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Taking Stock: Assessing the Current *Status* and Evolution of the United Nations Security Council's Legislative Resolutions

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Abstract

The present essay intends to provide for an in-depth analysis concerning the enactment of new legislative resolutions by the UN Security Council with a view to dealing with foreign terrorist fighters and Islamic State of Iraq and the Levant as well. It will be argued that, instead of voicing unweavering concerns about the Council's increasing tendency to resort to this specific tool, UN Member States have widely welcomed these resolutions, deeming them necessary and proportionate response to urgent threats faced by the International Community as a whole. Accordingly, this has generated a clear distinction between the previous legislative resolutions and the recent ones. As a result, by dwelling more specifically on States' utterances made during the meetings devoted to discuss these new general resolutions, it is argued that such resolutions are to be looked upon as subsequent practice pursuant to Article 31, paragraph 3(b) of 1969 Vienna Convention on the Law of Treaties (VCLT), which means that they are relevant in order to interpret Article 41 of the UN Charter. Ultimately, and based on the assumption that States are now more inclined to accept general obligations in the counter-terrorism's domain, the manuscript addresses the topic of how the UN Security Council should legislate in order to secure the widest acceptance possible and be in accordance with several International Law's requirements.

1. Preface

Twenty years have passed since the United Nations Security Council (hereinafter also UNSC or SC) adopted the so-called legislative Resolution 1373 (2001).[1] As is well known, this resolution provided for a general

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[1] cf M Fremuth and J Griebel, 'On the Security Council as Legislator: A Blessing or a Curse for the International Community?' (2007) 76 *Nordic Journal of International Law* 339; L Martinez, 'The Legislative Role of the Security Council in its fight against

framework for the imposition of sanctions by *all states* against any person who commits, attempts to commit or participates in the commission of terrorist act, freezing 'without delay funds and other financial resources' owned by such a person.[2] Specifically, the Security Council stated that states had 'to criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories', if these funds were intended to be used in order to carry out terrorist acts.[3] A similar pattern of resolution has been resorted to by the same Council this time to address the threat to international peace and security posed by the proliferation of nuclear weapons and arms of mass destruction. Indeed, under Resolution 1540 (2004), all states were ordered, *inter alia*, to take all necessary measures both to 'prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons' and to 'prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery'.[4] The Security Council also required States to enforce border control with a view to managing the spreading of illicit trafficking of nuclear-related material and items.

As one can aptly note, these two resolutions, instead of dealing with a concrete and specific situation amounting to a threat to the peace, a breach of the peace or an act of aggression under Article 39 of Chapter VII of the UN Charter,[5] prescribe general and abstract legal prescriptions; they are also supposed to be in force for an indefinite time (*sine die* obligations). The peculiar feature of these resolutions is that the Security Council has qualified international terrorism and nuclear proliferation as 'threats to the peace' *sic et simpliciter*. Such a use of its powers under Chapter VII of UN Charter is indeed somewhat problematic and it has fuelled an intense debate among scholars. Notably, the controversy mainly stems from the assumption that, when using its powers under Chapter VII, the Security Council must confine its action only in connection with specific situations.[6]

The aim of this article is to assess what the current *status* of the UNSC's legislative resolutions is and analyse their evolution. To this end, a brief overview of the content of the global measures will be provided in Section 2; the ensuing issues relating to the assumption of legislative powers by the Council will be investigated in Section 3 with a view to questioning to what extent the

Terrorism: Legal, Political and Practical Limits' (2008) 57 *The International and Comparative Law Quarterly* 333; P Szasz, 'The Security Council Starts Legislating' (2001) 96 *American Journal of International Law* 901; J Alvarez, 'The UN's War on Terrorism' (2003) 31 *International Journal of Legal Information* 238.

2 cf UN Doc S/RES/1373 (28 September 2001), para 1(c).

3 ibid, para 1(b).

4 cf UN Doc S/RES/1540 (28 April 2004), paras 1–3.

5 For a comprehensive analysis of this article, see, *among others*, J Frowein and N Kirsch, 'Article 39' in B Simma and others (eds), *The Charter of the United Nations: A Commentary* (OUP 2002) 717.

6 See C Tomuschat, 'Obligation Arising for States without or against their Will' (1993) 241 *Recueil de cours* 344–46.

Security Council is endowed with the competence to pass this kind of measures. Section 4 will be devoted to analyse the new phase of the Security Council's legislation aimed at dealing with the threats posed by foreign terrorist fighters. As will be proved in Section 5, these new general resolutions have been welcomed and widely sponsored by Member States, thus creating a clear distinction between the previous legislative resolutions and the recent ones. From this viewpoint, the research will be confined to the statements made within the UN Security Council. Before proposing some concluding remarks, Section 6 will explore the question about how the Security Council should legislate.

2. The content of Resolutions 1373 and 1540

The fight against international terrorism has represented one of the lynchpins of the Security Council's agenda particularly since the 11 September terrorist attacks occurred. As already stated, the bulk of the operative paragraphs of Resolution 1373, which is in force to fight the 'eternal war on terrorism'[7] even nowadays (*sic!*), consists of general measures unilaterally imposed to all states.[8] Basically, the Security Council dictated to curb any source of financing terrorist activities, imposing legally binding obligations to criminalise and punish those individuals collecting and/or raising funds, financial assets and economic resources to facilitate such activities; states were also expected to refrain from providing any form of financial support to terrorism. A committee was established to overview the implementation of the measures mandated. It is certainly not the first time that the Security Council establishes a subsidiary organ charged with the task of receiving reports by states. Indeed, these organs have become increasingly notorious in the context of the smart sanctions, albeit their competences are not entirely similar.[9] It is well known that the UN executive body had already branded international terrorism as threat to the peace, but this was actually made in relation to *specific situations*.[10] Instead

[7] See I Cameron, 'The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions' (2006) <CAHDI _ 2006_ 22 E Cameron report.PDF (coe.int)> accessed 12 October 2020, 20–21. See also G Sullivan, *The Law of the List* (CUP 2020) 27–30.

[8] See, generally, M Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *Leiden Journal of International Law* 593, 595.

[9] In addition of being responsible for receiving reports, the sanctions committees have to deal with the requests of assistance *ex* art 50 of the Charter, with the so-called humanitarian exemptions and, most importantly, they have to maintain and regularly update a list of natural and legal persons (listing process) as well as delete the same subjects whose maintenance in the list is no longer authorised. See, *ex multis*, F Alabrune, 'La pratique des comités des sanctions du Conseil de sécurité depuis 1990' (1999) 45 *Annuaire Français de Droit International* 225; A Ciampi, *Sanzioni del Consiglio di sicurezza e diritti umani* (Giuffrè 2007) 17–18 and 75–84.

[10] See, eg UN Doc S/RES/1214 (8 December 1998); UN Doc S/RES/1267 (15 October 1999); UN Doc S/RES/1333 (19 December 2000).

of handling a case-based situation, Resolution 1373 is intended to be applied to not geographically limited threats in order to make the UNSC able to address the ever-changing international threats to the peace. Not surprisingly, Resolution 1390, which specifically target Osama Bin Laden and Al Qaeda but is not linked to any State, has been adopted just few months later Resolution 1373.[11]

The same holds true with regard to the adoption of the Resolution 1540.[12] The Security Council laid down mandatory duties to prevent and suppress 'the proliferation of nuclear, chemical or biological weapons and their means of delivery' and imposed a series of penal and administrative obligations which UN members had to implement through legislative reforms of domestic law. Specifically, in relation to non-state actors, states were requested to make them unable to manufacture, acquire, possess, develop and use nuclear, chemical or biological weapons and to adopt 'appropriate effective national export and trans-shipment controls over such items'.[13]

Accordingly, the distinctive feature of these resolutions is that they attempt to regulate a global situation in a comprehensive way,[14] ie no matter if a situation of concrete threat really exists; moreover, they begin to also target non-state actors' activities rather than those only perpetrated by States (the so-called State-sponsored terrorism).[15]

[11] UN Doc S/RES/1390 (28 January 2002). According to L Ginsborg, 'UN Sanctions and Counter-terrorism Strategies: Moving towards Thematic Sanctions against Individuals?' in L Van den Herik (ed), *Research Handook on UN Sanctions and International Law* (Elgar 2017) 74, this Resolution is 'gournd-breaking' in that it imposes sanctions 'without any link to a specific territory or State'.

[12] About this resolution see, for an in-depth analysis, S Sur, 'La Résolution 1540 du Conseil de sécurité (28 avril 2004) entre la prolifération des armes de destruction massive, le terrorisme et les acteurs non étatiques' (2004) 108 *Revue Général de Droit International Public* 855; D Joyner, 'Non-proliferation Law and United Nations System: Resolution 1540 and the Limits of the Power of the Security Council' (2007) 20 *Leiden Journal of International Law* 489, according to whom general resolutions are acceptable only as exceptional response to urgent threats.

[13] See UN Doc S/RES/1540 (n 4), paras 2 and 3(d).

[14] In this sense, Abi-Saab asserts that the hallmark of any legislative action is the 'enactment of prospective, general, and abstract rules of conduct that bind all the subjects in the unlimited future'. cf G Abi-Saab, 'The Security Council as Legislator and as Executive in its Fight Against Terrorism and Against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy' in R Wolfrum and V Roben (eds), *Legitimacy in International Law* (Springer 2008) 109, 117. See also K Roach, *The 9/11 Effect: Comparative Counter-terrorism* (CUP 2011) 32.

[15] See UN Doc S/RES/731 (21 January 1992), deploring the destruction of Pan Am flight 103 and UTA flight 772; UN Doc S/RES/1189 (13 August 1998), condemning the terrorist bombings in Kenya and Tanzania; UN Doc S/RES/1214 (n 10), concerning the Talibans in Afghanistan.

3. The issues arising from the assumption, by the Security Council, of a legislative role

A. Article 39 of the UN Charter, peace and security

Before analysing states' *opinio iuris* concerning legislative resolutions, one should question whether this type of acts can be told to be in accordance with the UN Charter. Pursuant to Article 24(1) of the UN Charter, the Security Council is entrusted with the primary responsibility to maintain international peace and security. It detains discretionary powers to determine the existence of a threat to or a breach of the peace and what measures should be taken to curb it. Ever since the Security Council has been established, it has taken advantage of the indeterminacy related to the notion of 'threat to the peace' referred to in Article 39 in order to widely interpret such term both *ratione materiae* and *ratione personae*.[16] From a 'classic' notion relating to the presence of an international (interstate) conflict, over the past decades the SC has constantly moved toward an enlargement of the afore-mentioned term,[17] to such an extent that, recently, the spread of global infectious diseases has also been considered by the same organ (such as the Ebola crises occurred in 2014 and 2018), while, curiously enough, the current pandemic has been qualified as 'likely to endanger international peace and security'.[18] It is easy to argue, then, that Security Council has persistently broadened the determination under Article 39 in order to address the threat which is engaged with, so as to successfully accomplish its mandate under Article 24. For these reasons, some

[16] About the breadth of the term 'threat to the peace' see, comprehensively, Frowein and Kirsch (n 5), 717, 722 and 726; V Santori, 'The United Nations Security Council's (broad) Interpretation of the Notion of the Threat to Peace in Counter-terrorism' in G Nesi (ed), *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism* (Ashgate 2006) 89. The article under discussion also became the 'legal vehicle' allowing the Council to take some measures in respect of individuals, non-state actors and non-governmental entities. See, recently, L Borlini, 'The Security Council & Non-State Domestic Actors: Changes in Non-Forcible Measures between International Lawmaking and Peacebuilding' (2021) 61 *Virginia Journal of International Law* 489, 501–502.

[17] See the declarations of the former UN Secretary General K Annan, 'Towards a Culture of Peace' in F Mayor and R-P Droit (eds), *Letters to Future Generations* (UNESCO Publishing 1999) 15. For an accurate reference to the SC's relevant practice, see B Conforti and C Focarelli, *Le Nazioni Unite* (Kluwer 2018) 234–40. As Cohen points out, the Council based the enlargement under discussion upon 'community values rather than international peace per se'. cf J Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (CUP 2012) 270.

[18] It seems to be a clear recalling of art 33 of UN Charter's Chapter VI, as noted by M Arcari, 'Some Thoughts in the Aftermath of Security Council Resolution 2532 (2020) on Covid-19' (2020) 70 *Questions of International Law* 59. See also I R Pavone, 'Security Council Resolution 2532 (2020) on COVID-19: A Missed Opportunity?' (2020) 9 *European Society of International Law* 1. About the Ebola crises, see UN Doc S/RES/2177 (18 September 2014) and UN Doc S/RES/2439 (30 October 2018).

commentators have stated that, for the purpose of such article, the SC 'must be able to deal with abstract as well as specific threats to the peace'.[19]

Having regard to the Security Council's practice prior to the adoption of Resolution 1373, it appears that it only reacted to a specific situation; it never acted in a pre-emptive way.[20] This can be explained if one considers that, until the 1990s, peace was mainly interpreted as the absence of any conflict and, accordingly, it was seen in negative terms. The human security paradigm then emerged in the international legal order, postulating the need for a comprehensive approach to understand the sources of international instability, such as food, health, environment, personal security, community security and political security.[21]

Alongside this reasoning, if one assumes that the UN founding treaty can be seen as a living instrument, whose provisions have to be read in accordance with the ever-changing nature of the international legal order, the Security Council could take all the necessary steps to cope with the situation determined under Article 39, either concrete or general measures.[22] In this way, SC properly fulfils its responsibility and such article, in conjunction with Article 24 (1), is interpreted in a teleological manner so that an *effet utile* can be attributed to the cited provisions. However, as a counter-argument, it has to be recalled that, despite the fact that every UN organ interprets its own competence and jurisdiction,[23] such interpretation must receive the support of UN members and the relevance of Articles 24(2), 25 and 48 of the UN Charter must be therefore stressed. As will be observed, in the case of both Resolutions 1373 and 1540, states have considered as urgent the need to

[19] cf S Talmon, 'The Security Council as a World Legislature' (2005) 99 *American Journal of International Law* 175, 181. The Author's general reasoning is that the Council may determine any situation to be a threat to the peace, provided that there is a 'genuine link' between the measures mandated and the maintenance of international peace and security.

[20] According to Happold (n 8), 600, the SC's role is 'essentially reactive'.

[21] cf United Nations Development Program, *Human Development Report 1994: New Dimensions of Human Security* (1994), 24–25. The literature about the human security abounds. See, among others, M Mc Donald, 'Human Security and the Construction of Security' (2002) 16 *Global Society* 277; J Jones, 'Human Security and Social Development' (2004) 33 *Denver Journal of International Law and Policy* 92*;* R Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (CUP 2006) 72.

[22] This view is taken by those scholars who, at least to us, improperly consider the Charter as the Constitution of the International Community as a whole. Among the most influencing Authors, see B Sloan, 'The United Nations Charter as a Constitution' (1989) 1 *Pace International Law Review* 61; P M Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', (1997) 1 *Max Planck Yearbook of United Nations Law* 1; B Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529.

[23] Cf. *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep, 167–68.

combat terrorism and nuclear proliferation but not necessarily shared the means employed.

B. States' reactions towards general and global resolutions

As previously indicated, the assumption of legislative powers has not remained unnoticed and has fuelled a heterogeneous academic debate regarding the following question: Can the Security Council, in the exercise of its functions, assert that a general situation amounts to a threat to the international peace and security? As far as the UN Charter is concerned, some authors emphasise that nothing in its provisions impedes the Security Council to act in this way.[24] They thus deny that the Security Council should refrain from dealing with the general situation and from imposing upon states abstract obligations. This would be all the more so if one considers that Article 41 allows the SC to take appropriate measures as long as they do not involve the use of force (so-called 'short of war measures'). The list therein is in fact a negative and an illustrative one and can 'include both specific and general obligations'.[25]

However, the same is true if one takes the opposite view. Indeed, the UN Charter does not *expressly* provide with a legal basis neither for the adoption of such resolutions nor for legislative powers to be used by its executive organ. Consequently, some scholars have often underlined the *ultra vires* nature of these resolutions, arguing that, under Chapter VII, the UNSC's powers must be exercised with regard to specific situations and to what is strictly required for a peace-enforcement operation, an idea to which we totally adhere.[26]

[24] M Wood, 'First Lecture: The Legal Framework of the Security Council' (2006) available at <www.lcil.cam.ac.uk> accessed 24 October 2020, 7–9; Talmon (n 19), 192, suggests that global legislative resolutions enable the Security council 'to take a pre-emptive approach to the discharge of its responsibility under the Charter'.

[25] See J Frowein and N Kirsch, 'Article 41', in B Simma and others (n 5), 735–40; J Crawford, *Chance, Order, Change: The Course of International Law* (Nijhoff 2014) 426–27. Furthermore, Martinez (n 1) 335, concludes that, in order to interpret art 41, the legislative resolutions can be considered as subsequent practice under art 31(3)(b) of the Vienna Convention on the Law of Treaties (1969). About the negative nature of the illustrative list in art 41, see, specifically, *Prosecutor v Dusko Tadić*, ICTY, Decision IT-94-1-AR72, (2 October 1995), para 35.

[26] One cannot but refer to the impressively intense criticism made by Professor Arangio-Ruiz concerning the increasing tendency of the Council to assume powers not accorded to it by the Charter. Notably, he persuasively argued that the Council 'can dispose of the rights of the states for what is essentially required by the peace-enforcement actions, not law-making, law determining'. See G Arangio-Ruiz, 'On the Security Council's Law-Making' (2000) 83 *Rivista di Diritto Internazionale* 609, 723–24. Similarly, K Zemanek, 'Is the Security Council the Judge of Its Own Legality?' in E Yapko and T Boumedra (eds), *Liber Amicorum Mohammed Bedjaoui* (Brill 1999) 636–37, arguing that the UNSC's action cannot result in passing 'abstract prescription of future rules of general conduct for an indefinite period of time'. With particular regard to the legislative resolutions, see Szasaz (n 1), 901, observing that such resolutions are not in accordance with the UN Charter as it does not assign to the Security

Having prepared the ground for the analysis, it is now time to consider the discussions within Security Council, as they can be regarded as the expression of UN members' *opinio iuris.* As regards Resolution 1373, states did not protest simply because they were not afforded the opportunity to do so. The Security Council did not arrange any prior debate, leaving States without chance to express their positions about this 'historic decision', as the representative of Germany suggested.[27] The text of the resolution was prepared by the USA and sponsored by its allies. Through the sponsoring process, a certain number of states decide to back the act either by directly participating in its drafting or by showing political support:[28] the more the numbers of states will be, the higher is the level of legitimacy of the Security Council's action. That being said, in relation to the Resolution 1373, several meetings were organised *after* its adoption, where states discussed the implications of the global legislation for the fight against terrorism. In this scenario, the resolution has been qualified as 'necessary step' that pursued 'unprecedented scope' and offered 'solid basis for international community to counter international terrorism'.[29] During the first meeting devoted to informing the counter-terrorism committee about the national and regional steps taken in implementing Resolution 1373, states reiterated the 'ambitious new path' providing for 'an agenda for resolute and systemic action in combating terrorism'.[30]

In a nutshell, *two* are the main reasons as to why states did not manifest their opposition against this resolution: (i) the lack of prior consultation and (ii) the great momentum against terrorism, as it came about in a post-9/11 scenario.

Acting as a treaty-promoter, the UNSC has made several measures legally binding upon states, which were already enshrined in counter-terrorism international treaties, such as the International Convention for the Suppression of the Financing of Terrorism (ICSFT).[31] These conventions, at the time in which Resolution 1373 was enacted, were not signed or ratified by the majority of states.[32] This entails that the Security Council has acted in such a way as to circumvent the conventional rules regarding the

Council law-making powers. *Contra*, see, authoritatively, E Rosand, 'The Security Council as "Global Legislator": *Ultra Vires* or Ultra Innovative' (2003) 28 *Fordham International Law Journal* 542, 556–57.

27 See UN Doc S/PV 4394 (2001), 6. Similarly, see UN Doc S/PV 4413 (2001) France and UK 15.

28 See M Wood, 'The Interpretation of Security Council Resolutions, Revisited' (2017) 20 *Max Planck Yearbook of United Nations Law* 1.

29 See UN Doc S/PV 4413 (n 27), Jamaica 3, Russia 11 and Tunisia 13. The USA stressed that the resolution is a 'mandate to change fundamentally how the international community responds to terrorism' 16.

30 See UN Doc S/PV 4453 (2002), 7 and 15. In addition, see UN Doc S/PV 4453, Resumption 1 (2002), Russia 7 and Mexico 26.

31 As noted by J Alvarez, 'Hegemonic International Law revisited' (2003) 97 *American Journal of International Law* 873, 875, '[t]he Council did not limit itself to the measures that consensus document … and chose not to wait until that Convention secured sufficient state parties to enter into effect'.

32 At the relevant time, only four States were parties to the Convention. As of today, 188 States are parties to this convention, which is a tangible result of Resolution 1373. In

international law-making process, namely the free consent towards treaty-based obligations.[33] Several authors nevertheless advocated the *intra vires* nature of legislative resolutions as 'innovative' use or as '*laboratoire d'expérimentation*' of the UNSC's powers under Chapter VII,[34] emphasizing the following general assumption: the more serious the threat, the more the powers to deal with it.

As a result, the UNSC wanted to fill a normative lacuna in international law, relying on the preliminary assessment concerning the states' inability to cope with the situations covered by the relevant resolutions *uti singuli*[35]; unsurprisingly, Resolution 1373 has been defined as a 'universal convention'.[36] However, we take the view that the *political and pragmatic grounds*, which uphold the UNSC's efforts in the field of the maintenance of international peace and security, cannot be viewed as a *valid legal reason* for disregarding the aforementioned conventional rules and resorting to powers other than those relating to the peace-enforcement's actions.[37]

The situation is rather different with regard to Resolution 1540. First, even before it was adopted, some states voiced their concern about the global legislation passed by the UNSC, as they believed it not to be consistent with the Charter. India claimed that it was concerned 'over the increasing tendency of the Council in recent years to assume new and wider powers of legislation on behalf of the international community'.[38] Pakistan questioned as to whether the

this regard, Singapore noted that 'more and more countries are ratifying the key conventions in the battle against terrorism'. UN Doc S/PV 4512 (2002), 4 and Canada 22.

33 See, N Krisch, 'The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council' in C Walter (ed), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Springer 2003) 884, arguing that the Security Council 'has in fact replaced the conventional law-making process on the international level'. See also UN Doc S/PV 4950 Resumption 1 (2004), Namibia 17, whose representative asserted that any potential gap in international law 'can be filled by multilateral negotiated instruments and should not be filled by Council measures'.

34 See, precisely, Rosand (n 26) 545. The second expression belongs to S Szurek, 'La lutte internationale contre le terrorism sous l'empire du chapitre VII : un laboratoire normatif' (2005) 109 *Revue Général de Droit International Public* 5, 5.

35 Szasz (n 1), 905 welcomes the useful effects of the global legislations for the international community 'whose ability to create international law through traditional processes has lagged behind the urgent requirements of the new millennium'. Likewise, see Alvarez (n 33) 887.

36 L Condorelli, 'Les attentats du 11 septembre et leurs suites: où va le droit international' (2001) 105 *Revue Général de Droit International Public* 834.

37 Indeed, Rosand (n 26) 548, admits that the assumption of legislative competence can be mostly supported 'from a *purely pragmatic* perspective' (emphasis added). 'Practical considerations' as basis for the Council's global action have been also advocated by A Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion' (2007) 17 *European Journal of International Law* 881, 888, adding that, when an urgent normative response is needed, traditional law-making process is 'ill-suited to produce general law in a short time span'. *Contra*, see Abi-Saab (n 14), 120–21; Conforti and Focarelli (n 17) 275–77.

38 See UN Doc S/PV 4950 (2004), 23–24. For similar comments see UN Doc S/PV 4950 Resumption 1 (n 33) Mexico 5.

Security Council had 'the right to assume the role of prescribing legislative action by Member States'.[39] Indonesia and Iran expressed similar remarks, arguing that global legislation was 'not consistent with the provisions of the United Nations Charter' as it 'does not confer authority on the Council to act as a global legislature imposing obligations on States'.[40] The argument is quite straight-forward: according to these states, the legislative resolutions can be considered *ultra vires* in that they are adopted beyond the law of the United Nations, ie in usurpation of the functions bestowed by the UN Charter to the General Assembly. As a matter of fact, if one resorts to the systematic interpretation of Articles 10, 11 and 13 of the Charter, it is the General Assembly that seems to have the resemblance of a legislative organ.[41] From this perspective, Japan explained that 'the Security Council should be cautious not to undermine the stability of the international legal framework', because, resorting to a law-making process, could entail the risk of the distribution of power under the Charter of being altered, considering that the legislation should be enacted by a better-suited organ, such as the UN General Assembly.[42]

Secondly, states raised again the question of the circumvention of the treaty-making process. To start with, the SC, through the resolution under discussion, clearly tried to fill a gap in the domain of non-proliferation, that is to say, the non-access and non-transfer of weapons of mass destruction to non-State actors. Against this background, several states categorically denied the assumption of a law-making role because they did not want their sovereignty to be restricted by acts prepared within an organ composed of 15 members only, whose accountability remains unchallenged and whose deliberations are not affected by any direct judicial review.[43] In this regard, Pakistan stated that the Council was 'not the most appropriate body to be entrusted with the authority for oversight over

[39] UN Doc S/PV 4950 (n 38) 15, and again in UN Doc S/PV 4956 (2004) 3–4.

[40] UN Doc S/PV 4950 (n 38) 31–32.

[41] By virtue of art 11 of the UN Charter, the General Assembly is mainly entitled to discuss and consider 'general principles of co-operation' regarding the maintenance of peace and security. More importantly, pursuant to art 13, both the codification of international law and its progressive development rest with the same organ. As a consequence, some Authors assert the *ultra vires* nature of the legislative resolutions as passed in usurpation of the General Assembly's competences. See B Elberling, 'The *Ultra Vires* Character of Legislative action by the Security Council' (2005) 2 *International Organizations Law Review* 337, 342–43; Happold (n 8) 595 and 600–01, who considers the Charter as a Constitution *strictu sensu*, ie as assigning 'particular roles to the various organs of the United Nations'.

[42] UN Doc S/PV 4950 (n 38) 28. Moreover, by a quite clear expression, Professor Koskenniemi argued that the Security Council has maddled with the General Assembly's prerogatives under the UN Charter. In other terms, the Police has entered into the Temple. See M Koskenniemi, 'The Police in the Temple. Order, Justice and UN: A Dialectical View' (1995) 6 *European Journal of International Law* 325.

[43] The question of the judicial review in relation to the legality of SC's action is of course outside the scope of this paper. With particular regard to the possibility to seize the ICJ in order to scrutinise legislative resolutions see Elberling (n 41) 353.

non-proliferation or nuclear disarmament', while India indicated its unwillingness to 'accept any interpretation of the draft resolution that imposes obligations arising from treaties that India has not signed or ratified' and Nepal noted that Council was 'seeking to establish something tantamount to a treaty by its fiat'.[44] Had legislative resolutions been used in order to foster international cooperation in General Assembly, they would have been perceived as less intrusive within states' municipal legal orders and as a starting point for future international conventions.[45]

Other States, while sharing the same arguments, ultimately accepted this resolution as an urgent need in order to face an urgent threat. The declaration of the Philippines went in this direction in observing that 'this resolution deviates from time-tested modes of creating multilateral obligations but my delegation essentially regards it as an exceptional measure', joined by Algeria, whose representative, after noting that the Security Council is not vested with the mandate to legislate under the UN Charter, emphasised that it was 'acting in an exceptional manner'.[46] The entire reasoning is also well summarized by Switzerland: '[i]n principle, legislative obligations should be established through multilateral treaties [...]. It is acceptable for the Security Council to assume such a legislative role only in exceptional circumstances and in response to an urgent need'.[47] In other terms, only the need of urgent action is liable to justify the imposition of global obligations, which, as a matter of principle, should be multilaterally negotiated.

Thirdly, the issue of the relationship between Chapter VII and the item of the resolution. From this viewpoint, states underlined that the resolution 'should not need to invoke Chapter VII of the Charter'.[48] This was so for two reasons: (i) the possibility that Council could authorize the use of force in case of disregard of the resolution, as for the case of Algeria, saying that it was unnecessary 'to take action under Chapter VII'.[49] The choice to refer to this Chapter was defined as 'incomprehensible' by Nepal, while Cuba went even further in stating that 'some Power might interpret the adoption of this text to be a preauthorization or a justification for the unilateral use of force against given States'.[50] Although this reasoning is not entirely clear, as every binding measure

[44] UN Doc S/PV 4950 (n 38) 15 and 24; UN Doc S/PV 4950 resumption 1 (n 38) 14.

[45] cf UN Doc S/PV 4950 (n 38) Cuba 30; UN Doc S/PV 4950 Resumption 1 (n 33) Egypt 2, Namibia 17.

[46] UN Doc S/PV 4950 (n 38) 3 and 5, reaffirming the 'exceptional nature' in UN Doc S/PV 4956 (n 39) 7.

[47] UN Doc S/PV 4950 (n 38) 28 and Singapore 25 ([w]e agree that a multilateral treaty regime would be ideal. But time is not on our side. Urgent action is needed).

[48] ibid 4.

[49] ibid 5.

[50] See, respectively, UN Doc S/PV 4950 Resumption 1 (n 33) 14; UN Doc S/PV 4950 (n 38) 30. On this subject cf E Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraq Crisis' (2007) 56 *International & Comparative Law Quarterly* 83. cf also, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*

enacted by the Council must invoke Chapter VII, we believe that these states feared that other States may purposely infer erroneous consequences from the misinterpretation of the concerned resolution, implying the risk that they could pursue unilateral action on behalf of the Security Council, (ii) the perception that the threat was certainly worth of being addressed, but was less real than the terrorism *sic et simpliciter*. In fact, Pakistan argued that the threat the Council was dealing with was not 'imminent', thus not amounting to a threat to the peace under Article 39 of the Charter.[51] It is understood that the reason behind this severe criticism is due to the fact that Pakistan, not being a party of any anti-proliferation treaty, perceived the resolution, especially a legislative one, as greatly intrusive in its municipal legal order.

In the light of the above, one cannot talk about any *ex post* acceptance deriving from the role of the acquiescence, because several states, when discussing over the adoption of Resolution 1540, made one thing clear: this kind of resolution cannot become the regular practice of the UNSC, but rather is a special and urgent one.

To conclude, elaborating over the different nature of reaction, one should pay attention to the following considerations: (i) the *item* of the resolutions. On the one hand, Resolution 1373 was adopted first to react to the horrible 9/11 events (ie to an event that already happened) and secondly to prevent similar attack from happening again; on the other, Resolution 1540 was meant to address a threat that several states perceived as less real, (ii) as the discussions about Resolution 1540 proved, states thought that, after enacting Resolution 1373, Security Council would not legislate again. They supported that Resolution because the 9/11 events shook so profoundly states' consciousness that even a general and global resolution was perceived as a necessary tool.[52] A final note is worth of being mentioned: as States' reaction towards Resolution 1540 proved, they are less inclined to lend support to general resolutions addressing topics other than terrorism. The following Sections will deal with this finding.

4. Security Council (re)starts legislating: the need to tackle foreign terrorist fighters' actions

After enacting Resolutions 1373 and 1540, a lengthy stalemate in the UNSC' legislation occurred until a new non-state actor capable of causing a considerable threat to international peace and security emerged: the *foreign terrorist fighters* (hereinafter also FTFs). In a couple of years, from 2014 to 2019, four legislative resolutions have been adopted by the UNSC, in order to face the growing concern about foreign fighters' terrorist acts and, most importantly,

notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep, 41, paras 114–15.

[51] UN Doc S/PV 4950 (n 38) 15.

[52] UN Doc S/PV 4710 (2003), Croatia 7: 'Those acts [9/11 events] shook the foundations of the world order'.

their alignment with the self-proclaimed Islamic State of Iraq and the Levant (ISIL). In this case, it can be argued that the UNSC has overstepped the pattern of the previous legislative resolutions, insofar as, under international law, the foreign terrorists' activities were not regulated neither by any treaty nor by general international law, thus creating *ex novo* general and abstract obligations. As will be noted, these resolutions received significant endorsement by states, which considered them as necessary and proportionate in relation to the urgent threat faced by the International Community.

When unanimously passing Resolution 2170, members of the security Council showed a solid will in deploring '[the] continued threat posed to international peace and security by ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida'.[53] Acting under Chapter VII, the SC has mandated additional measures with particular regard to ISIL and the destabilising presence of the FTFs.[54]

To start with, considering that ISIL has been branded as a 'splinter group' of Al-Qaida, Resolution 2170 is intended to extend the Al-Qaida sanctions regime to legal and natural persons whose activities are affiliated with ISIL or ANF. As a matter of fact, the Security Council has reiterated the states' *general* obligations to prevent and suppress the financing of terrorism under Resolution 1373, which now includes ISIL and ANF financial activities, such as the trafficking of oil and the controlling of related infrastructures.[55] As the representative of Iraq correctly observed, 'the importance of the resolution lies in the fact that it combines all previous resolutions on combating terrorism and focuses the efforts of Member States in combating ISIL'.[56]

As regards foreign terrorist fighters, the UNSC has appealed to states to take the necessary measures devoted to ensure that foreign fighters are unable to use their territories in order to join terrorist groups, and has expressed its readiness to include in the black-lists those who facilitate or finance both recruitment and moving of foreign fighters.[57] Moreover, it has recommended to initiate effective procedures of border control and, for this purpose, to foster international co-operation.[58] These measures constitute a sort of prelude to the general framework that the SC will improve by means of Resolution 2178.

Admittedly, through this resolution adopted by unanimity, the UN executive body, invoking Chapter VII, has prescribed general obligations upon states to cope with the abstract threats posed by foreign fighters and by all forms of

[53] UN Doc S/RES/2170 (15 August 2014), para 1 and preamble (18).

[54] The first time the Security Council manifested its concern about the emerging presence of the foreign terrorist fighters was in a presidential statement, in which it addressed their activities relating to the illicit trafficking of oil. See UN Doc S/PRST/2014/14 (2014). About the fighting against this peculiar phenomenon see, for a very detailed analysis, A De Guttry, F Capone and C Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer 2016).

[55] UN Doc S/RES/2170 (n 53) paras 11–13.

[56] UN Doc S/PV 7242 (2014), 8.

[57] UN Doc S/RES/2170 (n 53) paras 7 and 9.

[58] ibid, para 8.

terrorism, not just the international one, as the preamble significantly highlights.[59] Interestingly enough, the resolution also provides for a definition of foreign fighter, that is, a person 'who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training'.[60] These persons are *directly* addressed by the UNSC and are *demanded* to 'disarm and cease all terrorist acts'.[61]

Drawing on precedent legislative resolutions, states have to comply with the terms of Resolution 2178 by criminalizing specific activities and by adopting and/or amending their domestic legislations. Accordingly, they have to duly punish their nationals and any individual 'who travel or attempt to travel' to other states with the aim of preparing, participating or planning terrorist acts; if the nationals raise or provide funds intended to be used to finance the travel or the training of foreign fighters, they have to be treated accordingly.[62] As one can expect, all these persons committing such activities can be listed in the Al Qaida sanction List and be subject to the freezing of their financial assets.[63]

Moreover, states must take certain preventive measures in order to keep foreign terrorist fighters outside their territories, as long as reliable clues have been collected to determine that the person concerned will likely carry out a terrorist act. For example, it appears to be of the utmost importance that Security Council has laid down the duty (i) to initiate effective border patrolling

[59] UN Doc. S/RES/2178 (24 September 2014), preamble (1) (2) and (22). M Milanovic, 'UN Security Council adopts Resolution 2178 on Foreign Terrorist Fighters' (2014) *EJIL:Talk!* <www.ejiltalk.org/un-security-council-adopts-resolution-2178-on-foreign-terrorist-fighters/> accessed 10 November 2020, has in fact noted the 'potential for abuse inherent in some of the provisions of the resolution' in that all forms of terrorism are being banned.

[60] UN Doc S/RES/2178 (n 59), preamble (8).

[61] ibid, para 1. This apparently ambiguous paragraph has been the object of the analysis conducted by A Peters, 'Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person, Part I' (2014) *EJIL: Talk!* <www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal person-part-i/> accessed 10 November 2020. Arguably, she submitted, from the textual interpretation of the resolution, which foresees clear and explicit obligations at least with regard to such paragraph, it can be said that it constitutes 'the legal basis for everyone's obligation not to commit terrorist acts'. The verb 'demands' is being incrementally used by the Security Council, supposedly, with the intention to issue binding injunctions to individuals, undertakings and non-state actors. See Borlini (n 16) 527–30.

[62] UN Doc S/RES/2178 (n 59) para 6(a) and (b).

[63] It is relevant to stress that, in 2015, the Security Council has passed Resolution 2253, extending the scope of Al Qaeda sanction regime to include ISIL. As of today, therefore, this regime is called ISIL (Da'esh) & Al-Qaida Sanctions regime, with subsequent transformation of the black-list from Al Qaeda Sanctions List to ISIL (Da'esh) & Al-Qaida Sanctions List. cf UN Doc S/RES/2253 (17 December 2015), para 1. According to Ginsborg (n 11) 82–86, this act could serve as basis for the Council to pass thematic resolutions in respect of individuals.

operations, (ii) to gather travel data and (iii) to make sure that identity papers and travel documents are not being fraudulently utilised.[64]

To thwart heinous attacks conducted by FTFs, Resolution 2396 (2017) has set up an even greater sanctions regime, enriched by measures seeking to elaborate a comprehensive approach based on two main pillars: on the one hand, the strengthening of preventive measures and, on the other, the fostering of international judicial co-operation. The first pillar, which is legally binding for UN members, precisely consists of enhanced controlling activities, such as the duty to arrange advance passengers information (API), as provided by International Civil Aviation Organization (ICAO).[65] The API would serve the purpose to make states able to timely trace the foreign terrorist fighter's movements, identifying his/her attempt to entry into, transit through, or depart from their territories. In a similar vein, the SC has issued binding obligations concerning the duty to 'develop the capabilities to collect, process and analyse' passenger name record (PNR) data and biometric data as well.[66]

As for the second pillar, paragraph 5 stipulates that states are *called upon* to timely exchange relevant information concerning the movements and the financial activities of foreign fighters so as to properly identify them; additionally, both PNR data and watch lists should be circulated through 'bilateral or multilateral mechanisms'.[67] In this way, the UNSC pursues the aim of addressing the issues arising out from the returning or relocation of foreign fighters and their families, especially those formed in conflict zone, urging states to take the appropriate measures in order to investigate them and, where necessary, to prosecute them in accordance with applicable international as well as domestic law.

The last relevant legislative act enacted by the SC is Resolution 2462 (2019) (invoking Chapter VII, unanimously adopted). Recalling states' obligations under Resolution 1373 and 2178 to establish criminal offences about the travel, recruitment and financing of foreign fighters, the same body has once again underlined the urgent need to pass domestic legislation in order to criminalise the provision or collection of funds and economic resources intended to be used with a view to carrying out terrorist acts by either organizations or individuals and entities.[68] As regards the contrast to FTFs, SC has issued some recommendations, which are germane to the efficient exchange of information and intelligence material about their movements and relocations, thus calling for a better

[64] UN Doc S/RES/2178 (n 59) para 2.

[65] UN Doc S/RES/2396 (21 December 2017), para 11. The reason lying behind this decision is that FTFs 'may use civil aviation both as a means of transportation and as a target, and may use cargo both to target civil aviation and as a means of shipment of materiel'. ibid, preamble (25).

[66] ibid, para 12. These measures must be implemented in full respect of both ICAO recommendations and international human rights law. As for the biometric data, they include 'fingerprints, photographs, facial recognition'. ibid, para 15.

[67] ibid, paras 12–13

[68] UN Doc S/RES/2462 (28 March 2019) para 5.

international co-ordination in the counter-terrorism context.[69] What is certainly worth noting is that not only the fight against FTFs and terrorism must be conducted in a manner consistent with states' obligations under relevant international human rights law, but also that the SC has, for the first time ever, invited states to take into due consideration 'the potential effects of counter-terrorism measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors'.[70]

5. The substantial acceptance of newer legislative resolutions

At this stage, the significant point we would like to underscore is that, from the in-depth analysis of the relevant statements concerning the approval of the new general resolutions, any criticism whatsoever can be inferred in relation to the exercise of legislative powers by the Council.[71] Quite the contrary, during the meetings held *after* the adoption of the concerned resolution, UN members have largely lent support to the UNSC's efforts to combat the challenging threats posed by FTFs and have considerably welcomed the resolutions as urgent and necessary global response to curb ISIL. For illustrative purposes, it has to be stressed that the Resolution 2178 has in fact received wide endorsement by more than 100 States, thereby causing an increase of legitimacy of SC's global legislation. The meeting arranged by the President of the Security Council, Mr Barack Obama, was a high-level one, as it saw the participation of a huge amount of Kings, Presidents and/or Heads of State, whose precious statements have been issued following the immediate unanimous approval of the resolution. They clearly underlined the importance of adopting a resolution that sets an 'appropriate global strategy', a 'normative framework' and a 'timely response' to combat both the Caliphate and FTFs.[72]

[69] ibid, paras 19 and 28.

[70] ibid, para 24. From this point of view, the UK truly appreciated 'the fact that we have addressed those issues for the first time in this Chapter VII counter-terrorism resolution'. cf UN Doc S/PV 8496 (2019), 11.

[71] The only critical comments were issued by the representative of Syria, stating that '[t]oday's resolution 2170 (2014) was not discussed with Syria during its drafting phase'. See UN Doc S/PV 7242 (n 56) 8.

[72] See UN Doc S/PV 7272 (2014). Mr Obama opened the meeting stating that 'we must come together as nations and an international community to confront the real and growing threat of foreign terrorist fighters' 3. The urgency and the need to have a cohesive response by the International community was underlined by Nigeria 5, Rwanda 10, UK 14, EU 29 and United Arab Emirates 39. The representative of French applauded the Resolution as 'it defined a global strategy for combating terrorism' 6, while Chad described it as 'a new step' enabling states to curb a phenomenon that affects the entire world 6. Algeria and India commended the measures decided by the SC as they represent 'appropriate international response to terrorism" and establish "a new legal and normative framework' 31 and 40. Netherlands stated that '[it] sends a strong signal that we stand shoulder to shoulder to confront the threat posed by foreign terrorist fighters' 25. Ultimately, the representative of the

If we take into account Resolution 2396, we note that it has been sponsored by 66 States and that some of them have considered it a milestone in the fight against terrorism, while others emphasised the need for an enhanced multilateral co-operation regarding the sharing of information and the assistance to states that need it. For example, both USA and Russia agreed in affirming 'the need to share a range of information' and to 'act collectively' as the only way to attain considerable results.[73]

As for Resolution 2462, even though 69 States sponsored it—thus receiving less backing than 2178—, the SC arranged a meeting, convened by France, which was attended not only by a large number of nations, but also by a group of experts invited in accordance with rule 39 of the Council Provisional Rule, including a member from the UN Office of Counter-terrorism, the Permanent Observer of the Red Cross, the delegation of the European Union and the African Union as well. The overwhelming majority of States stressed the 'great momentum' provided by the resolution and indicated how vital it is 'to further strengthen the sharing of information among States in order to keep up with evolving technology and the expansion of the areas in which terrorists operate'; Italy also highlighted the aim of 'harmonizing existing rules and recommendations' of the counter-terrorism legal framework.[74]

Importantly, all these meetings have made true the reasoning of some authors who called for an intense debate and a greater involvement in the meetings of the Security Council in relation to the adoption of general measures, especially for non-members states of this organ, which are invited pursuant to Rule 37 of the SC provisional rules of procedures, considering that global legislation as such affects every UN member's interests.[75]

One cannot but note, therefore, that two elements concur in determining the pattern of the newer legislative resolutions: (i) the draft resolution is co-sponsored by a large number of states and not by the permanent member alone

Holy See warned the Council that 'international cooperation must also address the root causes of international terrorism' 33.

[73] cf UN Doc S/PV 8148 (2017), 3 and 6. According to the representative of Italy, the aim of the resolution is to solve the 'problem of returnees through the adoption of balanced and effective measures' 5 (similarly France 6). Uruguay was very clear in encouraging 'States that are able to do so and the competent bodies of the United Nations to provide assistance to States that need and request it' 8. The only critical remarks were formulated by the representative of Egypt, who complained about the 'prescriptive language' of para 3 of the resolution and about the imposition of 'new and costly obligations on all States' [in relation to operative paragraphs 12 and 15] 4.

[74] The relevant statements are contained in UN Doc S/PV 8496 (n 70). See, Indonesia 9, Poland 11, Italy 34, Japan 37, EU 41, Cuba 56 and the Permanent observer of AU 63. The United Nations Office of Counter-Terrorism (UNOCT) underlined that 'only through strong collaboration and targeted efforts can we achieve concrete results in our fight against terrorism and terrorist financing' (3).

[75] See, *inter alios*, Martinez (n 1) 353, according to whom 'any future normative resolution should follow this precedent [the Author is referring to Resolution 1540]'. Talmon (n 19) 186 suggests that, pursuant to art 31 of the UN Charter, Member States have to be granted the 'opportunity to express their views'.

(1373) or by the states sitting in the Security Council at the relevant time (1540), (ii) all these states are invited to formal meetings where, together with other states and individual experts, the official statements are collected; however, such meetings take place only after the resolution, though widely sponsored, has been already adopted. One possible explanation that can help understand the absence of criticism is that states take advantage of some expressions such as the fight against 'terrorism', not only 'international terrorism'.[76] This means that states are happy to use UNSC legislation for their own ends, such as cracking down on domestic dissent, given that they 'apply notoriously wide, vague or abusive definitions of terrorism'.[77] Consequently, all these resolutions give raise to quite relevant concerns as they 'may be used by states to nefariously target those who disagree with them in new and highly coercive ways'.[78] The lack of clarity of certain words is also extremely dangerous, considering that the binding measures the UNSC mandates clearly fall within the scope of Article 25 and Article 103 of the UN Charter, which can be used as a legal shield in order to disregard any other international obligation.

Another reason that sheds some light on the states' posture towards newer legislative resolutions is that the fight against terrorism is now perceived as a *general interest* for the international community as a whole, while the adoption of 1373 provided for a great momentum only. At that time (2001), in fact, the collective interest in combating terrorism was only *emerging*, meaning that it has been consolidated over the years[79]; as proof of this evolutive trend, since

[76] A comprehensive definition of what constitutes an act of terrorism under international law is still lacking. The Special Tribunal for Lebanon defined terrorism in the following terms: '(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element'. Cf. *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, (16 February 2011), STL-11-01/I, para 85. For a critical comment about the Special Tribunal's ruling see, *inter alios*, K Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?' (2011) 24 *Leiden Journal of International Law* 655.

[77] In this vein, see M Scheinin, 'Back to 9/11 panic? Security Council resolution on foreign terrorist fighters' (2014) *Just Security* <www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/> accessed 10 November 2020. The Author has qualified Resolution 2178 as a 'huge backlash in the UN counter-terrorism regime'.

[78] F N Aoláin, 'The UN Security Council, Global Watch Lists, Biometrics, and the Threat to the Rule of Law' (2018) *Just Security* <www.justsecurity.org/51075/security-council-global-watch-lists-biometrics/> accessed 18 November 2020.

[79] This specific topic is addressed by V J Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention*, (Bloomsbury 2012). She argues that international rules regarding the prevention as well as the repression of terrorism give raise to *erga omnes* obligations. In this sense, see also the declaration of Ireland regarding Resolution 1373, affirming that '[the fight against terrorism is now, so to

resolution 2170 (concerning the terrorism in general and ISIS–FTFs in particular), states no longer question the permanent measures set forth therein. Furthermore, in the declarations of states, several references are made to the 'shared' effort of the international community to defeat the scourge of terrorism, and the 'shared' nature of the threat to be faced is often emphasised.[80]

With these considerations in mind, taking into account the fact that UN Member States acquiesced legislative resolutions, the latter can be qualified as 'subsequent practice' pursuant to Article 31, paragraph 3(b) of Vienna Convention on the Law of Treaties (VCLT) and can be helpful to interpret Article 41 of the UN Charter, as the ICJ clarified in a series of landmark rulings. The ICJ, in fact, stated that (i) every UN organ determines its own jurisdiction,[81] (ii) the practice of the UN organs, such as the Security Council, is relevant, especially when not contested, to interpret a provision of UN Charter, as for the abstention rule concerning Article 27(3),[82] (iii) the rules enshrined in the Vienna Convention are applicable to the UN Charter itself, as it is a multilateral treaty, 'albeit a treaty having certain special characteristics'.[83]

Based on these premises, the International Law Commission, in its 2018 report on the subsequent practice for the purpose of treaty interpretation, noted that such practice can arise from the conduct of an organ of the international organization if States react in such a way as to support the conduct in question.[84] Conversely, an act that is adopted despite the opposition of certain Member States is liable to constitute subsequent practice for the purpose of interpretation, but not as a practice establishing an agreement between the parties and thus as an authentic means of interpretation.[85] From this perspective, it is relevant to stress, once again, that the newest legislative resolutions have faced no opposition. In addition, as the ILC suggested, subsequent practice has also the effect to confirm that an 'evolved understanding' of a certain provision is agreed upon by Member States.

The above considerations permit to assert that the evolutive interpretation of Article 41 of the UN Charter, based upon the subsequent practice of the UNSC supported by States, is able to legally justify the adoption of general resolutions but only for the *strict purpose* of regulating the *fighting against terrorism*, which states deem to be a collectively shared effort. States' utterances with regard to Resolution 1540 make this finding more substantiated, considering that, besides

speak, a global public good and is almost universally regarded as such. That perception must be strengthened, not diminished, over time'. Un Doc S/PV 4512 (n 32) 16.

80 See, for instance, UN Doc S/PV 7272, (n 72) France 6, Chad 7, and China, expressing that Resolution 2178 reflects 'the common will of the international community'. See also UN Doc S/PV 8148, (n 73) Uruguay 8.

81 *Certain expenses*, (n 23) 167–68.

82 *Legal Consequences for States*, (n 50) para 22.

83 *Certain expenses*, (n 23) 157.

84 See *Report of the International Law Commission*, Chapter IV, A/73/10, 2018, 97.

85 cf *Third Report on subsequent practice in relation to the interpretation of treaties*, A/CN.4/683, (2015), 45–53.

few minor exceptions, they did not back it at all as it was dealing with another topic.

6. How the Security Council should legislate

If we assume that states are now inclined to accept this kind of resolutions, we need to illustrate *how* the Security Council should pass general legislation, abiding by at least these four elements: (i) proportionality and necessity principles, (ii) broad consultation, (iii) compliance with human rights, including due process guarantees, (iv) margin of appreciation.

(i) The proportionality principle should bind the Security Council's actions.[86] It is necessary to stress that this principle is not to be interpreted as a step-by-step approach, that is, firstly the exhaustion, by the Security Council, of the provisional measures under Article 40, then those not implying the use of force and finally those involving the use or authorization of armed force. Rather, it has to be interpreted as the appropriateness of the measure aiming at restoring the international peace and security. That being said, the new resolutions under discussion met this principle, insofar as States repeatedly emphasised their proportionate nature in relation to the evolving threats posed by terrorism and FTFs. Specifically, as regards Resolution 2178, states applauded the Security Council's efforts in setting out new measures representing '*appropriate*' international response, as the threat posed by foreign terrorist fighters illustrated the changing nature of terrorism.[87] Several States also reiterated the *appropriateness* of the coherent measures set forth in Resolutions 2396 and 2462. The fact that states deemed the measures taken to be proportionate helped the Council to secure wide acceptance.

As per the necessity principle, the UN Charter's provisions state very clearly that the action carried out by the UNSC is to be 'necessary' in order to maintain or restore international peace and security.[88] When making comments about Resolutions 2396 and 2462, States observed that such measures were necessary to adapt the international and domestic legal framework to the continuously evolving threats posed by terrorism, especially the financing of terrorism through less-explored methods, such as crypto-currencies. For instance, the USA Representative maintained that Resolution 2462 aimed at 'adapting

[86] See M Reisman and D Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes' (1998) 9 *European Journal of International Law* 86, 98–101; E De Wet, 'Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime' (2001) 14 *Leiden Journal of International Law* 277, 287–92; S Marchisio, *L'ONU* (Il Mulino 2012) 229.

[87] Emphasis added. cf UN Doc S/PV 7272 (n 72), Bulgaria, Pakistan, Algeria, Senegal and India at 22 30, 31, 32 and 40.

[88] See arts 40, 42 and 43 of the UN Charter. See also J M Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2007) 223.

United Nations tools to address today's counter-terrorism financing threat'.[89] Thus, this principle, too, contributes to make the Council's action more acceptable.

(ii) It is submitted that the outcome of broad consultations has to be taken into account when passing general resolution. From this standpoint, it is worth noting that, on the one hand, any previous consultation with the states had been performed by the UNSC before Resolution 1373 was adopted;[90] on the other, the same organ held a series of meetings with states *before* passing Resolution 1540. The same holds partially true for the legislative resolutions concerning foreign terrorist fighters. The UNSC engaged itself in broad negotiations, which unfortunately cannot be analysed as they are informal and thus not publicly held, so as to increase the sponsorship of the draft resolution; afterwards, a large meeting is organised when voting on the resolution. It is therefore clear that the Security Council has shown its willingness to organise high-level debates in order to allow those states and/or individuals who want to express their statements to do it. This is of particular importance in that the UN executive body has to respect the will of the international community.[91] As can be expected, efficiency of action always requires solid *consensus* and both legitimacy and legality of the action undertaken must be confronted with the willingness of the international community as a whole. If the SC eventually meets resistance, this would undermine legitimacy and would jeopardise the efforts in the context of the collective security system.

(iii) The need to respect human rights is closely linked to the above considerations as it contributes to stimulate the acceptance of legislative resolutions. Indeed, it has to be highlighted that some European landmark rulings, such as the *Organisation of Modjahedines People of Iran* (*OMPI*) judgment adjudicated by the former European Court of First Instance, demonstrated how far the 1373 sanction regime is able to affect procedural fundamental human rights enshrined in the European legal order. As a matter of fact, the Court quashed the relevant European regulation, on the basis that it infringed upon the rights of the appellant, namely the rights of defence and the right to a fair hearing.[92]

[89] This is also well-formulated by Belgium and Côte d'Ivoire, noting that such resolution fills 'important gaps related to the rapid evolution of the electronic financing infrastructure'. cf UN Doc S/PV 8496 (n 70), 16, 18 and 20.

[90] See UN Doc S/PV 4385 (2001), 2. The United States circulated a Draft Resolution during an informal meeting, with only permanent members being involved in previous consultations. Subsequently, the Draft prepared by the P5 was adopted in the public meeting.

[91] About the indispensable endorsement of the International Community *vis-à-vis* the Security Council's resolutions, see, comprehensively, Conforti and Focarelli (n 17), 246.

[92] cf Case T-228/02 *Organisation des Modjahedines du Peuple d'Iran v Council of the European Union* (CFI, 12 December 2006), para 173; Similarly see Case T-47/03 *Jose Maria Sison v Council of the European Union* (CFI, 11 July 2007), para 226. For a general comment see, *inter alios*, C Koedooder and N de Lang, 'Anti-terrorism Blacklisting in the European Union: The Influence of National Procedures on the

Without dwelling on topics already properly analysed[93], suffice it to note that it was possible to perform this kind of judicial review because of the nature of the 1373 sanction regime. Such regime is, in fact, a decentralised one, which means that the black lists are drafted and prepared at the regional and/or domestic level and through an autonomous process. This, in turn, gives states a wide margin of appreciation in order to balance their obligations under UN Charter and those arising from, e.g., international and European human rights law.

For these reasons, in 2014, concerned by the necessity to harmonise UN obligations and human rights-related obligations, the UNSC included an element which is relevant in order to differentiate FTFS' resolutions from the Resolution 1373: the call for respecting international law while combating international terrorism. Indeed, when implementing the obligations stemming from the Resolution 2178, states are expected to abide by three categories of rules, i.e. international human rights law, humanitarian law and refugee law.[94] The Security Council has therefore shown full awareness about the 'complementary and mutually reinforcing' *liaison* existing between the efficient fighting against international terrorism and the compliance with human rights and the rule of law.[95] Therefore, reasons of efficiency (preventing resolutions from being challenged before national and/or international courts for being inconsistent with human rights) and legality (respecting human rights also means respecting international human rights law) dictate to take into account the protection of human rights, which, in turn, helps the Council to increase the legitimacy and acceptance of its general resolutions.

(iv) As a scholar suggests,[96] states should be endowed with wide leeway devoted to thoroughly implement Security Council's measures in a manner consistent with their domestic legal orders. In other terms, these legislative resolutions should only pose obligations to achieve a certain result[97]. Back to 2004, when Resolution 1540 was adopted, states made clear that they claimed a

Judgment of the Court of First Instance of the European Communities' (2009) 36 *Legal Issues of Economic Integrations* 313; E de Wet, 'Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection' in B Fassbender (ed), *Securing Human Rights?: Achievements and Challenges of UN Security Council* (OUP 2012) 142–52.

93 See, *ex multis*, C Eckes, 'EU Restrictive Measures against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions' (2014) 51 *Common Market Law Review* 869; S Poli, *Le misure restrittive autonome dell'Unione europea* (Editoriale scientifica 2019); N Zelyova, 'Restrictive Measures - Sanctions Compliance, Implementation and Judicial Review Challenges in the Common Foreign and Security Policy of the European Union' (2021) 22 *ERA Forum* 159.

94 UN Doc S/RES/2178 (n 59), preamble (7). States such as Chile and Luxembourg considerably applauded this mention. See, UN Doc S/PV 7272 (n 72) 12 and 16.

95 See also UN Doc S/RES/2482 19 July 2019, preamble (19).

96 Rosand (n 26) 584–85.

97 We use this term within the meaning of the civil law tradition, focusing upon the goal to accomplish, that is to say the need to counter FTFs. Regarding the difference between obligations of result and obligations of conduct, see P M Dupuy, 'Reviewing the Difficulties of Codification: on Ago's Classification of Obligations

room for manoeuvre with a view to accommodating possible conflict of obligations. As Pakistan said, the flexibility the Council allowed states was part of the reason leading to support this Resolution.[98] Interestingly, in the second phase of its legislation, the SC initially maintained a wide approach in defining global obligations, because it drew upon previous resolutions which gave states a margin of appreciation[99] Afterwards, it should be vividly stressed that, rather than merely setting guidelines, the other legislative resolutions, especially Resolution 2462, prescribe in detail the reforms and/or amendments that States are recommended or bound to put in place. They indicate the persistent tendency with which the SC handles those matters traditionally regarded to be within the mandate of the state sovereignty, with increasingly detrimental effects for the remaining area of their *domain reservée*.[100] It comes with no surprise that, in the preamble of Resolution 2462, a reference is made regarding the grave concern about the lack of adequate level of implementation concerning the deny to make funds and financial assets available to terrorists.[101] The partial lack of implementation represents, therefore, the way in which states express their positions against this peculiar feature of the newer legislative resolution. However, the relevant point to be underlined is that these resolutions do not receive adequate implementation not because of their general-legislative nature; rather, some states find themselves unable to apply the measures mandated therein, lacking capacities in the field of disrupting financing terrorism or experience in dealing with 'new payment technologies and virtual currencies', while others are unwilling to cooperate in the domain of the information sharing, 'citing the perceived politicization of requests by either the receiving or submitting State', thus potentially undermining the Council's efforts to produce an efficient fight against terrorism.[102] To prevent this from happening again in

of Means and Obligations of Result in Relation to State Responsibility' (1999) 10 *European Journal of International Law* 371.

98 UN Doc S/PV 4950 (n 41) 15.

99 As Trinidad and Tobago put it, 'we especially pay attention to the provision that States may be able to comply to *varying degrees*, depending on their capacity' emphasis added. UN Doc S/PV 7272 (n 72)28.

100 As example of peculiar conducts sponsored by the Security Council in respect of matters regulated by the domestic jurisdiction see UN Doc S/RES/2482 (n 95), preamble (10), urging States to 'strengthen, where appropriate, their criminal justice, law enforcement and border-control capacities, and to develop their capacity to investigate, prosecute, disrupt, and dismantle trafficking networks'. See also paras. 4 and 8 of the same resolution.

101 UN Doc S/RES/2462 (n 68), preamble (18). In 2019, the Monitoring Team reported that only '65 Member States are generally compliant' with the implementation of both API and PNR systems; it also complained about the challenges faced by States 'in collecting or accessing biometric data of foreign terrorist fighters located in the conflict zones and of those likely to return or relocate to other areas'. See UN Doc S/2019/570, paras 88–89.

102 See, specifically, the findings of the *Joint report of the Counter-Terrorism Committee Executive Directorate and the Analytical Support and Sanctions Monitoring Team*, UN Doc S/2020/493, 2020, paras 29, 87–88.

the future, less stringent requirements (resulting in wider leeway) would be welcomed or, conversely, such technical requirements should be accompanied by financial resources and necessary technical assistance to countries so that they can shoulder their obligations under these resolutions.

7. Concluding remarks

All the considerations put forward to call for some concluding thoughts. First of all, it is to be pointed out that states are nowadays more inclined to consider legislative resolutions as a necessary and proportionate tool to conduct an adequate fight against terrorism. There is a greater involvement of non-members of the Security Council in the drafting process as well as in the voting meetings (under Rule 37 of Procedural Rules), which are also attended by experts, invited to express their views in accordance with Rule 39 of the same Rules. That being said, and although the assumption of legislative prerogatives does not arouse opposition, for the reasons set out in Section VI states still find themselves unable and/or unwilling to appropriately implement the measures mandated by the Security Council. This represents the main sign of protest against technical legislative resolutions and it is at the root of the divergence between states' *opinio iuris* (their statements in the meetings) and their conduct.

Despite the existence of such incoherence, there are valid legal arguments to affirm that, to the extent strictly necessary to regulate the fight against terrorism, states accept the enactment of general resolutions. At the same time, they hold the right, as *extrema ratio*, to contest and disregard a specific resolution, if they deem it not to be in accordance with the UN Charter.[103] As a matter of fact, it has to be recalled that, when admitted to the UN organization, they have undertaken to accept and carry out the decisions and the obligations imposed on them by the UNSC;[104] nevertheless, it is also true that they have expressed their consent towards the implementation of *lawful obligations*, that is to say, when such obligations are in accordance with the Charter and, reasonably, with the principle of legality.[105]

[103] This famously happened when Members States of the Organization of African Unity declared that they would no longer have complied with the Council's resolutions mandating sanctions against Libya. cf OAU, *The Crisis between the Great Socialist People's Libyan Arab Jamahiriya and the United States of America and the United Kingdom*, Doc AHG/Dec.127 (XXXIV), (8–10 June 1998), paras 2–3.

[104] See arts 24 and 48 of the UN Charter.

[105] Indeed, pursuant to art 25 of the UN Charter, states are expected to comply with the measures legitimately taken, ie, measures that are respectful of the Charter and hence *intra vires*.