

COMBATING INTERNATIONAL TERRORISM: NEW POWERS FOR THE SECURITY COUNCIL?

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1. INTRODUCTION

In dealing with the atrocity of international terrorism and the threat thereof, the United Nations has developed different instruments. Especially in the years after the attacks of 11 September 2001 the Security Council has become more involved in the fight against terrorism. In line with the way in which the Security Council has reacted to other atrocities, it has qualified different terrorist attacks as breaches of international peace and security. However, it has also qualified international terrorism in general as 'a threat to international peace and security', without pointing to specific attacks. Since this qualification is linked to the requirements of Article 39 of the United Nations Charter, it opens up the opportunity for the Security Council to adopt compulsory measures. The Security Council's power to adopt, with only 9 of the 15 members, a measure that is binding on all Member States means that even though in theory more than 180 States might disagree with the adopted measure, the measure still needs to be adhered to. This is especially remarkable when some of the measures have a legislative character. After all, international legislation has traditionally been closely linked to the principle of sovereignty, in that States can only be bound by new legislation if they express their consent to be bound. It has been argued that the atrocities which the UN has to deal with nowadays differ from those envisaged during the drafting of the Charter and therefore legitimise the changing interpretations of the powers of, for example, the Security Council. Nevertheless, it is clear that these shifting interpretations come with several shortcomings of a serious nature, especially when they touch upon the civil rights of individuals targeted by the measures of the Security Council. This will moreover put Member States in an awkward position *vis-à-vis* the human rights obligations they have to uphold, which are, moreover, promoted by the UN itself.

In order to interpret and analyse the powers and the alleged shortcomings of the new policies and measures, several questions can be asked. Does the concept of threats to international peace and security cover international terrorism *per se*? Or does international terrorism pose a new threat which legitimises a different approach? If the latter is the case, what forms the framework of powers and limitations? And if the paradigm of threats to international peace and security is shifting, how does that relate to the paradigm of positive peace in the Charter? And is the principle of peace and security more important than the principle of respect for human rights?

Before going into these questions, the developments with regard to the new measures of the Security Council *vis-à-vis* combating terrorism and their most prominent shortcomings will be outlined. Related to the evaluation of the shortcomings is the question of the hierarchy of the principles of the Charter, which will be dealt with next, as they form the most important limitations to the powers of the Security Council when it is acting under Chapter VII of the Charter. This aspect is related to the interpretation of the paradigm of 'threats to international peace and security' and the terminology of peace in general in the Charter.

2. THE SECURITY COUNCIL'S COUNTER-TERRORISM MEASURES

While the Security Council adopted a mere 19 resolutions¹ on topics related to terrorism in the period prior to the events of 9/11 – the first being in 1970 – the Council had already surpassed that number in the few years after the attacks of 9/11.² Characteristic of the Council's resolutions in the period prior to 9/11 is the close connection between the adopted measure and the specific terrorist attack or a specific terrorist method. The measures or recommendations that are subsequently included in these resolutions are consequently very much related to a specific event or method and thus to ending that particular situation.

Moreover, the number of times that Chapter VII of the Charter is mentioned as the explicit legal basis for the resolution in the period prior to 9/11 is seven.³

¹ Security Council Resolutions 286 (1970), 578 (1985), 618 (1988), 635 (1989), 638 (1989), 731 (1992), 748 (1992), 883 (1993), 1044 (1996), 1054 (1996), 1076 (1996), 1189 (1998), 1192 (1998), 1193 (1998), 1214 (1998), 1267 (1999), 1269 (1999), 1333 (2000) and 1363 (2001).

² Security Council Resolutions 1368 (2001), 1373 (2001), 1377 (2001), 1378 (2001), 1383 (2001), 1386 (2001), 1388 (2002), 1390 (2002), 1438 (2002), 1440 (2002), 1450 (2002), 1452 (2002), 1455 (2003), 1456 (2003), 1465 (2003), 1516 (2003), 1526 (2004), 1530 (2004), 1535 (2004), 1540 (2004), 1566 (2004), 1611 (2005), 1617 (2005), 1618 (2005), 1624 (2005), 1699 (2006), and 1735 (2006).

³ Security Council Resolutions 748, 883, 1054, 1192, 1267, 1333, and 1363.

In the period after 9/11 this explicitly occurs in 13 resolutions,⁴ but could just as well have been the case in all resolutions adopted after 9/11 considering the topic and its relation to other resolutions. A direct consequence of these considerable differences between resolutions adopted prior to and after 9/11 is the fact that in numerical terms the resolutions adopted after 9/11 include far more binding measures for the Member States.

It seems that the Security Council, when dealing with terrorism after 9/11, only uses its powers under Chapter VII of the UN Charter, and leaves aside the powers that follow from Chapter VI of the Charter. This is understandable from the point of view that a repressive or responsive approach in particular is needed to deal with the problem of international terrorism. However, dealing with international terrorism as a general threat to the international community calls for a more comprehensive approach to the problem and the measures adopted should extend beyond the classic reaction to a breach of the peace. A comprehensive approach to the problem should also entail preventive measures and measures that deal with the root causes and so on.

As mentioned above, the Security Council did not frequently use its functions under Chapter VII when dealing with the threat of terrorism before 9/11. The Council mostly limited its actions to condemnations of specific attacks, or the use of specific devices, in some cases followed by sanctions against a certain State because of its alleged involvement in terrorist activities. At the end of the 1990s, the Council, for the first time, issued a declaration in a resolution on international cooperation in the fight against terrorism.⁵ This declaration coincided with the implementation of the sanction regime for Afghanistan and its Taliban Government. This sanction regime, imposed by Resolution 1267 (together with the follow-up resolutions referred to as the 1267 regime), also laid down the foundations for the extensive sanction regime against members of Al Qaida, which was expanded after 9/11, and will be dealt with below.

The terrorist attacks on the United States of 9/11 have clearly formed a turning point in the Security Council's policy on combating terrorism. Not only did the Security Council declare that it considered all terrorist attacks as threats to international peace and security,⁶ and by condemning *inter alia* the attack on the Moscow theatre as a threat to international peace and security⁷ it followed up on this declaration, but also by adopting Resolution 1373 it developed a

⁴ Security Council Resolutions 1373, 1383, 1386, 1388, 1390, 1452, 1455, 1526, 1540, 1566, 1617, 1624, and 1735.

⁵ Security Council Resolution 1269 (1999).

⁶ Security Council Resolution 1377 (2001).

⁷ Security Council Resolution 1440 (2002).

comprehensive set of financial measures to be taken by States.⁸ Moreover, Security Council Resolution 1373 (hereafter referred to as the 1373 regime) ordered Member States to legislate, which is a first in the history of the practice of the Security Council. In order to supervise the implementation of the financial measures the Council also established in the same resolution an administrative organ, namely the Counter-Terrorism Committee (CTC).

The 1267 regime and the 1373 regime form the two most prominent pillars of the Security Council's post-9/11 counter-terrorism policy. Both resolutions refer to Chapter VII of the Charter in the preamble to the resolution for the legal basis, and are thus based on the far-reaching powers of the Security Council to restore a situation that poses a threat to international peace and security with the possibility of adopting binding decisions. Both regimes have, however, been severely criticised by States and academics, because they dispute the legality and the legitimacy of the regimes. Indeed there are several shortcomings in the way these regimes have been adopted and or implemented, which will be illustrated below.

The 1267 regime, originally established to put pressure on the Taliban Government and its members in Afghanistan to extradite Osama bin Laden and to close the terrorist training camps, has been modified on several occasions by follow-up resolutions. Already in 2000, the scope of Resolution 1267 was extended to target not only members of the Taliban Government, but every individual or entity with *connections* to the Al Qaida terrorist organisation.⁹

The 1267 Sanction Committee, established to monitor the implementation of the sanction regime, is in charge of drawing up lists of names of individuals and entities that fit this description, and should thus also interpret how close the connection between individuals and entities and the Al Qaida organisation should be. Resolution 1333 itself was after all unclear on the closeness of the connection of individuals to Al Qaida or Osama bin Laden. There was thus no transparency in the Sanction Committee's interpretation of this requirement. Resolution 1617 (2005) clarified this connection to a certain extent. The activities that fall within the scope of this resolution include participation in the financing, planning, facilitating, preparing or perpetrating of acts by, in conjunction with, under the name of, on behalf of, or in support of Al Qaida, Osama bin Laden or the Taliban, or their associates. The same holds true for supplying, selling or transferring arms and related *matériel* to them, or the recruiting for, or otherwise supporting their activities.

⁸ Security Council Resolution 1373 (2001).

⁹ Security Council Resolution 1333 (2000).

According to the guidelines of the Sanction Committee, a State can advise the Committee to place the name of an individual or an entity on the so-called Consolidated List. This nomination is accompanied by some information to indicate the connection of the person or the entity to Al Qaida or Osama bin Laden. The Committee, consisting of representatives of the members of the Security Council, then decides behind closed doors according to a no-objection procedure. Once a person or an entity is placed on the Consolidated List, Member States are informed in order to execute *inter alia* the freezing of financial assets.

In Resolution 1617 (2005), the requirements concerning the quality of the information which the State delivers to the Sanction Committee were improved. In that resolution the Security Council decided that States proposing names or entities for listing also had to provide a statement of case describing the basis of the proposal to the Committee. The Committee may subsequently use the statement of case in response to queries by Member States whose nationals, residents or entities have been included in the Consolidated List. The Council also decides whether the Committee may determine on a case-by-case basis to release the information to other parties, with the prior consent of the designating State, for example for operational reasons or to aid the implementation of the measures.

Although some improvements have been made to the listing or nomination procedure, there are still several shortcomings to the procedural rights of individuals targeted by the sanctions. For example, the information delivered by States to the Sanction Committee that might lead to a nomination for listing is thin and often comes from intelligence sources, which makes it impossible to verify.

Decision-making within the Sanction Committee, which consists of the members of the Security Council and is therefore neither impartial nor independent but a political body, takes place unanimously through the no-objection procedure and behind closed doors. Any member of the Sanction Committee can object to the nomination for listing or the delisting request of an individual for whatever reasons within 48 hours. If this does not take place, the individual is placed on the list, or is denied the delisting.

It is a major improvement to the procedure that an individual can now start a delisting procedure¹⁰ by submitting his request to the 'focal point' of the UN Secretariat.¹¹ Until the adoption of this resolution the individual concerned had

¹⁰ First version of the delisting procedure: 'Statement of Chairman of 1267 Committee on delisting procedures', Press Release SC/7487, AFG/203, 16 August 2002.

¹¹ In the original version of the delisting procedure an individual could not appeal against being placed on the list on his/her own account, but needed to be represented in his/her request by a State of his/her residency. The delisting procedure as such only became operational on 16 August 2002 after the Aden incident. Mr Aden and three other Swedish nationals of Somali

to convince the Government of the State in which he or she was a resident to initiate the procedure. However, it is still only members of the Sanction Committee who can place the request on the Committee's agenda.

Once the issue is on the agenda, the individual has a heavy burden in proving his innocence, without having access to the evidence that initially legitimised the nomination.

The impact of these extended targeted resolutions on a listed person's life is very severe, since it means that all financial assets and bank accounts are frozen. In a way, it is a modern form of banishing someone from society. The Security Council, through the actions of the Sanction Committee, is in a way acting as a judge, without complying with fair trial principles.

This procedure has been heavily criticised in many reports,¹² and some concrete proposals have been made to improve the procedure, such as extending the powers of the Monitoring Team, which is now handling the verification of the personal records of the nominees, to deal with the delisting requests. Other proposals include the establishment of an ombudsman or a panel of experts. Even more radical are the proposals to establish an independent arbitral panel or even an independent and impartial court. So far, however, these proposals have not been considered by the Security Council.

origin appeared on the 1267 list, because of alleged connections with the Al Barakaat organisation, which allegedly finances Al Qaida. As a consequence of this listing, their financial assets were blocked by the Swedish Government. Mr Aden and the three others complained that they were mistakenly placed on the list and consulted a lawyer, who complained to the Swedish Government. After long deliberations the Swedish Government complained to the 1267 Sanction Committee, which in turn stated that there was no procedure for delisting. Instead, the Swedish Government had to consult the US Government, since the USA was the nominating State. The US Government, however, refused to disclose the evidence that led to the nomination on the list in the first place. After long political deliberations, the file was finally handed over to the Swedish Government. After an analysis of the evidence, which only contained 29 pages, by the Swedish Intelligence Agency, according to the Head of the National Criminal Investigation Department of the Swedish Police the evidence was not enough to start a criminal investigation. (Public Statement by Margareta Linderöth, Supreme Commander of the Swedish Security Police, Swedish National Broadcasting, 'Dagens Eko', 14 December 2001).

¹² See *inter alia* the 'White Paper' of the Watson Institute called 'Strengthening Targeted Sanctions Through Fair and Clear Procedures' of March 2006 which has been presented to both the General Assembly and the Security Council (A/60/887 – S/2006/331, 14 June 2006); and the report written by BARDO FASSBENDER of Humboldt-Universität zu Berlin on the request of the Secretary-General, called 'Targeted Sanctions and Due Process' (20 March 2006). But Ms Kalliopi K. Koufa, the Special Rapporteur of the Sub-Commission on Terrorism and Human Rights, has also drafted in total a working paper and five reports on the topic: Working Paper, E/CN.4/Sub.2/1997/27, 26 June 1997; Preliminary Report, E/CN.4/Sub.2/1999/27, 7 June 1999; Progress Report, E/CN.4/Sub.2/2001/31, 27 June 2001; Second Progress Report, E/CN.4/Sub.2/2002/35, 17 July 2002; Additional Progress Report, E/CN.4/Sub.2/2003/WP.1, 8 August 2003; and Final Report E/CN.4/Sub.2/2004/40, 25 June 2004.

The second pillar of the Security Council's counter-terrorism policy is the 1373 regime. The core of the measures adopted by the Security Council in this resolution is related to the financing of terrorism and the measures resemble some of the measures that States should implement pursuant to the International Convention on the Suppression of the Financing of Terrorism.¹³

This resolution requires Member States to put in place legislation criminalising the financing of terrorism. Member States should moreover ensure that terrorists will not go unpunished and that they are served with sentences that fit the crime. States should also freeze the funds and financial assets or other economic resources of 'persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.'¹⁴

The Council, however, failed to define terrorism, and only stated that international terrorism as such poses a threat to international peace and security. This resolution thus did not find its origin in a concrete incident or a direct threat, but in an indefinite threat of a general character. Nor is it the intention of the Security Council that this resolution should relate to a specific terrorist attack and that, henceforth, freezing measures should only be taken against individuals or entities that can be linked to that specific attack. On the contrary, the Security Council intends this resolution to apply to terrorism in general, whether committed in the past or in the future, leaving it to individual States to determine who or what will fit within the category.

States should further prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available to persons or entities involved in terrorism. This entails financial institutions, such as banks or insurance companies, not only freezing financial assets, but also being forbidden to open accounts or close insurances.¹⁵

Naturally, States should refrain from providing any form of support to entities or persons involved in terrorist acts, including by suppressing the recruitment of members for terrorist groups and cutting off their supply of weapons. They should further provide an early warning to other States and enter into an

¹³ The International Convention on the Suppression of the Financing of Terrorism was adopted in February 2000, but did not enter into force until April 2002.

¹⁴ Security Council Resolution 1373 (2001).

¹⁵ Ibid.

exchange of information, as well as deny a safe haven to those connected with terrorism.¹⁶

With the same resolution the Council established the CTC, with the mandate to monitor Member States' implementation of the resolution. The CTC consists of all members of the Security Council, and is assisted by 15 experts in, for example, legal issues, border control issues and financial issues. The CTC is constantly dealing with the reports that States have to submit on the progress they are making on the implementation of the requirements in the resolution. The CTC examines the reports and may request more information and formulate advice for improvements. The CTC also has a switchboard function by connecting technical assistance seekers to technical assistance providers.

Most remarkable is the fact that the CTC does not have a human rights expert in its midst and therefore does not comment on human rights aspects of national counter-terrorism policies. Albeit motivating States to fight it, the Council has failed to define the term terrorism thus leaving an opportunity for abuse of power. Consequentially, abuse has been reported by human rights NGOs in several reports.¹⁷

The 'best' offer after the revitalisation process of the CTC in 2004 was the appointment of a liaison officer to the Office of the United Nations High Commissioner for Human Rights, which of course comes nowhere near a real human rights expert as a member of the team.

3. NEW POWERS FOR THE SECURITY COUNCIL?

The overview of the practice of the Security Council in relation to combating terrorism shows that the Council has used both a very targeted as well as a very general approach in its policies. The main questions concern the basis and the scope of these powers.

The fact that the Council refers to Chapter VII of the Charter and determines that international terrorism poses a threat to international peace and security in both the 1267 and 1373 regimes is the only certainty when evaluating the legal basis of these measures. Since no military means are involved, one would expect

¹⁶ Ibid.

¹⁷ Both Human Rights Watch and Amnesty International in their reports point to the fact that several States have abused the international support for the fight against terrorism to legitimise disproportionate and arbitrary measures which they have been taking against political adversaries, such as the Chinese measures against the Uighurs in Xinjiang. Arabic and Islamic men have also been especially targeted by such measures. Other States have taken more restrictive or penal measures against asylum seekers and refugees. See, for example, HUMAN RIGHTS WATCH, *September 11: One Year On*, (New York: Human Rights Watch, 5 September 2002) <http://www.hrw.org/campaigns/september11/>.

Article 41 of the Charter to form the legal basis of the policies. However, and in line with the Council's own practice, there is no explicit reference to this article. Assuming that Article 41 constitutes the basis for the policies, critics hold, on the one hand, that the purpose of Article 41 is not to impose sanctions that target individuals, and, on the other, that Article 41 can only be used to impose measures related to a concrete threat or situation and not to legislate generally. These criticisms raise the question as to whether or not the Security Council is using new or adjusted powers.

Although the Security Council has very broad powers when it comes to the maintenance of international peace and security, these powers are not without limits. As a basic principle of institutional law, the principle of the attribution of powers sets the boundaries for the powers of every organ of an organisation to the extent that it only enjoys powers that are conferred on it by or implied in the constituent document of the organisation. The question thus arises as to whether or not these policies fall within the powers and the limitations to these powers of the Security Council.

The primary responsibility of the Security Council for the maintenance of international peace and security is laid down in Article 24 of the Charter. The limits to the general power of the Security Council follow from Article 24, paragraph 2 of the Charter, which states that the Council shall act in accordance with the purposes and the principles of the United Nations. These limits are especially explicit when it comes to the Council's powers in the field of dispute settlement. In accordance with the principles and purposes laid down in Article 1 of the Charter, these should be exercised in conformity with the principles of justice and international law. Such an explicit limit is not laid down with regard to the powers to take effective collective measures for the prevention and removal of threats to international peace and security. Therefore, when acting under Chapter VII of the Charter, the chapter that allows enforcement action, the limits to the powers only follow from the principles and purposes of the UN as laid down in Articles 1 and 2 of the Charter. In such situations the Security Council is believed to be acting as a police officer, rather than as a judge. Other sources of limitations to the powers of the Council, which do not immediately follow from the Charter, are the principle of *ius cogens* and the principle of proportionality.

Before the Security Council can act in pursuance of its primary task, it has to be established that there exists as a minimum a situation that is likely to endanger the maintenance of international peace and security (Article 33 UN Charter). It has to be established, therefore, that international terrorism constitutes such a situation. If that is the case, the Council can act under Chapter VI of the Charter. But, as stated, the Council refers in Resolutions 1267 and 1373 to Chapter

VII. Consequently, the question that should thus be dealt with is whether or not it is fair to determine that acts of international terrorism in specific cases, or international terrorism in general, can be categorised as one of the situations referred to in Article 39 of the Charter.

The terms 'threat to the peace', 'breach of the peace' and 'act of aggression' referred to in Article 39 of the Charter are not further defined in the Charter. The first limitation in Article 39 follows from the meaning of the term 'peace'. Although, in general, the concept of peace can have a wide or a narrow meaning, it can be assumed that the term 'peace' in Chapter VII has a narrow meaning,¹⁸ since the specific role of Chapter VII in the Charter underlines the assumption that the term 'peace' in the meaning of Chapter VII should be interpreted narrowly, meaning the absence of the organised use of force.

When the Charter was drafted, the Security Council's task under Chapter VII was principally to deal with inter-State war.¹⁹ Hence, the formula 'to maintain or restore *international* peace and security' was included in Article 39. Over the years, the scope of Article 39 has been widened. It is no longer unusual for the Security Council to determine that internal conflicts are a threat to international peace and security. Since the 1990s, the Council has also developed a practice of qualifying grave violations of human rights,²⁰ as well as violations of democratic principles,²¹ as a threat to international peace and security.

The term 'threat to the peace' offers most room for interpretation and is therefore the most interesting of the criteria mentioned in Article 39 for examining the legal basis of measures aimed at combating terrorism under Chapter VII. There is a 'breach of the peace' in the case of hostilities between armed units of two States, or effective, independent *de facto* regimes.²² These hostilities can be serious, but not so serious as to constitute an act of aggression.²³ An 'act of aggression' presumes the direct or indirect use of force, and is in any case a breach of the peace.²⁴ An 'armed attack' in the sense of Article 51 of the Charter necessarily constitutes an act of aggression.

The Security Council can take measures against terrorism that it has qualified either as a breach of the peace or as an act of aggression, if this terrorism is State-

¹⁸ J.A. FROWEIN and N. KRISCH, 'Introduction to Chapter VII', in B. SIMMA (ed.), *The Charter of the United Nations: A Commentary*, (Oxford: Oxford University Press, 2002), p. 720; E. DE WET, *The Chapter VII Powers of the United Nations Security Council*, (Oxford – Portland, Oregon: Hart Publishing, 2004), pp. 138-144.

¹⁹ FROWEIN/KRISCH, *supra* note 18, p. 720.

²⁰ FROWEIN/KRISCH, *supra* note 18, p. 724-725.

²¹ FROWEIN/KRISCH, *supra* note 18, p. 725.

²² FROWEIN/KRISCH, *supra* note 18, p. 721.

²³ DE WET, *supra* note 18, p. 144.

²⁴ FROWEIN/KRISCH, *supra* note 18, p. 722.

terrorism of a high intensity. Under international law, however, this would rather qualify as a violation of the prohibition of the use of force or the principle of non-intervention. For this reason, the Security Council uses the term 'threat to the peace' when it deals with terrorism under Chapter VII.

The term 'threat to the peace' is rather vague. It comprises situations that could develop into armed hostilities, but also post-conflict situations that – if not guided in the right direction – could revert to conflict situations. As stated above, the term is not reserved for situations of international conflict, but can also be applied to internal conflict situations. At the beginning of the 1990s, the Security Council went to great lengths to argue that internal conflict situations had a destabilising effect on the region, and could therefore be qualified as constituting a threat to international peace and security. Later on, it no longer pointed to these trans-border effects.²⁵

It thus seems that the category of 'threats to the peace' would offer possibilities for dealing with international terrorism. The practice of the Security Council, moreover, shows that it has referred to this category on many occasions when reacting to specific terrorist events. The same practice by the Council, however, does not show any prior situation in which the Council did make this qualification without referring to a specific situation, or defining the general assessments of a method.

Therefore, although the qualification of the situation in Afghanistan and the refusal to extradite Osama bin Laden can well be qualified as a threat to international peace and security, as has been done in relation to the 1267 regime, this is not as obvious in the case of Resolution 1373. After all, in that resolution no reference is made to any specific terrorist attack or specific terrorist threat, but rather to a non-defined general notion of a phenomenon or battle strategy, comparable to stating that the use of anti-personnel mines would create a threat to international peace and security and thus allow for any enforcement measure to be taken by the Security Council, which would thereby bind the Member States.

In the spirit of the geopolitical developments, it could well be the case that the organisation is evolving and is transforming existing powers in order better to respond to new threats. In this case, one would then have to assume that Article 39 also *implies* the power to determine that the *possible* application of a method of non-conventional use of violence by a non-State actor or the threat thereof, constitutes a threat to international peace and security. One would have to assume this because the Council itself does not give any arguments for this new development. Nor does it define the term 'international terrorism'.

²⁵ FROWEIN/KRISCH, *supra* note 18, p. 723.

Assuming that the powers of the Council have evolved in such a way that it can qualify a general method of conducting conflicts as a threat to international peace and security, this still does not give it the power to legislate. Indeed, the (quasi-)legislative actions of the Security Council in Resolution 1373 have met with much criticism. Whether one would qualify a certain act as (quasi-) legislative²⁶ and, therefore, deviating from the Security Council's main function as a 'police officer' of world peace, depends on the definition of a legislative act. If one would consider a legislative act to be any act that is unilateral in form, creating or modifying an element of a legal norm, and that is general in nature, then even economic sanctions would qualify as such,²⁷ even though these sanctions are mostly used as a temporary measure to pressure a State into changing its behaviour to restore international peace and security. Some, therefore, consider such acts to be a concrete execution of the powers under Article 41 of the UN Charter, as they are exercised with regard to concrete cases in the context of restoring or maintaining international peace and security.²⁸

This is, however, not the case with Security Council Resolution 1373, which is not applicable to a concrete case, but is of a general nature. In the resolution States are obliged *inter alia* to criminalise terrorist acts and to freeze the financial assets of terrorists or terrorist organisations. Unilaterally, the Security Council sets completely new norms that would not even qualify as customary international rules.

A major distinguishing factor between resolutions concerning specific cases and situations referred to in Resolution 1373 is that in the case of the former it is clear when the situation concerned ceases to exist. After all, the adopted measures have a clear goal, namely to put an end to the situation that is threatening international peace and security. Such conditions imply a form of temporariness and are in line with the overall character of Chapter VII of the Charter that confers exceptional powers upon the Council for exceptional cases. Resolution 1373, apart from lacking any linkage to a specific situation, does not have a so-called 'sunset clause' and is therefore applicable for an indefinite period of

²⁶ Even though a decision is not a legislative act in name, it can bear all the hallmarks of a legislative act.

²⁷ Such reasoning is adhered to by, for example, F.L. KIRGIS, 'The Security Council's First Fifty Years', (1995) 89 *American Journal of International Law*, 1995, p. 520.

²⁸ T. SATO, 'The Legitimacy of Security Council Activities under Chapter VII of the UN Charter After the End of the Cold War', in J.M. COICAUD and V. HEISKANEN (eds.), *The Legitimacy of International Organizations*, (Tokyo – New York – Paris: United Nations University Press, 2001), p. 325.

time. Many authors have qualified this action by the Security Council as its first true legislative act.²⁹

Clearly, the Council is using new powers or at least adapted powers for its 1373 regime, which seems to rely on a broad interpretation of Article 39 of the Charter, or on a new interpretation of the paradigm of threats to international peace and security. The latter might not be the case for the 1267 regime, but the extent of the targeted sanctions is definitely a new development, which also triggers questions as to its legal basis.

In the case of sanctions imposed by the Security Council, the first condition to be met is of course the determination of a threat to international peace and security. In addition, it is necessary to examine the scope of Article 41, that provides for a non-exhaustive list of measures that can be qualified as 'measures not involving the use of force'. Although the Charter does not contain any requirements concerning the goal of the sanctions, it is quite clear that their general purpose should be to maintain or restore international peace and security, as stated in Article 39.

Whereas Article 41 of the Charter does not contain any limitations on the kinds of measures that can be implemented, its predecessor, Article 16 paragraph 1 of the Covenant of the League of Nations, included a limited list of options that could be taken against Member States that had resorted to an act of war.³⁰

When drafting Article 41 of the Charter, both the United States and the United Kingdom in particular were opposed to including a limited list of measures.³¹ It was therefore clear that Article 41 would constitute the legal basis for an open category of measures. There is, however, no indication in the text or the history of the drafting of the Article that would suggest whether there was any agreement on the possible addressees (States, non-State actors, or individuals) of the measures.

During the Cold War, the instrument of sanctions under Chapter VII of the Charter was used only once, namely against the apartheid regime of South

²⁹ P.C. SZASZ, 'Security Council Starts Legislating', (2002) 96 *American Journal of International Law*, pp. 901-905.

³⁰ Article 16 of the Covenant of the League of Nations read: 'Should any Member of the League resort to war in disregard of its covenants under article 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.'

³¹ J.A. FROWEIN and N. KRISCH, 'Article 41', in B. SIMMA (ed.), *The Charter of the United Nations: A Commentary*, (Oxford – New York: Oxford University Press, 2002), pp. 735-749.

Rhodesia in December 1966.³² These sanctions were at first selective, but later of a general character. They were exclusively implemented against the State, not against any non-State actor.

It took until 1990 before the Security Council used the instrument of sanctions once again, by imposing a comprehensive trade and weapons embargo against Iraq.³³ The only exceptions to the embargo concerned medical supplies and the first necessities of life. In Resolution 670 (1990) the Council confirmed the comprehensive character of the sanctions by prohibiting all air transport to Iraq, except for humanitarian relief.

Except for the comprehensive character of the sanctions regime against Iraq, most sanctions implemented by the Security Council have a more limited character, for example an embargo on weapons.³⁴ But sanctions could also entail a limitation of diplomatic or consular services (for example, Libya (1992) and Sudan (1996)), travel bans for members of military juntas or their families (Sierra Leone (1997)), or the freezing of assets and financial sources of leaders and their families (Haiti (1993)).

After a few years of more intensive use of the instrument of implementing sanctions, the Secretary-General of the UN, Boutros Boutros-Ghali, in his Supplement to an Agenda for Peace, concluded:

Sanctions, as is generally recognised, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plights of their subjects. Sanctions always have unintended or unwanted effects. They can complicate the work of humanitarian agencies [...]. They can conflict with the development objectives of the Organisation [...]. They can have severe effect on other countries. They can also defeat their own purpose by provoking a patriotic response against the international community, symbolised by the United Nations, and by rallying the population behind leaders whose behaviour the sanctions are intended to modify.³⁵

³² Security Council Resolution 232 (1966).

³³ Security Council Resolution 661 (1990).

³⁴ See for example Security Council Resolution 713 (1991) concerning the Federal Republic of Yugoslavia, Resolution 748 (1992) concerning Libya, Resolution 751 (1992) concerning Somalia, Resolution 841 (1993) concerning Haiti, Resolution 864 (1993) concerning UNITA in Angola, Resolution 918 (1994) concerning Rwanda, Resolution 788 (1992) concerning Liberia, Resolution 1132 (1997) concerning Sierra Leone, and Resolution 1160 (1998) concerning the Federal Republic of Yugoslavia, including Kosovo.

³⁵ Supplement to *An Agenda for Peace*, 1995, A/50/60, 1995, par. 70.

Apart from the concern for the reverse political effect, it was most of all the concern for the violations of fundamental rights caused by some sanction regimes that started a thorough discussion on the legality and legitimacy of sanctions as an instrument.³⁶

The solution for decreasing the undesirable side-effects and enhancing the effectiveness of the sanctions could not be found in humanitarian exceptions, since these were as a rule already included in the sanction regimes. The debate therefore focused on making the sanctions 'smarter' and more targeted.³⁷

In 2000, five years after the Supplement to an Agenda for Peace, the Secretary-General of the UN, Kofi Annan, stated that one could now speak of an 'emerging consensus among Member States, that the design and implementation of Security Council sanctions need to be improved and their administration enhanced to allow a more prompt and effective response to present and future threats to international peace and security. Future sanctions regimes should be designed so as to maximise the chance of inducing the target to comply with Security Council resolutions, while minimising the negative effects of the sanctions on the civilian population and neighbouring and other affected States.'³⁸

Studies show that targeted sanctions are indeed less invasive *vis-à-vis* the fundamental rights of the civil population; however, adverse humanitarian consequences cannot be ruled out.³⁹ The development towards the use of targeted sanctions has made this instrument a useful enforcement measure in combating terrorism, since the sanctions can now be targeted to affect those involved in terrorism. However, the way in which the targeted sanctions are imposed under the 1267 regime is yet another interpretation of the power of the Security Council to impose sanctions. While the targeted sanctions that have been imposed so far have in particular targeted the leaders of a regime who were in charge of the policy that was creating the threat to international peace and

³⁶ For an overview of different opinions, see for example W.J.M. VAN GENUGTEN and G.A. DE GROOT (eds.), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights*, (Antwerp: Intersentia, 1999). See also D. CORTRIGHT and G.A. LOPEZ, 'Assessing Smart Sanctions. Targeting Sanctions: Lessons from the 1990s', in M. BRZOSKA (ed.), *Smart Sanctions: The Next Steps*, (Baden-Baden: Nomos Verlagsgesellschaft, 2001), pp. 19-38, at p. 19.

³⁷ In 1999-2000, the Swiss Government took the initiative in the debate by organising a series of expert meetings on financial sanctions, known as the 'Interlaken Process'. The results of the 'Interlaken Process' can be found on <http://www.smartsanctions.ch>. This initiative was followed by the German Government with a meeting on arms embargoes and travel and air transport bans, known as the 'Bonn-Berlin Process'. A selection of the contributions to the 'Bonn-Berlin Process' is found in M. BRZOSKA (ed.), *Smart Sanctions: The Next Steps*, (Baden-Baden: Nomos Verlagsgesellschaft, 2001).

³⁸ Report of the Secretary-General on the Work of the Organisation, A/55/1, New York, 2000, at p. 13.

³⁹ D. CORTRIGHT and G.A. LOPEZ, *supra* note 36, p. 19.

security, one cannot make the same assessment in relation to the individuals who are targeted by the 1267 regime. Contrary to, for example, Government members, the individuals and entities that allegedly have a connection with Al Qaida or Osama bin Laden and are from then on placed on the Consolidated List, have no power to put an end to the overall situation that is creating the threat to international peace and security. In other words, there are no clear conditions, and it is thus not clear what each individual should do to put an end to the situation in which sanctions are imposed.

Just as with the 1373 regime, the legal basis for the powers of the Security Council are at the very least stretched to accommodate the new version of the sanction regime as imposed by Resolution 1267 and on. It thus depends on whether or not and to what extent the limitations on the powers are being respected, before any conclusion can be drawn on the question whether or not the Council is acting within its powers.

4. NEW LIMITATIONS TO THE POWERS OF THE SECURITY COUNCIL?

Apart from the obscurity surrounding the legal basis of these measures, it seems that the few limitations that follow from the Charter have been especially drafted to limit the powers exercised by the Security Council in its 'police' function. When assessing the legality of the actions of the Security Council that would qualify as being (quasi-)legislative, (quasi-)judicial or administrative, the Charter limitations do not seem to fit the purpose of these new functions, because instead of temporary or preventive measures being issued, the actions that follow from these new functions do not fit this qualification most of the time. Kelsen's argument, therefore, that the main task of the Security Council under Chapter VII of the UN Charter is not to restore the law, but to maintain or to restore peace,⁴⁰ and that therefore the only restrictions on its actions follow from the principles and purposes of the Charter, and that acting in accordance with the principles of justice and international law should therefore not be a further complicating factor, is irrelevant when the Security Council is not acting in this function. In other words, if the Council is indeed developing new powers, the question regarding what regime of limitations should be applied seems to be a fair one.

In relation to the legislative measures that follow from Resolution 1373, and that are based on the powers of Chapter VII, one would have to conclude that

⁴⁰ H. Kelsen, *The Law of the United Nations. A Critical Analysis of its Fundamental Problems*, (London: Stevens and Sons Ltd., 1951), p. 294.

at a minimum the principles and the purposes of the Charter, as laid down in Articles 1 and 2, should be respected. The principle of non-intervention belongs to this category of principles and purposes and normally also entails a prohibition on prescribing legislation. However, the Charter also states that its function shall not prejudice the application of enforcement measures under Chapter VII. Thus, a limitation to the legislative actions of the Council does not follow from this principle.

Furthermore, it seems difficult to point to other limitations that should be respected in relation to the new-found powers applied in Council Resolution 1373, other than the general desire for a better motivation of and clearer delimitation of the powers. Respect for human rights, which is after all one of the principles of the Charter, could also be better guaranteed, but, on the other hand, it is not possible to point to any violation by the Council itself in relation to the 1373 regime in this respect. One could merely mention neglecting the purpose of promoting respect for human rights. The fact that a liaison officer, and not even an expert, was appointed to the CTC only after some time had passed is illustrative of this conclusion.

The impact of the limitations that follow from the purposes and principles of the Charter on the 1267 regime is somewhat different. Some measures have a large impact on the personal lives of individuals; it is therefore important to assess to what extent human rights guarantees are upheld while the Council exercises its powers, and to what extent human rights guarantees form a limitation on the powers of the Council. After all, these human rights guarantees would normally protect individuals from an unbalanced use of power by Governments. The question is whether these guarantees also offer protection against an abuse of power by an organ of an international organisation.

History shows that the Security Council has become increasingly involved in the enforcement of human rights. It has more than once considered that gross and large-scale human rights violations qualify as a threat to international peace and security, and has also acted upon this declaration by implementing non-military measures, and on some occasions even military measures. With regard to the struggle against terrorism, the Council has, when addressing Member States, underlined on several occasions the importance of adhering to the human rights obligations that follow from the different human rights conventions and from the customary rules of international law.

Despite all the noble aspirations, the Council itself does not always comply with human rights norms when taking anti-terrorism measures. As mentioned before, this becomes especially alarming when the rights of individuals are concerned. Moreover, since States or regional organisations have to comply with the decisions of the Security Council, but are also bound by human rights norms,

this can cause problems and can undermine the intended effectiveness of the measures. This conflict is not always easily solved by referring to Article 103 of the UN Charter. Article 103 of the Charter lays down the supremacy of decisions by the UN over other international obligations. Human rights norms which are in conflict with UN decisions can thus not officially be invoked to rectify this problem. However, national judges, as well as courts of regional organisations, dealing with decisions of the regional organisation that incorporate the Security Council resolutions, struggle with this conflict. This is particularly so when human rights norms are incorporated into their constituent documents.⁴¹

While it has already been established that the Security Council when imposing the sanction regime on individuals through its listing procedure is in a material sense violating fair trial principles, the formal question remains whether or not the Security Council is bound by the fair trial principles.

The human rights guarantees that are especially jeopardised by the sanction regime are the fair trial principles, more specifically the right to be heard by a fair, impartial and independent tribunal. Also part of the fair trial principles are the principles of equality of arms and the presumption of innocence, as well as the right to appeal. The question now is whether or not these elements of the right to a fair trial fall within the scope of the limitations as laid down in the Charter's purposes and principles, specifically in its reference to the promotion of human rights. The Charter does not specify the extent of this limitation and merely mentions them as guidelines. Nevertheless, the Security Council's complete disregard for human rights or other principles would violate the Charter.⁴² This argument is supported by De Wet's interpretation of the impact of the principle of good faith, as laid down in Article 2 (2) of the Charter. De Wet argues that the principle of good faith, linked to the principle of equitable estoppel, prevents the organisation from acting contrary to the core principles of human rights and humanitarian law.⁴³ After all, the practice of the Security Council shows that the Council has become increasingly involved in the enforce-

⁴¹ See for example the cases before the Court of Justice of the European Union: Court of First Instance, 21 September 2005, Case T-306, *Yusuf and Al Barakaat*; Court of First Instance, 21 September 2005, Case T-315, *Kadi*; Case T-253/02, *Chafiq Ayadi*, OJ 2002, C 289/5; Case T-318/01, *Othman*, OJ 2002, C 68/13; OJ 2002, C 68/13; and on the national level: Arrest of the Tribunal de première instance de Bruxelles, *Sayadi et Vinck c. L'Etat Belge*, 18 February 2005. For an elaborate analysis of the *Yusuf* and *Kadi* case, see M. BULTERMAN, 'Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities', (2006) 19 *Leiden Journal of International Law*, pp. 753-772.

⁴² FROWEIN/KRISCH, *supra* note 18, pp. 710-711.

⁴³ DE WET, *supra* note 18, pp. 191-216.

ment of human rights. The question is therefore which rights constitute the category of core principles of human rights and humanitarian law.

Subsequently, if the fair trial principles should be considered to fall within the category of core rights that set limits to the powers of the Security Council, the question is how to qualify the sanctions. Can they be considered to be punitive measures? If that is the case, from now on the principles of equality of arms and the presumption of innocence should also be respected.

The right to a fair trial is guaranteed in Article 10 of the Universal Declaration of Human Rights, in Article 14 of the International Covenant on Civil and Political Rights, in Article 6 of the European Convention on Human Rights, and in Article 8 of the American Convention on Human Rights. Moreover, the elements of the fair trial principle are incorporated in almost every national legal system. This right is therefore considered to be a general principle of law recognised by civilised nations and one of the foundations of democratic societies based on the rule of law.⁴⁴

With regard to the question whether the Security Council is bound by the principle of fair trial as a limitation to its powers, it is first of all important to elaborate on the inherent limitations on the right to a fair trial itself. Then, it will be argued that the Security Council is not only bound by this right through the purposes and principles of the Charter, but also because of the *ius cogens* status of the right to a fair trial.

The right to a fair trial, as incorporated in Article 14 ICCPR and Article 6 ECHR, is not listed among the non-derogable rights in Articles 4 (1) ICCPR and 15 ECHR. It is therefore fair to state that the Security Council can derogate from this right when it is acting under Chapter VII, which, after all, implies a situation that is – at the very least – a threat to the peace and that, in its turn, can be qualified as a state of emergency in the sense of these articles.⁴⁵

However, the Human Rights Committee in its General Comment No. 29 on States of Emergency noted that during armed conflicts common Article 3 of the Geneva Conventions of 1949 explicitly guarantees the core elements of the right to a fair trial and that there is no justification for derogating from these core elements in other emergency situations.⁴⁶ The Human Rights Committee goes further by arguing that the recognition of the non-derogability of certain rights is, in part, also a recognition of their peremptory nature.⁴⁷ According to this line

⁴⁴ See for example P. MALANCZUK, *Akehurst's Modern Introduction to International Law*, (London – New York: Routledge, 1997), p. 49.

⁴⁵ DE WET, *supra* note 18, p. 344.

⁴⁶ Human Rights Committee, General Comment No. 29, *States of Emergency*, 2001, par. 16, UN Document CCPR/C/21/Rev.1/Add.11 (2001).

⁴⁷ *Ibid.*, par. 11.

of reasoning, the core elements of the right to a fair trial⁴⁸ thus enjoy a *ius cogens* status.⁴⁹ *Ius cogens* norms naturally also provide a limitation to the powers of the Council, even though they do not immediately follow from the Charter. With regard to the principle of *ius cogens*, one has to take into account that there is no clarity concerning which norms belong to this category.⁵⁰

The core elements of international humanitarian law concern the protection of the civilian population as well as the rules governing the means and methods of warfare in all forms of armed conflict. Common Article 3 of the 1949 Geneva Conventions lays down these fundamental rules, and they are considered by the International Court of Justice, the ICTY and the ICTR as the minimum humanitarian standards applicable to all forms of conflict.⁵¹ Even though these tribunals have never actually qualified these core principles as *ius cogens*, they are re-

⁴⁸ The Human Rights Committee especially refers to the principle that only a court of law may try and convict a person for a criminal offence; the presumption of innocence must be respected; and in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant (Human Rights Committee, General Comment No. 29, *States of Emergency*, 2001, par. 16, *supra* note 46). See the Committee's Concluding Observations on Israel (1998) (CCPR/C/79/Add.93), par. 21: '... The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency... The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention.' See also the recommendation by the Committee to the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning a draft third optional protocol to the Covenant: 'The Committee is satisfied that States parties generally understand that the right to habeas corpus and *amparo* should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole.' Official Records of the General Assembly, Forty-ninth session, Supplement No. 40 (A/49/40), Vol. I, Annex XI, par. 2.

⁴⁹ DE WET, *supra* note 18, pp. 342-346.

⁵⁰ D. AKANDE, 'The International Court of Justice and the Security Council. Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?', (1997) 46 *International and Comparative Law Quarterly*, p. 320 and 322; K. DOEHRING, 'Self-Determination', in B. SIMMA, *The Charter of the United Nations: A Commentary*, (Oxford – New York: Oxford University Press, 2002), pp. 47-63; N. WHITE, 'To Review or Not to Review? The Lockerbie Cases before the World Court', (1999) 12 *Leiden Journal of International Law*, p. 421; I. SEIDERMAN, *Hierarchy in International Law. The Human Rights Dimension*, (Antwerp: Intersentia, 2001), p. 86.

⁵¹ See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Rep. 1986, at 113-1; *Tadic* decision, Decision on the Defence Motion for Interlocutory Appeal and Jurisdiction, Case No IT-94-1-T, 2 October 1995, Appeals Chamber, par. 102; *Prosecutor v. Zejnil Delalic, Hazim Delic, Esad Lndzo and Zdravko Mucic*, Judgement, Case No IT-96-21, 20 February 2001, Appeals Chamber, at par. 143.

ferred to as 'intransgressible principles of international customary law',⁵² which comes as close to *ius cogens* as one can get.⁵³

The Security Council is therefore bound by the core elements of international humanitarian law when it authorises military enforcement action, for three reasons.⁵⁴ First, these core elements are part of the purposes and principles of the Charter. Secondly, because the United Nations has on many occasions committed itself to these norms; it has created a legal expectation the disregard of which would be a violation of the principle of good faith. And finally, these norms bear the quality of *ius cogens* norms.

As was made clear above, De Wet argues that the right to a fair trial during criminal proceedings can now also be considered as an element of *ius cogens*.⁵⁵ As was stated before, the Charter itself is not clear on the scope of the limitations on the powers of the Security Council that follow from the purposes and principles as set down in Articles 1 and 2 of the Charter. The reference made to the promotion of human rights may thus be interpreted as a mere guideline for Security Council actions. The category of human rights that are understood 'at least' to fall under this guideline qualify as core elements of human rights. Several interpretations of human rights regimes conclude that fair trial principles belong to the category of core human rights and even attribute a *ius cogens* status to the fair trial principles. It is therefore fair to conclude that the Security Council, when acting under Chapter VII of the Charter, should adhere to the core principles of fair trial. To this category of core elements of the right to a fair trial belongs the right to be heard by a fair, independent and impartial tribunal. Whether the applicability of the principles of fair trial goes as far as to include, for example, the principle of the presumption of innocence and the equality of arms, depends on how the sanction measures can be qualified. Only when these measures can be qualified as punitive measures would the principle of fair trial also include these elements. Taking into account the criteria⁵⁶ that have been developed by the European Court of Human Rights⁵⁷ to determine whether or

⁵² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 1996, at 258.

⁵³ DE WET, *supra* note 18, p. 215.

⁵⁴ DE WET, *supra* note 18, p. 215.

⁵⁵ DE WET, *supra* note 18, pp. 219-222 and pp. 342-346.

⁵⁶ In the three-factor test developed by the Court, it asks: whether or not the text defining the offence belongs, in the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and degree of the severity of the penalty that the person concerned risked incurring. (ECtHR 2 September 1998 (*Kadubec v. Slovakia*), Reports of Judgments and Decisions, 1998-VI, par. 50).

⁵⁷ The interpretation by the European Court of Human Rights of the term 'criminal charge' is considered to be the leading interpretation. See *inter alia* A.H. ROBERTSON (revised by J.G. MERRILLS), *Human Rights in the World*, (Manchester: Manchester University Press, 1992), p.

not a measure can be qualified as a punitive one, there is certainly reason to believe that the financial sanctions that follow after the listing by the Sanction Committee qualify as such.⁵⁸

Another principle that limits the powers of the Security Council is the principle of proportionality.⁵⁹ One would expect that as the scope of the powers of the Security Council is broadened, which according to the implied powers theory is possible, the threshold of limits on these 'new' powers increases equivalently. According to Fassbender in his report to the Secretary-General, the use of implied powers implicates the acknowledgement of implied duties or implied obligations.⁶⁰ With regard to the possibility of the Council taking measures that target individuals, it seems that respect for the individual's procedural rights should form that higher threshold. Clearly, the sanctions regime does not meet this threshold.

The question that remains unanswered is how to deal with the absence of a clear hierarchy of the different principles laid down in Articles 1 and 2 of the Charter. If, after all, one comes to the conclusion that the principle of respect for human rights has been violated, one has to weigh this violation against the respect for the principle of peace. The Charter has not indicated how to deal with a conflict between principles and purposes. Wolfrum argues in this respect that it is all about establishing a practical concordance while giving priority to the *lasting preservation of peace*.⁶¹ However, considering the broad interpretation of the term peace, which could just as well entail the positive interpretation of peace, which includes development, education, prosperity and human rights, Wolfrum's argument does not seem to solve this problem. What is left is the goal of a long-term effective counter-terrorism policy of the Security Council, which, considering the above arguments, needs some rectification of its shortcomings.

5. CONCLUDING REMARKS

In assessing the anti-terrorism measures that have been taken throughout the Security Council's history, it becomes clear that there is a development from

293, and A. NOLLKAEMPER and E. DE WET, 'Review of Security Council Decisions by National Courts', in (2003) 45 *German Yearbook of International Law*, p. 166-202.

⁵⁸ See more elaborately on this topic B.T. VAN GINKEL, 'De Naleving van Mensenrechten bij de Bestrijding van Terrorisme: de VN en het Recht op 'Fair Trial'', in C. FLINTERMAN and W. VAN GENUGTEN (eds.), *Niet-Statelijke Actoren en de Rechten van de Mens: Gevestigde Waarden, Nieuwe Wegen*, (The Hague: Boom Juridische uitgevers, 2003), pp. 199-214.

⁵⁹ FROWEIN/KRISCH, *supra* note 18, pp. 711-712.

⁶⁰ Report by FASSBENDER *supra* note 12, par. 6.7.

⁶¹ R. WOLFRUM, 'Purposes and Principles', in B. SIMMA (ed.), *The Charter of the United Nations: A Commentary*, (Oxford – New York: Oxford University, 2002), p. 34.

condemnations of specific terrorist attacks towards a condemnation of terrorism in general. On the other hand, the measures taken show a reverse tendency: from rather general measures they have become more targeted. The focus of the Council has also shifted from States to individuals.

It also seems that the Council's role has been strengthened, in the sense that it is acting more and more as a legislator. But it also seems stronger when exercising its executive role. Some States clearly applaud these developments. Others, however, are very concerned with the new-found powers of the Security Council and claim that checks and balances are lacking.

The problem seems to be, in particular, that the United Nations as an organisation is acting out of character when it shows little interest in respect for human rights. But States might also find themselves in a difficult position when national courts have to deal with violations of fair trial principles as a result of Security Council measures.

The geopolitical shifts in international relations and the new character of the non-conventional threats might have called for new interpretations of the powers of the Security Council, but these new powers are also not without limitations. And even though we are moving in a grey area when it comes to the exact scope of the limitations in this respect, the fact that alternative, less invasive methods are available to deal with the new problems seems to be the strongest argument for a broad interpretation of the limitations, and thus justifies a very critical look at the measures of the Security Council in relation to combating terrorism.

