Leiden Journal of International Law, 16 (2003), pp. 593–610
 Printed in the United Kingdom DOI: 10.1017/S0922156503001304

CURRENT LEGAL DEVELOPMENTS

Security Council Resolution 1373 and the Constitution of the United Nations

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Abstract
In Resolution 1373 the Security Council laid down a series of general and abstract rules binding on all UN member states. In doing so, the Council purported to legislate. This article discusses whether it is entitled to do so. In the light of the Charter and the past practice of United Nations organs, it argues that the Council can only exercise its Chapter VII powers in response to specific situations or conduct. In enacting Resolution 1373 the Council acted *ultra vires*. The article looks at the circumstances in which such an extension of the Security Council's powers might be acceptable, but concludes that unilateral attempts by the Council to legislate would be destructive of the international legal order.

Key words
constitution; legislation; Security Council; United Nations

> The police are ransacking the temple, searching for criminals and those it calls terrorists. The mind of the police – the security police in this case – is a machine, programmed to believe that history has ended and we won it; that what remains is a clash of civilizations and we intend to come up first. As it proceeds – helmets, boots, blackjacks and all – towards the altar, the people draw silently away into the small chapels, surrounding the *navis*, each to attend communion before a different god. After the police have gone, the altar hall is empty but for the few that were left to guard it, and their admirers. The frescoes, the bronze statues, the stained glass, the marble speak from different ages, through different symbols, and towards a now empty centre. *Quod non fecerunt barbari, fecerunt Barberini.* The peace of the police is not the calm of the temple but the silence of the tomb.[1]

1. INTRODUCTION

The extent of the powers of the Security Council has long been a subject of controversy. During the Cold War, use of the veto ensured that the Security Council only infrequently exercised its powers under Chapter VII of the United Nations Charter.

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1. M. Koskenniemi, 'The Police in the Temple: Order, Justice and the UN – A Dialectical View', (1995) 6 EJIL 325, at 348.

In the 1990s, however, the Security Council made extensive use of its enforcement powers under both Articles 41 and 42 of the Charter, doing so on the basis of an expanded interpretation of the meaning of the concept of 'threats to the peace' in Article 39.[2] Moreover, the techniques employed by the Council 'to maintain or restore international peace and security'[3] were frequently innovative, including not only those mentioned in the Charter, such as sanctions and military force, but the delimitation of international boundaries, the awarding of compensation, the establishment of international criminal tribunals, demands for the surrender of individuals, and the creation of international protectorates. These tendencies may have reached their apogee in Security Council Resolution 1373 of 28 September 2001.[4] Or, more worryingly, Resolution 1373 may mark the beginning of a new stage in the practice of the Council.

2. Security Council Resolution 1373 and its implications

Resolution 1373 was an element of the Security Council's response to the terrorist attacks of 11 September 2001. Following Resolution 1368 of 12 September 2001, it reaffirmed that such acts, 'like any act of international terrorism', constituted a threat to international peace and security. Expressly acting under Chapter VII, the Council decided that all states should act to prevent and suppress the financing of terrorist acts. States were also required to refrain from providing support or safe haven to terrorists, prevent terrorist acts, co-operate in their suppression, and prosecute their perpetrators. If not already, states were called upon to become parties to the various international conventions on terrorism. Finally, a Committee of the Security Council (the Anti-Terrorism Committee) was established to monitor the implementation of the resolution.[5] States were called upon to report to the Committee within 90 days, and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement the resolution.

To a large extent, the obligations imposed on states by Resolution 1373 mirror those set out in the 1999 Convention for the Suppression of the Financing of Terrorism.[6] In contradistinction to the Convention, however, Resolution 1373 does not provide definitions of various terms used in it, in particular 'terrorism', 'international terrorism', 'terrorist acts', or 'terrorists'. It appears that the task of adopting such definitions has been left to the Anti-Terrorism Committee, thus granting the Committee very substantial discretion in interpreting the extent of states' obligations under the resolution. Even more significantly, states have a choice as to whether or not to become parties to the Convention. The United States, for example, only became

2. See the statement issued by the President of the Security Council following its meeting of Heads of State and Government, 31 Jan. 1992, UN Doc. S/23500, reproduced in (1992) 31 ILM 758.
3. Art. 39 of the Charter of the United Nations.
4. SC Res. 1373 (28 Sept. 2001).
5. The Committee consists of all the members of the Security Council.
6. GA Res. 54/109 (9 Dec. 1999), reproduced in (2000) 39 ILM 270. For commentary, see R. Lavalle, 'The International Convention for the Suppression of the Financing of Terrorism', (2000) 60 ZaöRV 491, and A. Aust, 'Counter-Terrorism – A New Approach: The International Convention for the Suppression of the Financing of Terrorism', (2001) 5 Max Planck YB 285.

a party to the Convention on 26 June 2002.[7] By contrast, Resolution 1373 is in the form of a legislative act or statute. It is a unilateral act imposing a series of general obligations binding on all UN member states.[8]

Prior to 11 September the Security Council had taken a different approach when responding to acts of terrorism. In each instance when it acted under Chapter VII, there was a finding of a threat to the peace arising out of a specific situation which the measures taken by the Council were aimed at addressing. Security Council Resolution 731, adopted under Chapter VI of the Charter, spoke of 'acts of international terrorism that constitute threats to international peace and security'.[9] Resolution 748, adopted by the Council acting under Chapter VII, then determined that the Libyan government's failure to demonstrate its renunciation of terrorism and to comply with the request in Resolution 731 to surrender the persons suspected of the Lockerbie bombing constituted such a threat to the peace. Much the same procedure was followed by the Security Council in respect of the Sudanese government's failure to surrender those persons suspected of the attempted assassination of President Mubarak of Egypt in 1995,[10] and the Taliban's failure to surrender Osama bin Laden following the 1998 bombing of the US embassies in Kenya and Tanzania.[11] In each case, the Council reaffirmed that suppression of international terrorism was essential for the maintenance of international peace and security, but only acted in response to a particular situation.

The question therefore arises whether the Security Council was entitled to act in the way it did by adopting Resolution 1373. This is not to say that a worldwide agreement prohibiting the financing of terrorism is a bad thing. One might ask, however, whether the best way of establishing such a regime is by Security Council fiat. The issue is not only whether the Security Council has legislative powers but also whether its possession of such powers is, or would be, a good thing. This article seeks to investigate these questions. Its emphasis will be on the legality or otherwise of the Security Council's adoption of Resolution 1373. Its analysis is premised on an idea of the United Nations Charter as a constitution. This is not to say that the Charter is anything more than the constitution of an organization,[12] but it is to take the view that the Charter assigns particular roles to the various organs of the United Nations and that the powers of those organs are constrained by the roles assigned to them.[13]

7. As of 4 April 2003, the Convention had 78 state parties. As of 28 Sept. 2001 (the date of the adoption of Resolution 1373), it had four (Botswana, Sri Lanka, the United Kingdom, and Uzbekistan).
8. Which, in practical terms, means all states. Switzerland having become the 190th member of the United Nations on 10 Sept. 2002 and East Timor the 191st member on 27 Sept. 2002, the only non-member state remaining is the Vatican City.
9. SC Res. 731 (21 Jan. 1992). The implication seemed to be that acts of terrorism could jeopardize international peace and security but need not necessarily do so. This seems sensible. It is difficult to see, for example, how an incendiary device in a furrier's shop is a threat to the peace.
10. See SC Res. 1044 (31 Jan. 1996) and SC Res. 1054 (26 April 1996).
11. See SC Res. 1214 (8 Dec. 1998), SC Res. 1267 (15 Oct. 1999), SC Res. 1333 (19 Dec. 2000) and SC Res. 1363 (30 July 2001).
12. Rather than, say, the constitution of a society or a community. See J. Crawford, 'The Charter of the United Nations as a Constitution', in H. Fox (ed.), *The Changing Constitution of the United Nations* (1997), 9–11.
13. To be more specific, the argument is that although the Charter does not contain any system of checks and balances, it does include a 'weak' form of the separation of powers. See N. D. White, 'The United Nations System: Conference, Contract or Constitutional Order?', (2000) 4 SJICL 281, at 293–4.

3. The Security Council as legislator

Concerns about the Security Council acting as a legislator have been raised before with regard to previous Council decisions under Chapter VII of the Charter. With regard to the resolutions establishing the International Criminal Tribunals for the former Yugoslavia (ICTY)[14] and Rwanda (ICTR),[15] Martti Koskenniemi commented that the Council's actions setting up 'two *ad hoc* war crimes tribunals to issue binding judgements' seemed 'precariously close to international legislation'.[16] In a similar vein, Keith Harper argued that some of the obligations imposed on Iraq and Libya by Resolutions 687 and 748 amounted to legislation by the Security Council.[17] In Resolution 687, it prohibited Iraq from possessing chemical and biological weapons, although Iraq's existing obligations under the 1925 Geneva Protocol[18] only banned their use. In Resolution 748, it required Libya to surrender the Lockerbie suspects, despite its alleged rights under the Montreal Convention.[19] Harper asserted that the Council had 'explicitly created specific legal obligations for those states and implicitly for all states'.[20]

However, in none of these cases did the Security Council really legislate. The establishment of the two international criminal tribunals will be dealt with in greater detail later.[21] Suffice at this point to say that the Yugoslavia and Rwanda Tribunals were explicitly ad hoc institutions. They were established to deal with particular situations, and their constituent instruments circumscribe their jurisdiction.[22] The law applied by the tribunals is, at least avowedly, existing law.[23] The report of the UN Secretary-General on the establishment of the Yugoslavia Tribunal emphasized that the law applied by the tribunal was to be confined to rules of international humanitarian law which were 'beyond any doubt part of customary law'.[24] The Security Council did not impose new obligations upon individuals;[25] it simply

14. SC Res. 827 (25 May 1993).
15. SC Res. 955 (8 Nov. 1994).
16. Koskenniemi, *supra* note 1, at 326.
17. K. Harper, 'Does the United Nations Security Council Have the Competence to Act as a Court and Legislature?', (1994) 27 NYUJILP 103, at 126–9.
18. Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Warfare, (1929) 44 LNTS 65.
19. Convention for the Suppression of All Unlawful Acts Against the Safety of Civil Aviation, (1971) 974 UNTS 178.
20. Harper, *supra* note 17, at 126–7.
21. See section 5 *infra*.
22. The Yugoslavia Tribunal only has jurisdiction over persons responsible for serious violations of international humanitarian law committed in the territory of the former Federal Socialist Republic of Yugoslavia from 1 Jan. 1991 onwards. See Arts. 1 and 8 of the Statute of the International Criminal Tribunal for the former Yugoslavia, annexed to SC Res. 827 (25 May 1993). The International Criminal Tribunal for Rwanda only has jurisdiction over persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 Jan. 1994 and 31 Dec. 1994. See Arts. 1 and 7 of the Statute of the International Criminal Tribunal for Rwanda, annexed to SC Res. 955 (8 Nov. 1994).
23. Although see, for example, C. Warbrick and P. Rowe, 'The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadić* Case', (1996) 45 ICLQ 691.
24. UN Secretary-General's Report on aspects of establishing an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia, UN Doc. S/25704 (3 May 1993), reproduced in (1993) 32 ILM 1159, at 1170.
25. Although it did on states, for which see note 32 *infra* and accompanying text.

established mechanisms whereby infractions of the existing law could be punished. When states did seek to establish a permanent international criminal court, they did so by adopting a treaty, the Rome Statute.[26]

With regard to Resolutions 687 and 748, the obligations imposed on Iraq and Libya arose out of the particular circumstances giving rise to the Security Council's determination of a threat to the peace and were specific to those states. Other states' obligations concerning the possession and use of chemical and biological weapons or the prosecution or extradition of terrorist bombers were unaffected. This can be seen from the decision of the International Court of Justice (ICJ) on provisional measures in the *Lockerbie* cases.[27] Following Libya's agreement, as a UN member state, to accept and carry out the decisions of the Security Council,[28] the Court held that the effect of Article 103 of the Charter was that Libya's rights under the Montreal Convention were superseded by Resolution 748, at least prima facie.[29] The implication must be that other states' rights under the Montreal Convention were unaffected; only those of Libya, as the addressee of the resolution, were trumped.

More fundamentally, in his survey of the first fifty years of the United Nations, Frederic Kirgis has argued that the Security Council has always had legislative, or quasi-legislative, authority.[30] Kirgis based his view on the definition of legislative authority propounded by Edward Yemin:

> 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 indeterminate addresses and capable of repeated application in time.[31]

For Kirgis, Articles 41 and 42 authorize the Security Council to take such actions. Mandatory decisions of the Security Council, such as the imposition of economic sanctions,[32] are unilateral acts of the Council; they modify legal rules (such as conflicting treaty obligations), are directed at all states, and are capable of repeated application. This is fine as far as it goes. However, the Security Council can only issue such decisions in response to particular situations or conduct. Such decisions are not wholly general. For a particular norm to be truly general in nature, it needs to be applicable to all persons or particular classes of persons (rather than to specified individuals), in all circumstances or in all situations where particular criteria have been satisfied (rather than to specific situations or conduct). In other words, it should be composed of abstract legal propositions. This is not Kirgis's view of the practice

26. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9* (1998).
27. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. USA)*, Provisional Measures, Order of 13 Sept. 1993, [1993] ICJ Rep. 114.
28. Art. 25, UN Charter.
29. *Libya v. UK; Libya v. USA*, *supra* note 27, at 126.
30. F. L. Kirgis Jr, 'The Security Council's First Fifty Years' (1995) 89 AJIL 506 at 520–8.
31. E. Yemin, *Legislative Powers in the United Nations and Specialised Agencies* (1969), 6, quoted by Kirgis, *supra* note 30, at 520.
32. Or, indeed, the obligation to co-operate with the Yugoslavia and Rwanda Tribunals in the prosecution of persons accused of committing crimes within each of the Tribunals' jurisdiction. See Art. 29 ICTY Statute, *supra* note 22; and Art. 28, ICTR Statute, *supra* note 22.

of the Security Council. He states:

> The safeguards are found in Articles 39 and 42. When the Security Council makes an Article 39 finding, it should take care to demonstrate that there is indeed a threat to the peace, breach of the peace or act of aggression.[33]

He later writes of 'recent instances of quasi-legislation establishing norms *for particular situations* that go beyond what international law already required, without any recognition by the Council – or at least any acknowledgement – that it was doing so'.[34] Legislation involves the promulgation of abstract legal propositions. Such abstract propositions are not linked to concrete situations. It is for the judicial branch to apply them to such situations.

The crux of previous criticisms of the Security Council's use of its enforcement powers relate to the Council's playing a judicial (or quasi-judicial), rather than a legislative, role. Court judgements involve the interpretation and application of existing law to particular concrete factual situations. In interpreting or applying an existing rule in the light of a particular situation, a court creates a new rule, so that courts do play a law-making role, but that role is one of refinement and elaboration. Judicial law-making is consequently very different from legislation. As Oscar Schachter has written:

> The development of a body of case law . . . has its drawbacks. The facts that have been considered in each case have necessarily been limited and in large measure selected by chance; the outcome must invariably have been influenced by the parties and the adversary character of the proceedings. Obviously this falls far short of the process of conscious law-making (such as the elaboration of a treaty or a set of general rules) in which a wide range of situations and possible solutions are normally considered and the texts purposively designed to meet a variety of future circumstances.[35]

In the instances discussed above, the Security Council acted in response to particular situations. It did not purport to lay down general rules. Such resolutions can have precedential value. Indeed, in a number of cases the Security Council has recognized this by specifically stating that particular resolutions should not serve as precedents.[36] But they do not apply directly in analogous situations. In such circumstances a new resolution is required.

4. The Security Council and the UN Charter

Resolution 1373 differs from previous Security Council decisions under Chapter VII. The threat to the peace identified is not any specific situation but rather a form of behaviour: 'terrorist acts'. Indeed, it is a form of behaviour that the resolution leaves undefined. Further, the form of Resolution 1373 implies that it is to remain in force for an indefinite period. Not only are any (i.e. all) acts of international terrorism

33. Kirgis, *supra* note 30, at 522.
34. *Ibid.*, at 538 (emphasis added).
35. O. Schachter, 'The Quasi-Judicial Rôle of the Security Council and the General Assembly', (1964) 58 AJIL 960, at 964.
36. See, e.g., SC Res. 788 (19 Nov. 1992) on the situation in Liberia.

(whatever that term means) threats to international peace and security, but the resolution declares that

> acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.

The resolution does not include any review mechanism. It provides neither that it will cease to remain in force following a fixed period absent a positive vote of the Council, nor that it will continue in force until a contrary vote. The implication must be that Resolution 1373 is intended to remain in force indefinitely.[37]

It is often said that decisions of the Security Council under Article 39 with regard to the existence of a threat to the peace, breach of the peace, or act of aggression are political and, therefore, unreviewable. Even if this is the case, however, it is highly doubtful whether the Security Council is entitled to act under Chapter VII against a form of behaviour, rather than against a manifestation of that particular form of behaviour. Looking at Chapter VI of the Charter, the Council's powers are activated where there is 'any dispute' or 'any situation' which is 'likely to endanger the maintenance of international peace and security'.[38] In Chapter VII, Article 39 refers to 'any threat to the peace, breach of the peace or act of aggression', while the title to the chapter refers to 'acts of aggression'. The implication would seem to be that before the Council can act there must be a specific situation giving rise to either a danger to international peace and security (Chapter VI), or a threat to the peace, a breach of the peace, or an act of aggression (Chapter VII).[39] It seems clear, in particular, that with regard to the third option there must be an act of aggression.

To this the argument might be made that aggression is a term of art, denoting a legal concept with an existence outside the Charter.[40] One might even say that the concept of a breach of the peace is equally clear, meaning simply a breach of international peace and security arising from the use of armed force.[41] But one might argue that the concept of a threat to the peace is different. The term was first utilized in the Charter. No definition of the term was agreed at the United Nations Conference on International Organization in San Francisco in 1945, and none has been accepted

37. This implication is particularly strong given that any permanent member of the Security Council could ensure that Resolution 1373 remained in force by blocking the adoption of any future resolution aimed at modifying or repealing it. For the operation of the 'reverse veto', see D. D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', (1993) 87 AJIL 552, at 582–4.
38. See Arts. 33 and 34 of the Charter.
39. See also Art. 1(1) of the Charter, which provides that one of the Purposes of the United Nations is 'To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace'. The exercise of the Security Council's collective security functions is, again, linked to the existence of particular situations or conduct. Art. 1(1) can be contrasted with Art. 1(2). See H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1951), at 282–3, and note 48 *infra*.
40. See Art. 6(a) of the Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, (1951) 82 UNTS 279 (defining 'crimes against the peace'); and GA Res. 3314 (XXIX) on the Definition of Aggression (14 Dec. 1974). Resolution 3314, however, provides an explicitly non-exhaustive definition of aggression and states that the Security Council may determine that other acts constitute aggression under the provisions of the Charter.
41. See L. M. Goodrich, E. Hambro and A. P. Simons, *Charter of the United Nations: Commentary and Documents* (3rd edn, 1969), at 297–8.

since.[42] Consequently, the concept is an empty one until it is given content by the Security Council. But to come to such a conclusion would be to elide two issues. One can agree that the Security Council has a wide, if not an unrestricted, discretion in determining what sorts of behaviour or situations can be threats to the peace. It is clear that the definition of what can constitute a threat to the peace has been considerably widened over the past decade or so to include not only international armed conflicts but also civil wars, refugee flows, humanitarian emergencies, and terrorist acts. However, even if it is conceded that the Security Council has freedom to determine what can constitute threats to the peace, this is not to say that the Council can act save in response to a particular action or situation threatening international peace and security. The most ardent advocates of an expansive view of the Security Council's powers have seen its role as essentially reactive. John Foster Dulles, for example, stated that 'The Security Council is not a body that merely enforces agreed law. It is a law unto itself. If it considers any situation as a threat to the peace, it may decide what measures are to be taken'.[43] The Council can only react to particular threats. It cannot legislate to prevent them from arising.[44]

The function of the Security Council is to maintain or restore international peace and security.[45] Peace, here, is seen in negative terms: as the antithesis of war. Concepts of peace in positive terms, involving not only the absence of conflict but also the presence of various goods (democracy, respect for human rights, social justice, etc.), have influenced recent Security Council practice.[46] Nevertheless, it is the idea of peace as simply the absence of conflict that has determined the Security Council's role in the United Nations system. The Security Council is a global policeman.[47] It is concerned with the maintenance and restoration of order. Its role can be contrasted with that of the General Assembly. Indeed, by looking at the role of the General Assembly we can see the limits of the Security Council's powers.

Article 11 of the Charter is key. Article 11(1), in particular, provides that:

> The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security . . . and may make recommendations with regard to such principles to the Members or to the Security Council or both.

The General Assembly has the role of considering international peace and security generally.[48] The Security Council acts in specific situations. The General Assembly acts prospectively. It is its role to obtain agreement on what is necessary for the good life. As Martti Koskenniemi has put it: 'the Security Council is the Police, it

42. *Ibid.*, at 295.
43. J. F. Dulles, *War or Peace* (1950), at 194.
44. Although, of course, the concept of a 'threat' has a prospective element to it. The Security Council is not obliged to wait until something happens, it can intervene in a particular situation when it considers that something might.
45. See Arts. 24, 34, 37, 39, and 42 of the Charter.
46. Although not to the extent that is sometimes argued. See R. Cryer, 'The Security Council and Art. 39: A Threat to Coherence?', (1996) 1 JACL 161.
47. See also J.-P. Cot and A. Pellet (eds.), *La Charte des Nations Unies* (2nd edn, 1991), at 447.
48. See also Art. 1(2) of the Charter. The purpose it speaks of is: 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.' It can be contrasted with Art. 1(1). See note 39 above.

is concerned with order; the General Assembly is the Temple, it is concerned with justice'.[49]

Despite his eloquent formulation, this view is not the creation of Koskenniemi. It is implicit in the division of functions in the Charter between the Security Council and the General Assembly. As Goodrich, Hambro, and Simons wrote over thirty years ago,

> The Charter – on the assumption that the General Assembly was an organ of deliberation and the Security Council an organ of action – defined in considerable detail the functions and powers of each, emphasising the primary responsibility of the Council for making specific decisions to maintain or restore peace and security, and the responsibility of the Assembly to develop and recommend general principles of co-operation for strengthening peace and security.[50]

Famously, the General Assembly cannot legislate. Save with regard to certain matters to do with the United Nations' internal workings, its decisions cannot bind the membership.[51] On issues of international peace and security, it can only recommend. This is unsurprising. Had the Assembly been granted such a power, the establishment of the United Nations would have seen the creation, not of an international organization, but of a 'superstate'.[52]

The only reference to 'legislation' in the Charter is found in Article 13, which provides that 'The General Assembly shall initiate studies and make recommendations for the purpose of: (a) . . . encouraging the progressive development of international law and its codification'. It was this provision that was the basis for the establishment of the International Law Commission (ILC). However, although the General Assembly can adopt treaty texts, such as the Convention for the Suppression of the Financing of Terrorism, such agreements are binding on the member states only if they accede to them. Neither the General Assembly nor the Security Council can impose general obligations on the member states.

5. The Security Council and the establishment of international tribunals

Support for the conclusion that the Security Council cannot legislate can also be found in previous practice. It can be seen, in particular, in the positions taken with regard to the establishment of the two ad hoc international criminal tribunals and the International Criminal Court. This is an area where there have been considerable recent developments and with regard to which various actors (including the Security Council) have articulated their views of the legal situation.

In his report on the establishment of the International Criminal Tribunal for the former Yugoslavia, the UN Secretary-General wrote that a decision to establish a

49. Koskenniemi, *supra* note 1, at 337–9.
50. Goodrich *et al.*, *supra* note 41, at 11.
51. This, of course, is not to say that General Assembly resolutions have no legal value. See B. Sloan, 'General Assembly Resolutions Revisited', (1987) 58 BYIL 93.
52. See *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), [1949] ICJ Rep. 174, at 179.

tribunal under Chapter VII 'would constitute a measure to maintain or restore international peace or security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression'.[53] The Secretary-General went on to state:

> As an enforcement measure under Chapter VII . . . the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.

In other words, there had to be a specific situation constituting a threat to the peace, a breach of the peace, or an act of aggression, and action taken under Chapter VII had to be with the aim of maintaining or restoring international peace and security with respect to that situation. The same view was taken by the Security Council in Resolution 827 establishing the Yugoslavia Tribunal. The Council determined that the situation of widespread and flagrant violations of international humanitarian law within the territory of the former Yugoslavia continued to constitute a threat to international peace and security. It further stated that it was convinced that 'in the particular circumstances' the establishment 'as an ad hoc measure' of an international tribunal would contribute to the restoration and maintenance of peace. Again, the emphasis is on responding to a particular situation.

The Appeals Chamber of the ICTY also addressed the issue in the *Tadić* case when responding to the argument that it had no jurisdiction to try Tadić since it had been illegally established. In its decision, the Appeals Chamber made the following comments.

> The Security Council plays the central role in the application of both parts of the Article [Article 39]. It is the Security Council that makes the *determination* that there exists one of the situations justifying the use of the 'exceptional powers' of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes *recommendations* (i.e. opts not to use the exceptional powers but to continue to operate under Chapter VII) or decides to use the exceptional powers by ordering *measures* to be taken in accordance with Articles 41 and 42 with a view to maintaining or restoring international peace and security.
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> The situations justifying resort to the powers provided for in Chapter VII are a 'threat to the peace', a 'breach of the peace' or an 'act of aggression'. While the 'act of aggression' is more amenable to a legal determination, the 'threat to the peace' is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.
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> . . .
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> Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action.[54]

Later, applying the law to the facts of the case, the Appeals Chamber stated that the Security Council had established the Tribunal 'as an instrument for the exercise

53. UN Secretary-General's Report, *supra* note 24, at 1168.
54. *Prosecutor v. Tadić (Jurisdiction)* (Appeals Chamber, ICTY), (1995) 105 ILR 453, at 466–7 (emphasis in original).

https://doi.org/10.1017/S0922156503001304 Published online by Cambridge University Press

of its own principal function of the maintenance of peace and security, i.e. as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia'.[55] It can be seen that the Secretary-General, the Security Council and the Appeals Chamber of the ICTY were all agreed that before the Council could utilize its powers under Chapter VII there had to be a particular situation constituting a threat to the peace, and that the measures taken under Chapter VII had to be aimed at restoring international peace and security by ending that situation.

The Appeals Chamber also considered whether the establishment of the ICTY was contrary to a general principle of law whereby courts must be 'established by law'. The Appeals Chamber held that the principle that a court or tribunal must be established by law was a general principle of law,[56] but that the Yugoslavia tribunal had been so established.[57] It did so, however, on the ground that 'established by law' in the international context meant in accordance with the rule of law (i.e. in accordance with the appropriate procedures under the Charter) and providing all the necessary safeguards for a fair trial.[58] The Appeals Chamber did not think that to establish an international court there had to be an international legislature. Indeed, it considered that such a body did not exist. The Appeals Chamber stated:

> It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations . . . There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.[59]

The Security Council, the Appeals Chamber expressly stated, is not an international legislator. The Secretary-General thought the same,[60] and it is the logical conclusion of the view taken of the extent of the Security Council's powers by the Council itself.

The same view was taken during the drafting of the Statue of the International Criminal Court. Originally, two divergent views arose in the ILC Working Group.[61] One group felt that the court should be a judicial organ of the United Nations. The other thought that this might require amendment of the Charter and so advocated a

55. *Ibid.*, at 471. See also Judge Sidhwa's Separate Opinion, *ibid.*, at 562: 'since the Tribunal to be established was of a limited nature, for a limited purpose, for a limited time, for a limited territory and for offenders who had committed offences within the territory of former Yugoslavia, the decision was valid and fair, and squarely fell within Art. 41 of the Charter'.
56. *Ibid.*, at 472.
57. *Ibid.*, at 476.
58. *Ibid.*, at 473–6.
59. *Ibid.*, at 473.
60. The Secretary-General's Report had earlier stated that 'in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.' See UN Secretary-General's Report, *supra* note 24, at 1169.
61. Report of the Working Group on a draft statute for an international criminal court, Annex to Report of the International Law Commission on the work of its forty-fifth session (3 May–23 July 1993), UN Doc. A/48/10; [1993] II (2) YBILC at 101–2.

link with the UN through a treaty of co-operation such as those between the United Nations and its specialized agencies. States' comments on the draft overwhelmingly favoured the treaty option against that of the amendment of the Charter.[62] No state suggested that the court be created by Security Council resolution. In the ILC's comments on the Working Group's report, four methods of establishing a court were mentioned: by treaty, by Charter amendment, or by General Assembly or Security Council resolution.[63] With regard to this last option, however, the point was made that there was a distinction

> between the authority of the Council to establish an ad hoc tribunal in response to a particular situation under Chapter VII of the Charter and the authority to establish a permanent institution with general powers and competence. Chapter VII of the Charter only envisaged action with respect to a particular situation.[64]

The revised draft statute adopted by the Commission was in the form of a treaty. The commentary to draft article 2 (on the relationship of the court to the United Nations) stated that the Commission had 'concluded that it would be extremely difficult to establish the court by a resolution of an organ of the United Nations, without support of a treaty'.[65]

In 1997, however, John Dugard resurrected the idea of establishing an international criminal court by Security Council resolution.[66] Dugard agreed that it would be beyond the Council's Chapter VII powers to create a permanent international criminal tribunal. He argued, however, that such a court could be established under Article 24(1) of the Charter:

> The creation of a permanent international criminal court could in law be justified, following *mutatis mutandis* the reasoning employed by the Appeals Chamber in the *Tadic* case in respect of an *ad hoc* tribunal, as a measure designed 'to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace' (Article 1(1) of the Charter) or as a measure designed to promote respect for human rights (Article 1(3) of the Charter).[67]

Dugard relied on the International Court of Justice's *Namibia* Advisory Opinion.[68] There the Court found the legal basis for Security Council Resolution 276 (which it held to be binding) in Article 24(1) of the Charter. The Court thus rejected South Africa's contentions that Article 24 did not give the Council authority to act in situations not covered by the more detailed provisions of Chapters VI, VII, VIII, and XI of the Charter. The only limits to the Council's powers under Article 24 were 'the

62. See Observations of governments on the report of the Working Group on a draft Statute for an international criminal court, UN Doc. A/CN.4/458 and Add. 1–8; [1994] II (1) YBILC.
63. Report of the International Law Commission on the work of its forty-sixth session (2 May–22 July 1994), UN Doc. A/49/10; [1994] II (2) YBILC, at 22.
64. *Ibid.* See also A. Bos, 'From the International Law Commission to the Rome Conference (1994–1998)', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), at 40–4.
65. ILC, *ibid.*, at 28. See also *Tadić*, separate opinion of Judge Sidhwa, *supra* note 54, at 562.
66. J. Dugard, 'Obstacles in the Way of an International Criminal Court', [1997] CLJ 329, at 341–2.
67. *Ibid.*, at 342.
68. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion), [1971] ICJ Rep. 16.

https://doi.org/10.1017/S0922156503001304 Published online by Cambridge University Press

fundamental principles and purposes found in Chapter I of the Charter'.[69] Such a view obviously has relevance to the present discussion. Even if Resolution 1373 is *ultra vires* the Security Council's powers under Chapter VII, would it have been valid had it been adopted by virtue of the Council's general powers under Article 24?

Dugard's view of the extent of the Security Council's powers under Article 24 has a number of proponents.[70] However, such an expansive view of the Security Council's powers was rejected by a number of judges in the *Namibia* Advisory Opinion[71] and by the representatives of France and the United Kingdom in the Council's discussion of the decision.[72] The subsequent practice of the Security Council has been to make mandatory decisions under Chapter VII of the Charter.[73] And, as Jochen Abr. Frowein points out, the expansive approach does not 'appear appropriate with regard to the overall structure of the Charter'.[74]

However, even if it is accepted that the Security Council has general powers under Article 24, it does not follow that those powers are unlimited. In the *Namibia* case, the International Court of Justice was assessing the legality of a Security Council response to a particular situation, South Africa's continued presence in Namibia despite the General Assembly's termination of its mandate. It did so having already found that South Africa's behaviour as mandatory was subject to UN supervision. As the Court stated,

> It emerges from the communications bringing the matter to the Security Council's attention, from the discussions held, and particularly from the text of the resolutions themselves, that the Security Council, when it adopted these resolutions, was acting in the exercise of what it deemed to be its primary responsibility, the maintenance of international peace and security which, under the Charter, embraces situations which might lead to a breach of the peace (Art. 1, para. 1).[75]

In other words, the Court located the Security Council's authority as arising out of the existence of a particular situation. The rather sweeping statements made by the Court and by a number of the judges individually have to be seen in this context.

6. The Security Council and the regulation of armaments

Another area where limitations on the powers of the Security Council can be seen is with regard to disarmament. The regulation of armaments is a subject with regard to which the Security Council has been given a specific mandate under the Charter. It might be thought that an excellent way to prevent threats to the peace, breaches

69. *Ibid.*, at 52. See also R. Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Art. 25 of the Charter?', (1972) 21 ICLQ 270.
70. See, for example, Higgins, *supra* note 69, and N. D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (2nd edn, 1997), at 61–3.
71. *Namibia* case, *supra* note 68, Dissenting Opinions of Judges Fitzmaurice, at 292–5, and Gros Espiell, at 340–1; Separate Opinions of Judges Petrén, at 136, and Dillard, at 165–6.
72. J. Abr. Frowein, 'Article 39', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1994), at 613, n. 415.
73. J. Delbrück, 'Article 25', in Simma, *ibid.*, at 415.
74. Frowein, *supra* note 72, at 613–4.
75. *Namibia* case, *supra* note 68, at 51–2.

of the peace, and acts of aggression would be for the Security Council to impose disarmament obligations on states, for example by prohibiting the possession of particular forms of weaponry. Indeed, in 1945 inter-state violence was regarded as the type of conduct most likely to give rise to a finding under Article 39 of a threat to the peace, breach of the peace, or act of aggression. So, if the Council can impose general obligations on states to suppress terrorism, why can it not require them to disarm?[76]

The drafters of the United Nations Charter, unlike those of the Covenant of the League of Nations, did not seek directly to impose disarmament obligations on the member states. It was thought that the Axis powers' aggression in the Second World War had been encouraged by the military unpreparedness of the Western democracies. Peace was to be preserved, under the Charter scheme, by a policy of deterrence. However, the regulation of armaments remained an aspiration, and the Security Council was given special responsibility in the area. Article 26 of the Charter provides:

> In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating . . . plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

Article 26, however, is clear: the Security Council cannot impose general obligations of disarmament. Schemes for the regulation of armaments can be formulated by the Council, but have to be submitted to the membership. They cannot come into force save with the agreement of the member states, that is, by treaty.[77]

The Security Council has acted under Chapter VII to impose disarmament obligations on states. Resolution 687 imposed a disarmament plan on Iraq which, as noted above, went beyond Iraq's existing international obligations. However, as Robert Cryer has stated, 'What is notable . . . is the concentration upon the actions of the government [of Iraq]'.[78] The Resolution was responding to particular previous conduct. Iraq had by its previous behaviour[79] shown that its possession of such weapons was a threat to the peace.

Hans Kelsen took the view that a refusal to comply with a plan formulated by the Security Council under Article 26 could constitute a threat to the peace leading to enforcement action under Chapter VII.[80] This is unexceptional, provided that,

76. A somewhat similar suggestion was made by Paul Szasz, who proposed that the Security Council prohibit nuclear testing on the ground that it constituted a threat to international peace and security. See P. C. Szasz, 'New Ideas to Help Eliminate Nuclear Weapons: A New Approach to Achieving a CTB', (1992) 15 (5) *Disarmament Times*, repr. in P. C. Szasz, *Selected Essays on Understanding International Institutions and the Legislative Process* (2001).
77. Art. 11(1) of the Charter makes it clear that the General Assembly can only make recommendations with regard to the regulation of armaments.
78. Cryer, *supra* note 46, at 184.
79. The Resolution instances Iraq's invasion and occupation of Kuwait; its threats to use weapons in violation of its obligations under the Geneva Protocol; its prior use of chemical weapons; its use of ballistic (Scud) missiles against Israel; and its attempts to obtain materials for a nuclear weapons programme contrary to its obligations under the Non-Proliferation Treaty.
80. Kelsen, *supra* note 39, at 106.

as seems to be implied by Kelsen, the determination and consequent enforcement measures are directed against a state or states whose behaviour gives rise to a belief that their failure to disarm would constitute a threat to the peace. Security Council Resolution 825, adopted in response to North Korea's announcement of its intention to withdraw from the Non-Proliferation Treaty,[81] reaffirmed 'the crucial contribution which progress in non-proliferation can make to the maintenance of international peace and security'.[82] Resolution 825 was not adopted under Chapter VII, but the possibility of resort to enforcement measures was clearly present in the event of North Korean non-compliance. In such a case, the finding would have been that North Korea's conduct, that is, its failure to commit to the non-proliferation regime, gave rise to a threat to international peace and security.

Article 26 is clear: general obligations concerning the regulation of armaments can only be imposed by treaty. Indeed, substantial efforts have gone into concluding such treaties, both within and outside the United Nations.[83] The Security Council has merely recommended that states adhere to such treaties. It is only in particular situations that the Security Council can impose obligations of disarmament or non-proliferation and only when the Council considers that because of a state's conduct or the existence of a particular situation a threat to the peace has arisen. Chapter VII cannot be used to circumvent the limits to the Security Council's powers in Article 26. Even in an area where the Security Council has been given a specific mandate to act, it is not permitted to impose general obligations on the UN membership.

7. Conclusion: the status of Resolution 1373

The structure of the Charter and previous practice both support the conclusion that the Security Council can only exercise its powers under Chapter VII of the Charter in response to specific situations or conduct. As D. W. Bowett has written,

> Not even the General Assembly is a 'legislature' and the Council certainly is not. The obligations of Member States stem from the UN Charter, and the role of the Security Council is not to create or impose new obligations having no basis in the Charter, but rather to identify the conduct required of a Member State because of its pre-existing Charter obligations. Thus, the Council does not 'legislate': it enforces Charter obligations.[84]

Resolution 1373 purports to create a series of general and temporally undefined legal obligations binding the member states. In this it goes beyond the limits of the Security Council's powers.

However, this has not been the unanimous view. In a recent article,[85] Paul Szasz, while acknowledging its novelty, nevertheless welcomed Resolution 1373, stating

81. Treaty on the Non-Proliferation of Nuclear Weapons, (1968) 729 UNTS 169.
82. SC Res. 825 (11 May 1993). The use of the verb 'can' heavily qualifies the statement.
83. See N. Elaraby, 'Some Reflections on Disarmament', in C. Tomuschat (ed.), *The United Nations at Age Fifty: A Legal Perspective* (1995).
84. D. W. Bowett, 'Judicial and Political Functions of the Security Council and the International Court of Justice', in Fox, *supra* note 12, at 79–80.
85. P. C. Szasz, 'The Security Council Starts Legislating', (2002) 96 AJIL 901.

that

> The members of the Security Council were most likely unaware, when they hastily adopted Resolution 1373, of the pioneering nature of that decision. Now this door has been opened, however, it seems likely to constitute a precedent for further legislative activities. If used prudently, this new tool will enhance the United Nations and benefit the world community, whose ability to create international law through traditional processes has lagged behind the urgent requirements of the new millennium.[86]

Szasz highlighted the fact that the mandatory provisions of Resolution 1373 were based on the Convention for the Suppression of the Financing of Terrorism, the text of which had been adopted by the General Assembly without a vote. He did not, however, consider this to be of 'direct legal significance'.[87] Szasz also noted that the General Assembly's reception of Resolution 1373 had been 'tepid',[88] which he tentatively attributed to the resolution having failed to mention the General Assembly's 1994 and 1996 declarations on measures to eliminate international terrorism.[89] Another explanation, however, might be unease as to the nature of the resolution itself.

Nevertheless, Szasz provides an insight into the potential, as opposed to the threat, of Resolution 1373. The possession by the Security Council of a power to legislate might be more palatable if it were only exercised in partnership with the General Assembly. The two bodies would then serve to check each other. The General Assembly would ensure that legislation reflected the will of the majority of states. The Security Council would ensure its implementation.[90] However, Security Council–General Assembly co-operation would have to be express. The General Assembly would have to state not only that it wanted a set of general norms adopted but also that it wished to have them embodied in a binding Security Council resolution.[91] Otherwise, the Security Council would be able to pick and choose among General Assembly resolutions. In addition, alongside the creation of a legislative competence, the establishment of some form of judicial review might be thought necessary to allow dissenting member states to challenge the *vires* of legislative resolutions.[92] To put it plainly, one might consider that the granting of greater powers to the Security Council would require the installation of a system of checks and balances to prevent the Council from abusing them.

Such vistas seem distant. The international system does not, at present, seem sufficiently integrated to permit such a degree of co-operation between the General

86. *Ibid.*, at 905.
87. *Ibid.*, at 902.
88. *Ibid.*, at 903.
89. Declaration on Measures to Eliminate International Terrorism, GA Res. 49/60 (1994); and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, GA Res. 51/210 (1996).
90. Indeed, a parallel could be drawn with the *Namibia* case, *supra* note 68, where the Security Council could only act after the General Assembly had.
91. It has been suggested that this might be done under the authority of Art. 11(1) of the Charter. However, the specific references to disarmament and arms control in Art. 11(1), areas in which Art. 26 makes clear that the Security Council cannot legislate, serves to weaken this argument.
92. Perhaps utilizing the advisory jurisdiction of the International Court of Justice.

Assembly and the Security Council, nor for the Security Council to permit the International Court of Justice to exercise such a degree of oversight over the Council's activities. Indeed, it might well be that the very subjects on which the General Assembly wished to legislate would be those that the permanent members of the Security Council would wish to veto.[93] Absent such safeguards, the adoption by the Security Council of the power to legislate for UN member states can only be seen as a usurpation of those states' powers to legislate for themselves.[94]

It might be said, that the Security Council having spoken, nothing remains to be said. Security Council Resolutions are generally seen as being legal, at least prima facie.[95] As the International Court of Justice has stated, the Security Council is the initial judge of the legality of its own acts.[96] In addition, there is little agreement on what are the legal effects of *ultra vires* resolutions of international organizations. Accordingly, it might be argued that be that, absent a dispute on the extent of a state's obligations under Resolution 1373 coming before the International Court of Justice, the resolution has to be treated as valid. Even then, it might be argued that the exercise by the Security Council of its powers is unreviewable.[97]

However, the real issue is whether Resolution 1373 will serve as a precedent for future Security Council legislation. There has been one subsequent example of the Security Council purporting to legislate. Resolution 1422 has been criticized on the ground that the Council purported to exercise its Chapter VII powers without having made a prior determination that there existed a threat to the peace, breach of the peace, or act of aggression, as required under Article 39 of the Charter.[98] However, it can also be seen as an attempt to legislate, in that the resolution applies generally to operations established or authorized by the United Nations, not to any specific mission or missions.[99] However, a lot has happened since 12 July 2002. Now may not be a good time to speculate about the Security Council's future role as a legislator.

The issue of the legality of Resolution 1373 is important regardless of whether it can be challenged. Issues of legality are closely linked with issues of legitimacy. Justification of the composition of the Security Council is based on the realities of power. As Koskenniemi has pointed out, 'The *composition and procedures* of the Council are determined by the single-minded purpose to establish a causally effective centre of international power'.[100] However, as he also explains, the Council's composition

93. Such as the possession of nuclear weapons. See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Rep. 226, at 254–5.
94. That is, by negotiating and acceding to treaties, and participating in the formation of customary international law.
95. See *Certain Expenses of the United Nations* (Advisory Opinion), [1962] ICJ Rep. 151, at 168.
96. *Namibia* case, *supra* note 68, at 22.
97. For a summary and analysis of the debate over whether acts of the Security Council can be judicially reviewed, see J. E. Alvarez, 'Judging the Security Council', (1996) 90 AJIL 1.
98. See R. Cryer and N. D. White, 'The Security Council and the International Criminal Court: Who's Feeling Threatened?', (2002) 8 *Yearbook of International Peacekeeping* 141.
99. Resolution 1422 is, however, less objectionable than Resolution 1373, in that its duration is not indefinite but limited to a period of 12 months.
100. Koskenniemi, *supra* note 1, at 338 (emphasis in original).

and powers are only justifiable on the basis of its specific – and limited – purpose.[101] The Security Council can only maintain its authority so long as it acts within its allotted role.[102] Once the Security Council starts imposing general and temporally undefined obligations on states, it is usurping a role that states have reserved for themselves. Moreover, given its composition and procedures, it is doing so in a way that erodes the principle of sovereign equality.[103]

101. *Ibid.*, at 339.
102. For discussion of the issue of the legitimacy of the Security Council's use of its authority, see Caron, *supra* note 37.
103. See B. Bowring, 'The Degradation of International Law?', in J. Strawson (ed.), *Law After Ground Zero* (2002), at 16–17.