurisdictions which are not UN member states (such as Aruba, the Cook Islands, Gibraltar, Guernsey, the Holy See, the Isle of Man, Jersey, Macau, Niue). FATF's membership policy emphasizes that candidate countries should be 'strategically important', in view of factors including size of GDP, size of the banking, insurance and securities sector, and population, and also enhance FATF's geographic balance, see www.fatf-gafi.org/about/membersandobservers/fatfmembershippolicy.html.

[103]*2019 Report of the Special Rapporteur*, *supra* note 95, paras. 28–46. See also Huszti-Orban and Ní Aoláin, *supra* note 95, at 10–13

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For present purposes, it is useful to track the way in which the FATF recommendations have been reflected in the Council's activity. In Resolution 2253 (2015), the Council first reaffirmed, in the preamble, the provisions of Resolution 1373 (2001), with explicit reference to the financing 'of terrorist acts', then (as noted above) in the operative paragraphs, 'strongly urge[d]' all member states to implement the revised FATF standards, welcomed recent FATF reports, and expressly highlighted that FATF Recommendation 5 'applies to the financing of terrorist organizations or individual terrorists *for any purpose*, including but not limited to recruitment, training, or travel, *even in the absence of a link to a specific terrorist act*'.[104]

A year later, in the preamble to Resolution 2322 (2016), the Council:

> *recall[ed]* that the obligation in paragraph 1(d) of resolution 1373 (2001) also applies to making funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of terrorist organizations or individual terrorists *for any purpose*, including but not limited to recruitment, training, or travel, *even in the absence of a link to a specific terrorist act*.[105]

The extent to which this was merely a 'recall', rather than a reinterpretation of the obligation in paragraph 1(d) of Resolution 1373 which materially changed the scope of that obligation, is open to question. Paragraph 1(d) had not included the 'for any purpose' stipulation, or the express decoupling from a link to a specific terrorist act – changes which must be seen to have broadened the reach of the obligation. This was not simply an evolutive interpretation[106] of the terms in Resolution 1373 (2001).

In any event, the precise legal effect of this statement in Resolution 2322 (2016) was not immediately clear, given that the earlier provision had come in a mandatory paragraph of a Chapter VII resolution, while the 'recall' came in the preamble of a resolution which did not have that status. To what extent, as a matter of law, could the latter amend the former? Six months later, in Resolution 2368 (2017), the Council went further, and in an operative paragraph in a resolution adopted under Chapter VII, expressly 'clarified' that the obligation in para. 1(d) of Resolution 1373 (2001) applied to making funds available, directly or indirectly, for the benefit of terrorist organizations or individual terrorists 'for any purpose', and 'even in the absence of a link to a specific terrorist act'.[107]

As of this date, beyond the issue of *when* the obligation in question had attained this broader scope, it was unclear whether the 'for any purpose' stipulation also applied to paragraph 1(b) of Resolution 1373 (2001). That provision was not mentioned in Resolutions 2253 (2015), 2322 (2016) or 2368 (2017), and yet the rationale for adding 'for any purpose' would appear to apply equally here, and indeed FATF's recommendation (above) had been made with specific reference to the criminalization obligation addressed in paragraph 1(b) of Resolution 1373 (2001).[108]

[104]UN Doc. S/RES/2253 (2015), preamble, paras. 16–17 (emphasis added).

[105]UN Doc. S/RES/2322 (2016), preamble (emphasis added).

[106]A well-established method of interpreting treaties, at least, as reflected notably in the *Namibia* Advisory Opinion, in which the ICJ (in 1970) interpreted provisions from the 1919 Charter of the League of Nations, noting that it 'must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation' (*Namibia*, *supra* note 49, para. 53). See also *Navigational and Related Rights* in which the ICJ interpreted, in 2009, a treaty from 1858 (*Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, [2009] ICJ Rep. paras. 64–70).

[107]UN Doc. S/RES/2368 (2017), para. 20.

[108]FATF, *Criminalising Terrorist Financing: Recommendation 5*, October 2016, paras. 18–20

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This question was answered in March 2019, with the adoption of Resolution 2462 (2019). Here, in addition to confirming again the more expansive interpretation of paragraph 1(d) of Resolution 1373 (2001),[109] the Council also:

> *Decides* that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense the wilful provision or collection of funds, financial assets or economic resources or financial or other related services, directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists *for any purpose*, including but not limited to recruitment, training, or travel, *even in the absence of a link to a specific terrorist act*.[110]

Again, as noted above, paragraph 1(b) of Resolution 1373 (2001) had required criminalization only of financing known or intended to be used 'in order to carry out terrorist acts': the requirement that this link exist was express. The italicized text in Resolution 2462 (2019) expressly removed that requirement and confirmed that that obligation is now of a significantly broader reach.

Commentators including the UN Special Rapporteur for the promotion and protection of human rights while countering terrorism have criticized the breadth of the criminalization obligations in Resolution 2462 (2019),[111] though for present purposes these developments raise a separate point.

Considerations of how obligations would evolve, or be formally amended, were rarely addressed in the critiques of the early 2000s. With treaties, the situation is clearer. Treaties may be amended by agreement of the parties, with the specific procedures for doing so regulated either by the treaty itself, or, by default, under rules provided in the Vienna Convention on the Law of Treaties.[112] Certainly, such processes are unlikely to be swift. Separately, however, treaty law also provides that a particular word or phrase in a treaty can attain a different meaning over time, through the express agreement of the parties,[113] their subsequent practice in implementing the treaty,[114] or through developments in other international rules that bind the parties.[115]

These established rules do not exist with respect to Council resolutions.[116] There is nothing in the Charter to suggest that the Council is precluded from amending its own previous resolutions: if it determines such action to be necessary, it is authorized to do so. But practice even within the

[109]UN Doc. S/RES/2462 (2019), para. 3.

[110]Ibid., para. 5 (emphasis added).

[111]F. Ni Aoláin, 'The Massive Perils of the Latest U.N. Resolution on Terrorism', *Just Security*, 8 July 2019, available at www.justsecurity.org/64840/the-massive-perils-of-the-latest-u-n-resolution-on-terrorism/.

[112]1969 Vienna Convention on the Law of Treaties (VCLT), Arts. 39–41.

[113]VCLT, Art. 31(3)(a).

[114]VCLT, Art. 31(3)(b).

[115]VCLT, Art. 31(3)(c), and see discussion in K. Keith, 'Evolutionary Interpretation of International Law in National Courts', in G. Abi-Saab et al. (eds.), *Evolutionary Interpretation and International Law* (2019); D. McKeever, 'Evolving Interpretation of Multilateral Treaties: "Acts Contrary to the purposes and principles of the United Nations" in the Refugee Convention', (2015) 64 ICLQ 405, at 406–7.

[116]On the interpretation of Council resolutions, generally see M. Wood, 'The Interpretation of Security Council Resolutions, Revisited', (2017) 20(1) *Max Planck Yearbook of United Nations Law Online*, 29 August 2017, available at brill.com/abstract/journals/mpyo/20/1/article-p1_1.xml. He notes 'considerable scope for authentic interpretation [of its resolutions] by the Council itself' (at 5), as well as the possible evolution of the Council's understanding of its own decisions (at 26, citing Security Council Report, 'Special Research Report: Security Council Action under Chapter VII: Myths and Realities', 23 June 2008, at 36).

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counter-terrorism sphere is uneven, and whereas some amendments to the Council's resolutions on counter-terrorism have been express (notably, changes to the scope of the 1267 sanctions regime),[117] the foregoing discussion illustrates some questions that may arise where this is not the case.

For example, in ascertaining whether, and to what extent, the Council has amended a previous resolution or is now interpreting a phrase in a previous resolution in a materially different manner, what weight is to be attached to statements in preambular paragraphs, operative paragraphs in resolutions that were not adopted under Chapter VII, statements by Council members at sessions when the resolutions in question were adopted, or the Council's subsequent practice in other areas (presidential statements, practice of subsidiary bodies, etc.)?[118] There are no hard and fast rules here, and a case-by-case, contextual analysis is unlikely to facilitate clarity and consistency in application of what are, after all, legally binding provisions of global effect. A lack of clarity is particularly problematic in resolutions which oblige member states to establish individual criminal liability.

5.3 (In)coherence and the risk of fragmentation

Elements of recent Security Council resolutions on terrorism also raise questions regarding the coherence and consistency of international legal rules. Once more, the factors triggering these questions were not anticipated in the earlier critiques of Council law-making.

Looking first at coherence, a good example is the obligation to collect and use Passenger Name Record (PNR) data.[119] In April 2016, the EU adopted a Directive on the use of PNR in countering terrorism.[120] It had taken almost five years of negotiation for this instrument to be adopted, in view of complex issues relating to data protection, and particularly the sharing of PNR data with states outside of the EU. And this, it should be noted, was an instrument adopted by a collection of states whose legal systems already have so many rules in common, through the *acquis,* common instruments stipulating human rights obligations,[121] and a court with mandatory jurisdiction to rule on disputes that may arise (indeed, a court which has pronounced on precisely this issue)[122] – characteristics which are not replicated across the wider UN membership.[123]

In Resolution 2396 (2017), adopted in December 2017 under Chapter VII, the Security Council nevertheless decided that all UN member states:

[117]See text at *supra* note 51.

[118]The ICJ has confirmed that the contemporaneous practice of the Security Council on similar issues is a relevant factor in interpreting its resolutions (*Kosovo*, ICJ, *supra* note 76, paras. 94, 114).

[119]The principle of which is similar to that of API: the more information that state authorities can receive before a traveller arrives at their border, and cross-check against national and international databases, the more informed that state's decision as to any security-related measures which need to be taken with respect to that traveller. Whereas API data is limited to information contained in a national passport, PNR includes also details such as the traveller's address, how the flight ticket was purchased, recent travel history, etc.; that is, data that would not otherwise be collected from the traveller (UN Doc. S/2015/377, paras. 26–8).

[120]Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

[121]Under the Treaty on European Union, the rights guaranteed in the European Convention on Human Rights constitute general principles of EU law, while the rights recognized in the 2000 Charter of Fundamental Rights of the EU have the same legal value as the EU treaties (see Art. 6, paras. (3) and (1) respectively, Treaty on European Union).

[122]Following a referral by the European Parliament, in a 2017 Opinion the Court of Justice of the European Union held that the proposed EU-Canada PNR agreement was incompatible with the fundamental rights recognized by the Charter, and therefore, could not be concluded. Specifically, the Court found that the proposed agreement raised issues under Arts. 7 and 8 of the Charter (private life, and protection of personal data, respectively), and did not meet the strict necessity criterion that would justify such interference (CJEU, Opinion 1/15 of the Court (Grand Chamber), 26 July 2017).

[123]As of August 2020, 20 UN Member states are not party to the ICCPR (see treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND); while only 74 states had made a declaration accepting the compulsory jurisdiction of the International Court of Justice under Art. 36(2) of its Statute (see www.icj-cij.org/en/declarations).

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> shall develop the capability to collect, process and analyse, *in furtherance of ICAO standards and recommended practices*, passenger name record (PNR) data and to ensure PNR data is used by and shared with all their competent national authorities, with full respect for human rights and fundamental freedoms for the purpose of preventing, detecting and investigating terrorist offenses . . . [124]

As the end of the same operative paragraph acknowledged, however, at the time of this Council resolution ICAO had not yet adopted the requisite standards; the Council therefore 'urge[d] ICAO to work with its member states to establish a standard for the collection, use, processing and protection of PNR data'.

So how were states to implement an obligation 'in furtherance of' standards that did not yet exist? Also, compliance with this obligation would clearly have important resource considerations - as, again, the Council itself acknowledged in simultaneously 'call[ing] upon Member States, the UN, and other international, regional, and subregional entities to provide technical assistance, resources and capacity building to Member States in order to implement such capabilities'. Here, then, the Council imposed on all UN member states a new obligation, with significant legal and resource implications, despite the fact that there was no international consensus on what the correct, lawful, implementation of this obligation would look like – no consensus on the precise content of the obligation.

More than two years later, in July 2020, the ICAO Council adopted a standard on PNR. At time of writing, that standard is due to become effective in October 2020, and applicable in February 2021.[125] There are political dimensions to consider here, in that the Council's adoption of a binding rule on PNR (in December 2017) may have catalyzed political discussions within ICAO,[126] leading to adoption by the ICAO Council of a standard two and a half years later. Such political considerations should not be ignored. But equally – reflecting once more the distinctive character of the activity we are discussing – here the typical sequence in international law-making whereby political negotiation precedes and is directed towards the adoption of binding legal rules, was reversed.

Turning to consistency, the issue of 'fragmentation' in international law, generally, has been discussed at length elsewhere, in the 1950s by Jenks[127] and more recently by the International Law Commission (ILC).[128] With respect to counter-terrorism law specifically, in her September 2017 report the UN Special Rapporteur for the promotion and protection of human rights while countering terrorism, noted that the pace of norm-creation was creating challenges regarding fragmentation and ineffectiveness, and indeed, that the rate of response 'has often out-paced the capacity for full consideration of the overall effects of sustained norm creation on the protection and promotion of human rights'. She went on to call for fuller exploration of the interaction of these new norms with other bodies of norms, notably in the area of human rights and humanitarian law.[129]

[124]UN Doc. S/RES/2396 (2017), para. 12 (emphasis added).

[125]See www.icao.int/Newsroom/Pages/New-PNR-Data-Standards-amendment-to-improve-global-counterterrorism-efforts.aspx.

[126]ICAO's press release on adoption of the PNR standard noted that '[f]ollowing the UNSC unanimous adoption of resolution 2396 (2017), [ICAO] Secretary General Liu has made calls in the UN for greater international awareness and co-operation on the importance of information sharing to help prevent terrorist mobility. ICAO has pushed for progress by countries on enhanced border security, and also initiated an ad-hoc Task-Force which quickly realized the new PNR data standards' (ibid).

[127]Writing long before the Council's legislative phase, Jenks perceived conflict as 'an unavoidable incident of the present stage of development of the international legislative process'. See C. W. Jenks, 'The Conflict of Law-Making Treaties', (1953) 30 BYIL 401, at 402–5.

[128]International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, 13 April 2006, A/CN.4/L, at 682. See also J. Crawford, *Chance, Order, Change: The Course of International Law* (2014), at 275–309.

[129]Report of the Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 27 September 2017, A/72/495, paras. 21–22.

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The former has been discussed in detail elsewhere,[130] but the interaction of counter-terrorism law and IHL is also gaining prominence.[131] The recent focus reflects, in part, the evolution in the terrorist threat outlined at Section 4.1 above – that is, the fact that groups such as ISIL and affiliated groups, designated as terrorist organizations, are also party to non-international armed conflicts (NIAC) to which IHL is applicable, and tens of thousands of individuals have travelled to join such groups in situations of armed conflict. This raises at least two legal challenges.

First, whereas counter-terrorism law seeks to proscribe acts of violence and much conduct that is ancillary thereto, IHL envisages (and in an international armed conflict renders lawful) the use of violence within certain parameters. True, in a NIAC IHL neither provides for 'combatant immunity' nor precludes the application of domestic criminal (including counter-terrorism) law, but it does call on states to grant 'the broadest possible amnesty' to persons who have participated in the armed conflict,[132] and ICRC and other stakeholders have emphasized that characterizing as 'terrorist' the violent acts of a non-state party to a NIAC can undermine efforts to encourage that party to comply with IHL.[133] To date, whereas many of the counter-terrorism treaties include clauses clarifying the extent to which conduct in armed conflict is excluded from the reach of the treaties,[134] the Security Council has not expressly addressed whether the criminalization provisions in its resolutions apply equally in situations of armed conflict.[135]

The second challenge is how to ensure that counter-terrorism law does not impede the delivery of impartial humanitarian assistance as protected under IHL.[136] Humanitarian agencies have reported that, in practice, counter-terrorism laws often limit their ability to implement programmes according to needs alone, obliging them to avoid certain groups and areas, thereby delaying or preventing humanitarian assistance from reaching the most vulnerable communities.[137] This impact can arise in a number of ways: the risk of prosecution of humanitarian agency staff under laws which criminalize support to terrorism; the 'chilling effect' which that risk engenders; the incorporation in donor agreements of counter-terrorism clauses seen as unduly onerous or resource-intensive; and de-risking by financial institutions unwilling to provide financial services to humanitarian actors operating in situations of armed conflict where terrorist entities are known to be active. An important factor here is the expansion (discussed at Section 5.2 above) of the terrorism financing obligation to proscribe both the direct and indirect financing of terrorism

[130]See for example H. Duffy, *The 'War on Terror' and the Framework of International Law* (2015), at 456–660; and the contributions in Part III of B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2014), at 335–553.

[131]See, for example, J. Pejic, 'Armed Conflict and Terrorism: There Is a (Big) Difference', in A. M. Salinas de Frías, K. Samuel and N. D. White (eds.), *Counter-Terrorism: International Law and Practice* (2012), at 171–204; B. Saul, 'Terrorism and International Humanitarian Law', in B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2014), at 231; D. A. Lewis, N. K. Modirzadeh and G. Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism – Legal Briefing and Compendium* (2015); D. McKeever, 'International Humanitarian Law and Counter-Terrorism: Fundamental Values, Conflicting Obligations', (2020) 69(1) *International and Comparative Law Quarterly* 43; B. Saul, 'Terrorism, Counter-Terrorism, and International Humanitarian Law', in B. Saul and D. Akande (eds.), *The Oxford Guide to International Humanitarian Law* (2020), at 403–23 ('Saul 2020').

[132]Additional Protocol II, Art. 6(5)

[133]Saul 2020, *supra* note 131, at 418.

[134]Albeit the approaches taken differ across the treaties (see discussion in Saul 2020, ibid., at 410–12; McKeever, *supra* note 131, at 57–60).

[135]On this, and varying approaches in domestic courts see Saul 2020, ibid., at 415–19.

[136]On the relevant provisions of IHL, see McKeever, *supra* note 131, at 54–7.

[137]The ICRC has noted a range of activities which it and other humanitarian actors engage in and which could potentially engage counter-terrorism laws: 'visits and material assistance to detainees suspected of, or condemned for, being members of a terrorist organization; facilitation of family visits to such detainees; first aid training; war surgery seminars; IHL dissemination to members of armed opposition groups included in terrorist lists; aid to meet the basic needs of the civilian population in areas controlled by armed groups associated with terrorism; and large-scale assistance activities for IDPs, where individuals associated with terrorism may be among the beneficiaries'. See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 16 June 2020, Doc. 32IC/15/11, at 20.

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and the provision of funds to terrorists 'for any purpose' – this increases the risk that the provision of humanitarian assistance can fall afoul of terrorism financing laws.[138] These interactions between IHL and counter-terrorism law have been characterized by many as 'tensions',[139] and by some as conflicts between legal rules.[140] In an important development, resolutions adopted by the Council in 2019 have expressly addressed the possible effect of counter-terrorism measures on the delivery of impartial humanitarian assistance,[141] though some commentators have argued that the Council still needs to do more to resolve these tensions between the two areas of law.[142]

5.4 Compliance

This final point brings together those already noted in this part. First, as to *enabling* compliance, the blurring of the lines between soft law and binding rules means that a state seeking in good faith to ascertain what, precisely, the Security Council is obliging it to do and to act accordingly, must navigate this complex web of evolving norms. Second, unresolved issues around conflicts between elements of the counter-terrorism law developed by the Council and rules from other areas of international law, including IHL, may place states in a situation where complying with the former entails non-compliance with some of the latter.[143]

Third, a lack of clarity in what the binding rules are, whether and when the content of the rules has been amended, and (again) the point at which previously hortatory statements have attained the status of binding rules, complicates the task of ascertaining whether in fact a state has complied with the obligations created by the Security Council.

And fourth, in the event of non-compliance, what can be done? Absent a circumstance precluding wrongfulness,[144] a state's breach of a primary rule of international law on terrorism (be it treaty-based or deriving from a Security Council resolution) gives rise to that state's responsibility for an internationally wrongful act and the resulting obligations to cease the wrongful conduct and make reparation for any injury caused.[145] This international responsibility can be implemented through invocation (including by recourse to a competent international tribunal),[146] or countermeasures.[147] These are well-established rules of general international law. In practice, however, they may be significantly more difficult to apply in respect of counter-terrorism obligations created under Council resolutions as compared to those arising under the counter-terrorism treaties.

[138]See, generally, on these issues, A. Debarre, 'Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework', (2018) *International Peace Institute*, at 4–20; McKeever, *supra* note 131, at 53–77.

[139]Norwegian Refugee Council, *Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action* (2018), at 8, 16; E-C. Gillard, *Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action* (2017); F. Bouchet-Saulnier, 'IHL and Counter-Terrorism: Tension and Challenges for Medical Humanitarian Organizations', (2016) *Médecins sans Frontières Analysis*, at 1–7; Debarre, *supra* note 138, at 4–10.

[140]McKeever, *supra* note 131, at 68–73

[141]See UN Doc. S/RES/2462 (2019), para. 24; UN Doc. S/RES/2482 (2019), para. 16. On the legal effect of these provisions see McKeever, ibid., at 63.

[142]See, for example, www.hrw.org/news/2019/04/02/un-security-council-resolution-undermines-aid-human-rights-work; www.justsecurity.org/64158/correcting-course-avoiding-the-collision-between-humanitarian-action-and-counterterrorism/.

[143]See, for a specific example, the situation where medical assistance is provided, by an impartial humanitarian agency, to an individual known to be a member of a group designated as terrorist (McKeever, *supra* note 131, at 68–71).

[144]International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, (2001) *ILC Yearbook* 2001/II(2), 25, Arts. 20–7.

[145]Ibid., Arts. 1, 30–1 respectively.

[146]Ibid., Arts. 42, 48.

[147]Ibid., Arts. 49–53.

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Proulx[148] and Trapp[149] have examined in detail the intersection of counter-terrorism law with the law on state responsibility, and contend that the Council itself could play, and in some cases has played, a significant role in implementing state responsibility for terrorism.[150] The most compelling examples cited by these commentators pre-date 9/11, however, and relate to the more traditional counter-terrorism resolutions discussed in Section 2 above (notably, the Council's activity regarding Lockerbie):[151] that is, disputes arising out of alleged state involvement in specific acts of terrorism, involving Council resolutions which were limited in scope and comprised time-limits.[152] In the almost 20 years since the adoption of Resolution 1373 (2001), the Council has frequently condemned the terrorism-related acts of non-state actors[153] but has yet to infer,[154] much less find, that a particular state is internationally responsible for breach of that resolution or the other law-making resolutions which followed it.

What other forum is available? Adjudication by the ICJ is possible in principle, though unlikely. An inter-state dispute relating to alleged failure to comply with obligations arising under a Council resolution (on terrorism) would fall within the competence of the Court. While the question of whether the Court can or should conduct 'judicial review' of the legality of particular Council action remains open (and much debated),[155] there is nothing to stop the Court interpreting Council resolutions where necessary; it has already done so on many occasions.[156]

The more vexing issue is likely to be jurisdiction.[157] Whereas Trapp, looking at possibilities for invoking responsibility for state-sponsored terrorism,[158] examined the compromissory clauses[159]

[148]V-J. Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* (2012); V-J. Proulx, 'An Incomplete Revolution: Enhancing the Security Council's Role in Enforcing Counterterrorism Obligations', (2017) 8 *Journal of International Dispute Settlement* 303–38 (hereinafter Proulx 2017).

[149]K. N. Trapp, *State Responsibility for International Terrorism* (2011); K. N. Trapp, 'Holding States Responsible for Terrorism before the International Court of Justice', (2012) 3 *Journal of International Dispute Settlement*, at 279 (hereinafter Trapp 2012).

[150]On the Council and state responsibility, generally, see V. Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility', (1994) 43(1) *International and Comparative Law Quarterly* 55.

[151]Proulx 2017, *supra* note 148, at 325–6; Trapp 2012, *supra* note 149, at 288. See also Gowlland-Debbas, *supra* note 77, at 659–60.

[152]Proulx also highlights, in this respect, the Council's imposition of sanctions on Sudan following the attempted assassination of Egyptian President Mubarak (Proulx 2017, ibid., at 326).

[153]See, e.g., UN Doc. S/RES/1390 (2002); UN Doc. S/RES/2253 (2015); UN Doc. S/RES/2170 (2014). It is noted that resolutions adopted in the aftermath of 9/11 which addressed the provision of safe haven to al-Qaida (i) condemned, in this regard, the Taliban rather than Afghanistan, and (ii) did not draw express links between that activity and the (universal) obligations imposed under Res. 1373 (2001) (see, e.g., UN Doc. S/RES/1378 (2001), preamble).

[154]Proulx has noted that Council resolutions 'may shed light on the legal characterization of a given situation or provide guidance as to both the permissibility and legality of countermeasures or other responses contemplated by injured States'. See Proulx 2017, *supra* note 148, at 327.

[155]See, for analysis of the various possibilities and critiques of both the 'legalist' and 'realist' schools of thought on this issue, J. E. Alvarez, 'Judging the Security Council', (1996) 90(1) *American Journal of International Law* 1–39; also Gowlland-Debbas, *supra* note 77, at 662–73. For judicial views on the matter see *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, [1962] ICJ Rep. 151, at 168; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 13 September 1993, [1993] ICJ Rep. 325; *Separate Opinion of Judge Lauterpacht*, at paras. 98–107; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, [1992] ICJ Rep. 114, Separate Opinion of Judge Shahabuddeen, at 140–2.

[156]See, for example, *Namibia*, *supra* note 49, paras. 108–16; *Lockerbie Preliminary Objections*, *supra* note 77, para. 43; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, [2004] ICJ Rep. 136, paras. 120, 134, 139; Gowlland-Debbas, *supra* note 150, at 94–6.

[157]See also Proulx 2017, *supra* note 148, at 317–18.

[158]On the contention that the 'effective control' test for attribution may be inadequate with respect to state responsibility for terrorism see J. Crawford, *State Responsibility: The General Part* (2014), at 156–61.

[159]Under Art. 36(1) of the Statute of the Court, 'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force'.

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in the counter-terrorism treaties,[160] neither the Council resolutions at issue nor the Charter itself have such clauses. Indeed, these Council resolutions have no dispute settlement clauses whatsoever.[161] Alternatively, the consent-based jurisdiction of the Court over disputes relating to Council counter-terrorism resolutions could be founded on applicable Article 36(2) declarations or on an *ad hoc* agreement between the parties (*compromis*), though the cases in which either are available are likely to be rare.[162] Despite some recent progress on this front, still just over one-third of all UN member states have made the necessary declaration under Article 36(2), many with reservations as to subject matter and/or parties,[163] while the use of a *compromis* continues to be uncommon.[164] In some cases, regional treaties include dispute settlement clauses providing for the jurisdiction of the ICJ[165] which could potentially encompass disputes relating to implementation of Security Council resolutions, though such mechanisms do not exist with respect to all regions.

Whatever about the possibilities in theory, in practice the Court has not yet been seised of claims based on these resolutions.[166] This is not for want of inter-state disputes relating to terrorism: both before and after 9/11, the Court has been seised of disputes relating to alleged breaches of the counter-terrorism treaties (*Lockerbie* being an early case;[167] the pending dispute between Ukraine and the Russian Federation a more recent example[168]), while more general allegations of support to terrorism have been made by parties to a number of recent cases when setting out their positions on the factual background to the dispute.[169] Also, in two recent cases parties have made submissions based on Resolution 1373 (2001), though in neither instance were the applicant's claims based on the resolution[170] – in both *Jadhav*[171] and the

[160]Trapp 2012, *supra* note 149, at 279–98.

[161]Dispute settlement clauses are typically included in the counter-terrorism treaties discussed in Section 2 above, providing for arbitration and, where this is unsuccessful, referral to the ICJ, with the possibility of opting-out at time of signature or ratification (see, e.g., Financing Convention, Art. 24; 1988 Rome Convention, Art. 16; Terrorist Bombing Convention, Art. 20)

[162]See also Trapp 2012, *supra* note 149, at 284–6.

[163]See *supra* note 123.

[164]As of August 2020, of the 15 cases pending before the Court, only two had been instituted by way of *compromis* (the territorial dispute between Guatemala and Belize, and the *Gabcikova-Nagymaros Project* case between Hungary and Slovakia, which was instituted in 1993 and in which discontinuance was initiated in 2017 – details available at www.icj-cij.org/en/pending-cases).

[165]See for example Art. XXXI of the American Treaty on Pacific Settlement (the Pact of Bogota), which has regularly been invoked in cases coming before the ICJ.

[166]This perhaps is contrary to some expectations: Alvarez, writing prior to the Council's legislative phase on counter-terrorism, predicted that 'as the Council generates more law, ICJ judges, elected to decide the law, will find it difficult to avoid reexamining some of that Council-generated law'. See Alvarez (1996), *supra* note 33, at 20.

[167]Also, in the *Tehran Hostages* case the United States had argued, *inter alia*, that jurisdiction could be founded on the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, though ultimately the Court found it unnecessary to consider this argument (*United States Diplomatic and Consular Staff in Tehran, Judgment*, [1980] ICJ Rep. 3, para. 55).

[168]*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),* Judgment of 8 November 2019; Proulx 2020, *supra* note 54, at 167–70.

[169]See *Case concerning Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, CR 2018/17, 14–20, paras 19–33 (Newstead); *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, Joint Application, 4 July 2018, paras. 8–9.

[170]While Res. 1373 (2001) was considered by the Court in its Advisory Opinion in the *Wall* case, this related to effects which that resolution was alleged to have had on the scope of the right to self-defence under Art. 51 of the Charter (a matter addressed, obliquely, in the preamble), not on the operative parts of that resolution which addressed counter-terrorism measures to be taken by states (*Wall Advisory Opinion*, *supra* note 156, paras. 138–9; see also Separate Opinion of Judge Koojimans, ibid., at 219, paras. 35–6).

[171]India had claimed that Pakistan had breached its obligations under the Vienna Convention on Consular Relations with respect to an Indian national. In response, Pakistan made multiple arguments against the admissibility of India's application, including that the individual in question had been involved in terrorist activities and India had failed to act in good

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pending *Certain Iranian Assets*[172] the resolution was invoked (unsuccessfully) in support of challenges to admissibility.

In practice, then, the most significant mechanism in terms of compliance with Security Council resolutions on terrorism has been the Counter-Terrorism Committee (CTC). This entity, established by the Council under Resolution 1373 (2001),[173] plays an important and – again – distinctive[174] role in monitoring states' implementation of certain[175] Council resolutions on terrorism. In Resolution 1535 (2004) the Council established the Counter-Terrorism Committee Executive Directorate (CTED) as a 'special political mission' charged with supporting the CTC in this work. Importantly, the CTC's assessments do not seek to identify cases of non-compliance *per se* but, rather, take a more constructive approach by identifying ways in which the assessed state can strengthen its implementation of the Council provision in question (with technical assistance from a third party, if required): the CTC seeks to strengthen implementation of the Council's resolutions through dialogue with states, not through 'name and shame' findings of non-compliance.[176] And though there have been moves to increase information-sharing with other UN agencies,[177] the CTC assessments are not made public unless and until the assessed states choose to publicize them.[178]

faith. Here, Pakistan invoked three provisions of Res. 1373 (2001), contending that India was in breach of obligations arising under paras. 2(f) (on mutual legal assistance) and 2(g) (preventing the movement of terrorists by effective border controls and controls on travel documents). In light also of para. 3(a) (calling on states to intensify exchange of operational information, including on forged travel documents), Pakistan therefore contended that India was in violation of binding obligations of international law (*Jadhav Case (India v. Pakistan)*, Counter-Memorial of the Islamic Republic of Pakistan, 13 December 2017, paras. 171–83). In response, India stated simply that it was Pakistan that was in breach of these decisions and that the absence of an MLAT between the parties was due to the position of Pakistan (*Jadhav Case (India v. Pakistan)*, Reply of the Republic of India, 17 April 2018, para. 90). The argument was not developed during the oral proceedings (www.icj-cij.org/en/case/168/oral-proceedings). In its judgment of July 2019, the Court held that these matters could not be invoked as a ground of inadmissibility as they pertained to the merits (*Jadhav Case (India v. Pakistan)*, Judgment of the 17 July 2019, para. 57) but did not in fact return to them in its consideration of the merits.

[172]The case relates to the effect of a 1996 amendment to the Foreign Sovereign Immunities Act of the United States, which removed the immunity before US courts of states designated by the US as 'State sponsors of terrorism'. The respondent state invoked provisions of Res. 1373 (2001) in its challenges to admissibility and jurisdiction, arguing *inter alia* that, due to its alleged sponsorship of international terrorism contrary to that resolution, the applicant had come before the Court with 'unclean hands' (*Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections submitted by the United States of America, 1 May 2017, paras. 6.26, 7.33). Here the US cited paras. 1–2 of the resolution, specifically the provisions on preventing and suppressing the financing of terrorist acts and on refraining from providing any form of support to entities or persons involved in such acts. In its judgment on preliminary objections, the Court rejected this challenge to admissibility without prejudging whether such allegations might provide a defence on the merits (*Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, 13 February 2019, paras. 22–7, 116–24).

[173]UN Doc. S/RES/1373 (2001), para. 6.

[174]Proulx recently observed of the CTC that 'this novel counterterrorism edifice facilitated ongoing dialogue between key institutions in the transnational security realm and domestic legal systems and ensured that international legal obligations would be translated and implemented in those same systems'. See Proulx 2020, *supra* note 54, at 193.

[175]The CTC is given a clear role with respect to a number of Council resolutions (see UN Doc. S/RES/1373 (2001), para. 6; UN Doc. S/RES/1624 (2005), para. 6; UN Doc. S/RES/2178 (2014), para. 24; UN Doc. S/RES/2309 (2016), para. 11; UN Doc. S/RES/2322 (2016), para. 19; UN Doc. S/RES/2341 (2017), para. 10; UN Doc. S/RES/2354 (2017), para. 4; UN Doc. S/RES/2396 (2017); UN Doc. S/RES/2462 (2019), para. 36; 2482 (2019) para. 23). The CTC is not directly responsible for monitoring resolutions pertaining to the 1267 Sanctions regime, however, though there are areas of overlap: for example, Res. 2178 (2014) included provisions (on API) pertaining to individuals designated by the 1267 Committee, and the Council charged both the CTC and the 1267 Committee, as well as the entities established to assist their work, with following up on implementation of the resolution (UN Doc. S/RES/2178 (2014), paras. 9, 20–5; see, similarly, UN Doc. S/RES/2462 (2019), para. 36).

[176]See, e.g., UN Doc. S/RES/2395 (2017), para. 10; Johnstone, *supra* note 11, at 95–6. See also earlier discussion of the CTC's adoption of 'managerial compliance strategies' (N. Chowdhury Fink, 'Meeting the Challenge: A Guide to United Nations Counterterrorism Activities', (2012) *International Peace Institute*, at 8–10).

[177]See UN Doc. S/RES/2395 (2017), para. 13.

[178]Until 2006, individual country reports on implementation of Res. 1373 (2001) and Res. 1624 (2005) were publicly available. Since then, in its work supporting the CTC, CTED has issued public reports on the global implementation of Res. 1373 (2001), broken down by region or sub-region rather than individual states (see, e.g., UN Doc. S/2016/49; this report notes, at para. 5, that while it 'includes some references to specific States that have made notable progress in certain areas ... the fact

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While the benefits of this deliberate, pragmatic, and well-established approach can readily be appreciated[179] the present point is that the CTC's methodology is not designed to facilitate implementation by the Security Council (or indeed any other entity) of the international responsibility of states for breaches of the Council's resolutions on terrorism.[180]

6. Is it worth it? Necessity and efficacy

Recent Council resolutions on counter-terrorism, then, represent a distinctive category of international law-making and one which resists easy application of some organizing principles and processes of general international law. But that is not the end of the matter: as noted in Section 3, two of the arguments in favour of Council legislative activity in this area were that this was a necessary response to the threat which terrorism posed to international peace and security, and would be effective to that end.

As to necessity, there are legal, political, and practical dimensions to consider. Looking first at the legal, a point often missed in commentaries on the Security Council's law-making activities is that it is the General Assembly (GA), not the Council, to which the Charter assigns the responsibility for making 'recommendations for the purpose of ... encouraging the progressive development of international law and its codification'.[181]And the Council has primary, not exclusive responsibility for international peace and security, with the GA also having competence in this area.[182] Indeed, both before and after the Council began legislating in this area, the GA adopted a number of international counter-terrorism instruments, including the 1979 International Convention against the Taking of Hostages, the 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 Financing Convention, and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.[183] This 'default' allocation of responsibilities under the Charter should be borne in mind when considering the Council's recent legislative activity in the counter-terrorism sphere. Also, commentators including Alvarez have highlighted the increased 'democratization' of lawmaking by the GA, in view of both the number and type of stakeholders involved.[184]

that other States are not mentioned should not be understood to reflect negatively on their implementation efforts'. See further www.un.org/sc/ctc/resources/assessments/).

[179]Proulx has suggested that the Council's adoption of a series of resolutions on FTFs 'signals that the UNSC may be called upon to play a role in implementing the responsibility of individuals or non-state terrorist actors on the international plane, or at least deliver pronouncements relevant to the subsequent implementation of individual and/or non-state responsibility in other settings' (Proulx 2020, *supra* note 54, at 210).

[180]Chowdhury Fink previously noted that notwithstanding the unprecedented political momentum for international counter-terrorism co-operation that followed 9/11, 'enforcement remains a challenge in the absence of the council's willingness to name and shame noncompliant states' (Fink, *supra* note 176, at 20; see also E. C. Luck, 'The US, Counterterrorism, and the Prospects for a Multilateral Alternative', in J. Boulden and T. G. Weiss (eds.), *Terrorism and the UN: Before and After September 11* (2004), at 80–1.

[181]UN Charter, Art. 13(1). On the General Assembly's law-making generally see Chesterman, Johnstone and Malone, *supra* note 46, at 151–5. See also Hinojosa Martinez, *supra* note 1, at 339–40.

[182]See UN Charter, Art. 14; *Certain Expenses*, *supra* note 155, at 162–3; Crawford, *supra* note 158, at 709–10.

[183]Respectively, 1316 UNTS 205 and UN Doc. A/RES/34/146; 2149 UNTS 256 and UN Doc. A/RES/52/164; UN Doc. A/RES/54/109; 2445 UNTS 89 and UN Doc. A/RES/59/290). Details available at treaties.un.org/pages/Treaties.aspx?id=18&subid=A&clang=_en.

[184]J. Alvarez, *International Organizations as Lawmakers* (2005), at 273; see also Chesterman et al., who note that 'an interesting feature of [the General Assembly's lawmaking] is that all member states of the United Nations or relevant specialized agency have the right to participate in the negotiation and adoption of the treaty. Additionally, non-state actors, especially nongovernmental organizations (NGOs) tend to have more access, [international organization] personnel play a significant role, and expert bodies such as the [ILC] often play a role in treaty-drafting' (Chesterman, Johnstone and Malone, *supra* note 46, at 151).

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In the context of the critiques of Council law-making outlined above, it is useful to highlight some characteristics of the International Law Commission (ILC), the body established in 1947 to assist the GA regarding the progressive development and codification of international law.[185] First, on the issue of (in)consistency of legal rules, Watts highlighted the:

> great value in a generalist legal body such as the ILC with overall responsibility for international law and able to secure the coherence of its different sectors and to guarantee the balance and perspective of the system as a whole.[186]

Second, on democratic representation, the 34 members of the Commission are to be elected (by the GA) so that 'representation of the main forms of civilization and of the principal legal systems of the world should be assured',[187] while in its work on the progressive development of international law, the ILC is obliged to seek the views of governments on the topic under consideration[188] and the drafts it prepares are then discussed at the Sixth Committee of the GA, for discussion by all UN member states.[189] And third, the related point that the ILC does not always conclude that progressive development, or codification, on a given topic is appropriate. It is empowered to determine that the time is in fact *not* right for practice on a given issue to be codified: it can determine, at the outset, that a given topic is not yet appropriate for its study, or it can conclude, after initial study, that a given rule is not yet 'ripe for codification'.[190] Or, indeed, having concluded its examination of a topic, it can recommend that any draft articles it has prepared remain in that form, without being converted into a treaty.[191] These 'brakes' serve an important function, ensuring that the ILC's progressive development and codification of the law does not get too far out of step with the actual practice of states. The absence of such 'brakes' in Council law-making was apparent with the adoption of rules on PNR, discussed at Section 5.3 above: given the open questions as to content and the lack of consistent state practice, this would appear a topic that was not 'ripe for codification'. In short, the Council is not the only UN entity with competence in the area of developing international law, and indeed the other bodies having that competence are in some respects less susceptible to the criticisms directed at the Council's activities in this regard.

Coming back to the role which the Charter assigns to the Council itself, under Chapter VII it shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 [non-forcible measures] and 42 [forcible measures], to maintain or restore international peace and security.[192] The Council's discretion here is wide – both in terms of determining the existence of a threat,[193] and in deciding on the appropriate measure to

[185]General Assembly Res. 174 (II), November 1947.

[186]A. Watts, *Codification and Progressive Development* (2006) *MPEPIL*, at 37.

[187]Statute of the International Law Commission, Art. 8.

[188]Ibid., Art. 16(c).

[189]Rosenne, contrasting the ILC, in this sense, with its League of Nations predecessor, described a 'marriage of governmental reaction and professional expert investigation' (S. Rosenne, 'The Role of the International Law Commission', (1970) 64(4) AJIL 24, at 28–9).

[190]Under Art. 18(2) of its Statute, 'When the Commission considers that the codification of a particular topic is *necessary and desirable*, it shall submit its recommendations to the General Assembly' (emphasis added); see also discussion in P. S. Rao, 'International Law Commission', (2017) MPEPIL, at 6.

[191]See Art. 23 of the ILC Statute; Watts, *supra* note 186, at 16, 31; International Law Commission, *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission – Memorandum submitted by the Secretary-General*, 1949, UN Doc. A/CN.4/1/Rev.1, paras. 20–1.

[192]UN Charter, Art. 39.

[193]The range of phenomena which the Council characterizes as constituting threats to international peace and security has developed significantly over time (see Chesterman, Johnstone and Malone, *supra* note 46, at 127–8; McKeever, *supra* note 115, at 427–8).

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respond to that threat.[194] It is not unfettered, however. In discharging its duties the Council must act in accordance with the purposes and principles of the United Nations (which are laid down in Articles 1 and 2 of the Charter).[195] Also, Chapter VII itself contains multiple references to the Council adopting such measures as are *necessary* to maintain or restore international peace and security.[196] In the present context, the fact that the threat identified by the Council and against which its resolutions constitute a response, is, simply, 'terrorism', not limited to any one event, country, region, or period, gives further latitude to the Council.[197] Nevertheless, the Council's actions – whether authorization for the use of force, establishment of subsidiary bodies, or legislative action to fill an identified gap in the law – are to be framed by what it has determined to be a necessary measure to remove a particular threat or restore peace.[198]

This prompts the question: if the 'default' under the Charter is that legislative functions are the responsibility of the General Assembly, should Council legislation therefore (still) be seen as constituting urgent, exceptional, or even emergency measures to address an identified gap in existing international law?[199] In domestic law, and as is also reflected in international human rights law,[200] emergency measures are assumed not to be permanent, and often include clauses requiring the relevant authorities to verify whether they remain necessary after a designated period of time. Despite recommendations to this effect,[201] clauses of this nature have not been included in the Council's recent resolutions on counter-terrorism, however. The mandates of some of the UN bodies established to support implementation of the counter-terrorism framework are time-limited,[202] but the legal obligations imposed on states are not. Again, this contrasts with the Council's pre-9/11 approach, where it imposed legal obligations with respect to specific factual situations and with set times for the Council itself to reassess the necessity for such measures.[203]

The second dimension on necessity is political, and may go a long way to explain the volume of Security Council activity on counter-terrorism in recent years. For non-permanent members of the Council, campaigning for membership of the Security Council requires the commitment of significant resources on the part of a candidate state. Campaigns are planned years in advance, require the usage of significant political capital on the international stage, and necessitate the

[194]As stated by the ICTY Appeals Chamber, 'Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluations of highly complex and dynamic situations' (*Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 39).

[195]UN Charter, Art. 24(2)

[196]UN Charter, Arts. 40, 42, 43, 51.

[197]Talmon, *supra* note 1, at 181. The recent resolutions assert that 'terrorism *in all forms and manifestations* 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 motivations, *whenever and by whomsoever committed*' (e.g., UN Doc. S/RES/2178 (2014), preamble (emphasis added)).

[198]Talmon, ibid., at 183–4; Hinojosa Martinez, *supra* note 1, at 349.

[199]Talmon argued that 'the usual way of to create obligations of an abstract and general character (the conclusion of treaties and the development of customary international law) must be inadequate to achieve that aim. Council legislation is always emergency legislation' (Talmon, *supra* note 1, at 183–4); see also Rosand, *supra* note 1, at 585.

[200]See UN Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, paras. 2, 17; *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism*, 1 March 2018, A/HRC/37/52, paras. 10, 14.

[201]Writing in 2005, Rosand was broadly favourable towards the Council's legislative action, but proposed a number of safeguards were this activity to be repeated, such as 'regular (e.g., yearly) Council review of the measures to ensure that they are still needed' (Rosand, *supra* note 1, at 585–6); Hinojosa Martinez, *supra* note 1, at 359.

[202]See UN Doc. S/RES/2368 (2017), para. 94; UN Doc. S/RES/2395 (2017), para. 2.

[203]See *supra* note 14.

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diversion of diplomatic resources from other locations or international organizations.[204] When such campaigns are successful, membership of the Council requires significant staffing increases in states' diplomatic representations in New York (with demands heightened where the incoming member chairs Council subsidiary organs or working groups),[205] not to mention increases in the workload of relevant ministries in capitals. In turn, this commitment of resources creates a need for Council members to be able to identify tangible outputs for that investment. In recent years, amidst strong disagreements among Council members on other matters affecting international peace and security, there has been relative consensus on counter-terrorism.[206] Reaching agreement on resolutions in this sphere may be seen, therefore, as the most achievable 'deliverable' for Council members, including permanent members who have directly experienced a terrorist attack.[207] Further, for the non-permanent members, their term on the Council is a maximum of two years (sometimes only one year),[208] a factor contributing perhaps to the *pace* of recent developments in this sphere, as discussed above.

These political imperatives cannot be ignored. But they should be weighed, by Council members, against the legal points made above and also against a final, practical point which speaks to both necessity and efficacy.

The risk of excessive *domestic* legislation in the counter-terrorism sphere has been highlighted by many commentators, and sometimes characterized as ill-considered, 'knee-jerk' responses to particular terrorist attacks.[209] Fewer have drawn attention to an analogous risk arising from excessive legislation at the international level, but the concerns are similar. In view of the breadth of topics covered by the new law adopted at the international level, a wide range of domestic stakeholders will need to amend or expand their activities in response to the Council's resolutions: legislators;[210] police; prosecutors; judges; prison authorities; immigration authorities; customs authorities; national civil aviation and maritime security authorities; intelligence services; ministries of education; armed forces; banks and other financial institutions. In many cases, states – and therefore the wide range of domestic agencies involved – are also required to report to the UN on the measures taken to implement the new rules.[211] The 16 resolutions adopted between 2014 and 2019, discussed above, also contain 170 paragraphs addressed to relevant UN entities; with the expansion in the range of issues addressed by the resolutions has come a corollary expansion

[204]On the resources involved in campaigning for a Council seat, see www.cbc.ca/news/politics/canada-un-security-council-von-scheel-1.5113585; news.err.ee/948972/un-security-council-spot-would-cost-foreign-ministry-4-million-per-year; www.regjeringen.no/en/aktuelt/costs-campaign-un-security-council/id2638778/.

[205]On the staffing requirements of Council membership, the relative advantages of the permanent Members in terms of institutional memory and familiarity with Council procedure see P. Romita, N. Chowdhury Fink and T. Papenfuss, 'Issue Brief: What Impact? The E10 and the 2011 Security Council', (2011) *International Peace Institute*, at 2–3, 10; S. von Einsiedel, D. M. Malone and B. Stagno Ugarte, 'The UN Security Council in an Age of Great Power Rivalry', (2015) *United Nations University*, Working Paper Series No. 4, at 4–5.

[206]R. Gowan, *Minimum Order – The role of the Security Council in an era of major power competition* (2018), at 10–12; Chesterman, Johnstone and Malone, *supra* note 46, at 288.

[207]The five permanent members have played major roles in advancing some of the keystone resolutions in this area, including Res. 1373 (2001), 1624 (2005), 2178 (2014), and 2396 (2017).

[208]Where two member states agree to split a two-year term, as was the case recently with Italy and the Netherlands for the 2017–2018 term. On the evolving (strategic) approaches taken by E10 members, see 'In Hindsight: Emergence of the E10', *Security Council Report*, October 2018, available at www.securitycouncilreport.org/monthly-forecast/2018-10/in_hindsight_emergence_of_the_e10.php. On the history of split Council terms see Herndl, *supra* note 12, at 311–12

[209]See, with respect to legislation adopted in the United Kingdom, C. Walker, 'Clamping Down on Terrorism in the United Kingdom', (2006) 4 JICJ 1137; with respect to Australia, see Proulx 2020, *supra* note 54, at 199–200; K. Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (2011), at 309; F. Davis, N. McGarrity and G. Williams, 'Australia', in K. Roach (ed.), *Comparative Counter-Terrorism Law* (2015), at 650–82.

[210]On the challenges which incorporating Security Council resolutions into domestic law may pose for states see Bianchi, *supra* note 25, at 893–5.

[211]See, for example, UN Doc. S/RES/2199 (2015), para. 29; UN Doc. S/RES/2253 (2015), paras. 15, 36; UN Doc. S/RES/2368 (2017), para. 16.

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in the scope of the assessments carried out by those entities – this further increases the demands on member states when engaging in those processes. Recalling the discussion of soft law at Section 5.1 above, the Council resolutions on counter-terrorism which impose monitoring or reporting requirements often do not distinguish, in this regard, between the binding and non-binding parts of the resolutions.[212] As early as 2006, the Council itself acknowledged the heavy reporting burden which its counter-terrorism measures were imposing on member states[213] – and yet the volume and breadth of those measures continues to expand.

Writing in 2006, Bianchi observed that it would be 'misleading to believe that the efficacy of the fight against terrorism depends on increasing the number of international legal obligations incumbent on states'.[214] This was correct in 2006 and remains correct in 2020 but it does not go quite far enough: at some point excessive legislation is not only ineffective but counter-productive. Without commensurate increases in the resources allocated, the additional tasks which must be undertaken if states are to comply with Council resolutions will have consequences for the ability of those domestic actors to carry out existing tasks. Insofar as many of these domestic actors were *already* engaged in activities relevant to counter-terrorism (including those mandated by the Council in Resolution 1373 (2001), implementation of which remained far from complete while much of this new law was being adopted),[215] the new measures may mean that resources are spread ever more thinly in this field.

The foregoing assumes, of course, that these domestic actors are actually *aware* of these new rules. Whereas treaties are developed over time and require the involvement of domestic executive and parliamentary bodies, both during negotiation and – usually – ratification (involvement which can have positive consequences in terms of swift application thereafter), raising domestic awareness of rules arising from Security Council resolutions requires action by states' diplomatic representations, relaying developments at the UN level to capitals. In this context, it is pertinent that while the Security Council resolutions discussed here impose obligations on all member states, the staffing levels of member states' representations to the UN vary widely; few of the 193 UN member states have officers working solely on counter-terrorism matters.[216] Imbalances in member states' resources are even more apparent domestically, of course.

7. Council resolutions v treaties? Revisiting the comparison

If the Council's recently law-making activity creates significant challenges for the application of organizing principles and processes of general international law (as outlined in Section 5 above), and indeed may not be necessary or effective in achieving the aims sought (Section 6), what are the alternatives? Much of the earlier commentary placed the Council's law-making activity in opposition to traditional treaty-making processes.[217] With the benefit of hindsight, and additional practice to consider, some comments can now be made in response to those critiques.

[212]See, e.g., UN Doc. S/RES/2462 (2019), paras. 36–37. Thürer noted in his discussion of 'soft law', generally, that 'soft law is sometimes coupled with hard procedure' (Thürer, *supra* note 74, para. 13); in the context of counter-terrorism specifically, Huszti-Orban and Ní Aoláin have noted that the nomenclature of 'soft law' understates the extent to which these 'function as distinctly hard in practice' (Huszti-Orban and Ní Aoláin, *supra* note 95, at 6).

[213]See the Council discussion on 30 May 2006, UN Doc. S/PV.5446, and discussion in Bianchi, *supra* note 25, at 897.

[214]Ibid., at 914.

[215]In particular, regarding measures relating to countering the financing of terrorism (see UN Doc. S/2016/49, paras. 415–19, noting that '[t]he level of compliance with the requirements of paragraph 1 (c) and (d) of resolution 1373 (2001) remains inadequate' (para. 416)).

[216]On the imbalance in resources among even Security Council Members, and the impact this can have on actions taken in the area of counter-terrorism see Alvarez, *supra* note 1, at 876–7; on these imbalances generally see D. D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', (1993) 87(4) AJIL 552, at 564–5.

[217]See Section 3, *supra.*

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First, the expected advantages of making law by Council resolutions. One was clarity, but as discussed above, there are important areas of the recent resolutions where this has been, or indeed remains, lacking. Another was speed. It is undoubtedly true that the Council has legislated on a great many areas of counter-terrorism in a relatively short period of time. And it is very difficult to imagine that multilateral treaties on all of these topics could have been adopted in a similar period. It is also true that this Council action has generated or catalyzed political momentum on the international, regional, and national levels. And yet, the criminalization provisions, which are at the core of the Council's counter-terrorism framework, are not directly enforceable in any court, international or domestic.[218] Nobody is prosecuted for 'conduct contrary to paragraph 6 of resolution 2178'. Instead, domestic legislation is required. Indeed, in some regions the process of domestic incorporation has had to be further catalyzed by regional instruments or even, yes, the adoption of multilateral treaties.[219]

Also, the Council has, on occasion, subsequently amended counter-terrorism obligations created through its own earlier resolutions. In principle, this might be seen as illustrating an advantage: the Council is able to respond swiftly to evolving threats to international peace and security while treaties, by contrast, are more difficult to amend. And yet, in practice, as discussed at Section 5.2 above, the extent to which the Council has made such amendments in its resolutions on counter-terrorism, and the point in time at which they take effect, is not always easy to discern.

And what of the expected disadvantages of making counter-terrorism law through Council resolutions? As to the concern that resolutions would be less detailed than treaties, in fact the more recent resolutions have become significantly more elaborate, in some cases of comparable length to treaties: to take one example, Resolution 2368 (2017) has 103 operative paragraphs, 45 preambular paragraphs, and three annexes. As to the influence of politics on Council resolutions, it can hardly be denied that political compromise is an unavoidable part of treaty-making, too. As for the absence of *travaux* for Council resolutions, preparatory works are rarely dispositive in treaty interpretation, one way or another,[220] are only intended to play a supporting role, where other methods fail to remove ambiguity,[221] and in any event the records of Council debates at sessions when resolutions are adopted may serve an analogous function.[222]

The earlier critiques had also pointed to procedural flaws in Council law-making, noting that Resolution 1373 (2001) was adopted in just over 48 hours, that at the Council session when it was adopted no Council member spoke on the resolution, and that states which were not members of the Council were neither consulted on the draft nor present at its adoption.[223] There have, however, been subsequent examples of the Council employing more inclusive, and more considered, procedures in preparing resolutions. One related to Resolution 1540 (2004), on WMDs and non-state actors.[224] Drawing on the preparation of that resolution, Johnstone suggested that the Council is 'a more deliberative body than meets the eye', and that the co-operation of Council members with state and non-state actors outside the Council indicated a possibility 'for something like a "public sphere" to coalesce around' the Council.[225]

[218]See *Zollmann v. United Kingdom,* ECtHR (2003), Application no. 62902/00, Decision on Admissibility, at 1.

[219]For example, the 2015 Council of Europe Protocol mentioned above, and the 2017 EU Directive, *supra* note 20.

[220]A. Aust, *Modern Treaty Law and Practice* (2007), at 244–7; I. Sinclair, *The Vienna Convention on the Law of treaties* (1984), at 116.

[221]1969 Vienna Convention on the Law of Treaties, Art. 31(3).

[222]*Kosovo*, *supra* note 76, para. 94.

[223]Talmon, *supra* note 1, at 187; Hinojosa Martinez, *supra* note 1, at 350 (note 81).

[224]The Council spent six months working on the draft of Res. 1540; the views of states within and outside the Council were taken, and indeed the Council held an open debate with the active participation of 51 member states, 36 of whom were not members of the Council at the time (Talmon, *supra* note 1, at 188; Rosand, *supra* note 1, at 582–3; Hinojosa Martinez, *supra* note 1, at 352–3). See also Joyner, *supra* note 27, at 227–30, 235–8.

[225]Johnstone, *supra* note 11, at 112. Separately, in her discussion of the due process issues raised by the 1267 sanctions regime, Hovell has contended that development of the ombudsperson mechanism has 'undoubtedly opened up decision making in important ways' and has 'the potential to promote democratization by increasing access to information and opening up

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A recent resolution provides a positive illustration of this possibility. In January 2019 an *Arria formula* meeting[226] on measures to counter the financing of terrorism was organized by France, Peru, and Indonesia (who were Council members at the time) together with Australia and Tunisia (who were not); this allowed for the issues to be discussed among a larger group of states, UN bodies, representatives of research institutes, and private sector entities. Two months later, Resolution 2462 (2019) was adopted on this topic at a Council session at which representatives of 48 non-Council states, the EU, AU, FATF, ICRC, and Interpol also spoke; the benefits of the prior, more inclusive, step were highlighted by a number of states.[227] There is nothing in the Charter or the Council's rules of procedure[228] which *requires* that it take this more inclusive approach or, still less, that the views expressed by non-Council members are taken into account in the resolution that is ultimately adopted. But this more inclusive approach is certainly to be welcomed.[229] To quote Johnstone again: 'those at the table ultimately decide, but what they decide and how effective their decisions are is determined in part by the inclusiveness of the deliberations that led to them'.[230]

A different dimension of the debate regarding democratic representation – and one which was not fully explored in the earlier critiques – is the limited opportunities for non-Council states to circumscribe or subsequently amend the obligations imposed upon them by Council resolutions. First, states cannot enter reservations or interpretative declarations to Council resolutions in the way they can with respect to treaties.[231] Such devices have obvious benefits in that they enable states to specify – within certain parameters[232] – the obligations which they assume when becoming party to a treaty, thereby facilitating both wider adherence to legally-binding instruments and clarity in the precise scope thereof. And second, whereas treaties typically provide a state party with the option of bringing to an end the obligations it assumed thereunder by withdrawing from the treaty,[233] there is no such mechanism with respect to obligations arising under a Council resolution. As outlined above, the Council itself has the power to amend or terminate elements of previous resolutions,[234] though in the recent counter-terrorism resolutions it has consistently built

deliberation to a wider cross-section of the international community' (D. Hovell, 'Due Process in the United Nations', (2016) 110(1) AJIL 1, at 22–5).

[226]An informal meeting, arranged and chaired by a Council member but held outside of the Council chambers.

[227]See S/PV.8496, available at https://undocs.org/en/S/PV.8496. See also discussion at www.securitycouncilreport.org/monthly-forecast/2019-05/in-hindsight-arria-formula-meetings.php.

[228]On the drafting process for Council resolutions see Wood, *supra* note 116, at 11–14.

[229]Other examples of the more open approach of the Council can be seen in the open briefings of the CTC (in July 2019, Res. 2482 (2019) was adopted on the subject of the nexus between terrorism and organized crime; nine months earlier the CTC had held an open briefing on that subject (www.un.org/sc/ctc/news/2018/10/09/counter-terrorism-committee-holds-open-briefing-terrorcrimenexus/)).

[230]Johnstone, *supra* note 11, at 207. He also notes that some of the Council's functions are properly conducted behind closed doors, that the Council 'would not be an effective crisis manager if all its meetings were in public, let alone open to participation by the entire UN membership and interested NGOs' (at 211).

[231]The ILC has defined a reservation as 'a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization', and an interpretative declaration as 'a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions' (*Report of the International Law Commission, Sixty-Third Session,* 2011, A/66/10/Add.1, at 1–2)

[232]See VCLT, Arts. 19–23; see also the work of the ILC on this topic, available at legal.un.org/ilc/texts/1_8.shtml.

[233]See, e.g., Financing Convention, Art. 27; Terrorist Bombing Convention, Art. 23; see, generally, VCLT Arts. 42–3, 54, 56.

[234]In Res. 1372 (2001), after noting measures taken by Sudan to comply with earlier resolutions and welcoming that State's accession to some of the counter-terrorism treaties, the Council terminated the sanctions it had imposed in Res. 1070 (1996) following the attempted assassination of President Mubarak.

upon existing obligations rather than terminating them.[235] Once more, these considerations become more significant in the present context given the breadth and indefinite nature of the resolutions.

In sum, many of the criticisms of making law through Council resolutions as compared to treaties remain valid, and indeed have been compounded by the volume and nature of the more recent activity. There are many reasons why treaties have long been the preferred method for creating international law across an increasingly broad field of subjects,[236] and the foregoing analysis illustrates that what works in other fields should remain the default option for counter-terrorism, too.

That is not to say that making law through treaties will necessarily avoid all of the difficulties outlined above. The 1950 analysis by Jenks, cited earlier in this article, was based solely on conflicts which can and do arise between treaties – general and specific, universal and regional, old and new. Rather, it is to say that the *way*, and the *pace,* at which treaties are negotiated, adopted, and ratified, provides greater opportunities for these difficulties to be appreciated and resolved by actors at the domestic and international levels, before the law takes effect.

8. Conclusion

Law-making is only one of many functions which Security Council resolutions can serve. In the counter-terrorism sphere, as in others, the political imperatives for, and the political impacts of, Council resolutions should not be downplayed.[237] And the Council clearly has an important role to play in guiding multilateral responses to terrorism and ensuring that these are responsive to the threat as it continues to evolve. As of late-2020, two emerging issues stand out. First, the Council could encourage states to collect and share information on the increasing threat posed by terrorist groups motivated by extreme-right wing ideologies (including in the context of the COVID-19 pandemic), any transnational links between such groups, and effective response measures.[238] And second, further Council activity could also be beneficial with respect to the possible impact of counter-terrorism measures on the delivery of humanitarian assistance protected under IHL.

But there is a need for a shift in the institutional mindset. The volume and breadth of the Council's activity on terrorism since the emergence of ISIL is unprecedented. Ever more law, pertaining to ever more areas of state activity, that is of global effect and applicable indefinitely. Terrorism is not the only complex phenomenon that poses a threat to international peace and security, and the Council's activity on other issues that are also complex and of extreme importance to international peace and security is of a strikingly different nature. It would be a mistake to proceed on the basis that every evolution in international terrorism requires a Security Council resolution or, still less, a Security Council resolution that imposes binding obligations on all member states.

Many of the concerns raised in the early 2000s regarding the Council's law-making activity remain valid. Some which relate to Council procedures could be addressed: indeed, the Council has done so already, just not on a systematic basis. Regularizing some of the measures seen in 2019 would be a positive development. Overall, however, the problems highlighted in the

[235]On the need for express Council action to terminate obligations arising under an earlier resolution, and consequences for issues of democratic representation, see Caron, *supra* note 216, at 577–84; see also Gowland-Debbas, *supra* note 77, at 673.

[236]Crawford, *supra* note 128, at 115.

[237]Herndl, *supra* note 12, at 387.

[238]For State perspectives on this threat see *National Strategy for Counterterrorism of the United States of America*, October 2018, at 9–10, 18; *CONTEST: The United Kingdom's Strategy for Countering Terrorism*, June 2018, at 21. See also The Soufan Centre, *White Supremacy Extremism: The Transnational Rise of the Violent White Supremacist Movement*, September 2019; CTED Trends Alert, *Member States concerned by the growing and increasingly transnational threat of Extreme Right-Wing Terrorism*, July 2020 (the latter notes the efforts of such groups to use COVID-19-related conspiracies to radicalize) (www.un.org/sc/ctc/wp-content/uploads/2020/04/CTED_Trends_Alert_Extreme_Right-Wing_Terrorism.pdf).

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earlier critiques have been compounded by the sheer volume of activity since 2014, as new laws have been adopted and some of the older laws have been amended (expressly or otherwise). Clarity – regarding the precise scope of the obligations imposed by the Council or the interaction of those new obligations with other international rules – is often lacking.

Moving forward, the presumption should be that treaties – the more traditional method – constitute the more appropriate and effective mechanism for making new law. Where the Council determines, exceptionally, that this traditional method will in fact not suffice and that it must act, the content of the resolutions it adopts should be more systematically informed by considerations of necessity and of efficacy. Failure to do so risks unnecessarily over-burdening states' legislators, police, prosecutors and judges, and even diplomats; more to the point, it risks being counter-productive.

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