

THE SECURITY COUNCIL AS WORLD LEGISLATURE

*By Stefan Talmon**

As has recently been noted, the Security Council has entered its legislative phase.¹ This phase began on September 28, 2001, with the adoption of Resolution 1373.² Resolution 1540 of April 28, 2004, is the most recent example, but undoubtedly not the last. In a briefing on the Council's schedule for April 2004, its president, referring to the planned adoption of Resolution 1540, described the ongoing consultation process for that resolution as "the first major step towards having the Security Council legislate for the rest of the United Nations' membership." He explained that "[Resolution] 1373 had been the first step" and that the "Council would be needed more and more to do that kind of legislative work."³ In the legal literature the Council is referred to as "legislator"⁴ or "world legislator."⁵ One author has even claimed that "[b]y means of its enforcement powers, the Security Council has in fact replaced the conventional law-making process on the international level."⁶ These are revolutionary statements considering that, for a long time, the perceived wisdom was that "there is no machinery of international legislation"⁷ and that the states are the legislators of the international legal system. As recently as 1995, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held in the *Tadić* case: "There is . . . no legislature, in the technical sense of the term, in the United Nations system That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects."⁸ But the appeals chamber also noted that the Council is a body that "has a limited power to take binding decisions. . . . when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter."⁹ This Note will examine the legal framework for Security Council legislation and assess the effectiveness of this new weapon in the Security Council's arsenal. But before doing so, it may be useful to ask what is meant by "international legislation" in the context of Security Council action.

I. SECURITY COUNCIL RESOLUTIONS AS ACTS OF INTERNATIONAL LEGISLATION

The term "international legislation" has been used in a variety of ways by writers. They have employed it in a broad sense to cover "both the process and the product of the conscious effort to make additions to, or changes in, the law of nations."¹⁰ They have also used it to describe the conclusion of lawmaking treaties (i.e., multilateral treaties on matters of general interest), the making of customary international law, and the adoption of binding decisions by international

* University Lecturer in Public International Law and Tutorial Fellow, St. Anne's College, University of Oxford.

¹ José E. Alvarez, *Hegemonic International Law Revisited*, 97 AJIL 873, 874 (2003).

² The representative of Costa Rica, referring to Resolution 1373, said, "In short, for the first time in history, the Security Council enacted legislation for the rest of the international community." UN Doc. A/56/PV.25, at 3 (2001).

³ Press Conference by Security Council President (Apr. 2, 2004), at <<http://www.un.org/News/briefings/docs/2004/pleuigerpc.DOC.htm>>.

⁴ See, e.g., José E. Alvarez, *The UN's 'War' on Terrorism*, 31 INT'L J. LEGAL INFO. 238, 241 (2003); Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT'L L. 593, 596 (2003); Nico Krisch, *The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 879, 883 (Christian Walter et al. eds., 2003).

⁵ See, e.g., Klaus Dicke, *Weltgesetzgeber Sicherheitsrat*, 49 VEREINTE NATIONEN 163 (2001); Jasper Finke & Christiane Wandscher, *Terrorismusbekämpfung jenseits militärischer Gewalt. Ansätze der Vereinten Nationen zur Verhütung und Beseitigung des internationalen Terrorismus*, 49 VEREINTE NATIONEN 168, 172 (2001).

⁶ Krisch, *supra* note 4, at 884.

⁷ 1 OPPENHEIM'S INTERNATIONAL LAW 114 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

⁸ Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT-94-1-AR72, para. 43 (Oct. 2, 1995), 35 ILM 32 (1996).

⁹ *Id.*, para. 44.

¹⁰ 1 INTERNATIONAL LEGISLATION: A COLLECTION OF TEXTS OF MULTIPARTITE INTERNATIONAL INSTRUMENTS OF GENERAL INTEREST, at xiii (Manley O. Hudson ed., 1931).

organizations.¹¹ Security Council resolutions that established the United Nations Compensation Commission and the two ad hoc war crimes tribunals for Yugoslavia and Rwanda, imposed disarmament obligations on Iraq, determined the Kuwait-Iraq border, declared the applicability of the Fourth Geneva Convention to the occupied Palestinian territories, and, generally, imposed any economic sanctions have been termed international legislation or legislative acts in the literature.¹² States, on the other hand, used the term for the first time in connection with Resolution 1373, and, more recently, Resolution 1540.¹³

State practice seems to follow Krzysztof Skubiszewski, who suggested that international legislation should mean lawmaking that, in its basic features, remains identical with national legislation.¹⁴ But what are the basic features, the hallmarks, of international legislation? At the outset, it should be noted that international legislation does not necessarily require any legislative activity on the part of member states.¹⁵ International legislation is not to be equated with legislative agenda setting by the Council. It should be recalled that most resolutions imposing economic sanctions require some kind of legislative activity by the member states to make them applicable to individuals. The nature of the measures in these resolutions as mainly aimed at individuals and not at states is not the distinguishing feature of international legislation, either. By the mid-1990s, the Council had already turned to “targeted” or “smart” sanctions and aimed its measures specifically against certain persons or groups of persons deemed to bear particular responsibility for a threat to the peace. It primarily used financial sanctions and travel bans for this purpose.

The hallmark of any international legislation is the *general and abstract character* of the obligations imposed. These may well be triggered by a particular situation, conflict, or event, but they are not restricted to it. Rather, the obligations are phrased in neutral language, apply to an indefinite number of cases, and are not usually limited in time.¹⁶ Thus, while Resolution 1390 provides that “all States shall . . . [f]reeze without delay the funds and other financial assets or economic resources” of Osama bin Laden, members of Al Qaeda, and the Taliban, and other individuals, groups, undertakings, and entities associated with them,¹⁷ Resolution 1373 states in identical terms, but generally, that “all States shall . . . [f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts.”¹⁸ The basic characteristic of this new type of legislative or generic resolution¹⁹ is, as the Colombian delegate to the Security

¹¹ See Krzysztof Skubiszewski, *International Legislation*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1255, 1255 (Rudolf Bernhardt ed., 1995). On the use of the term “international legislation,” see also the references in OPPENHEIM’S INTERNATIONAL LAW, *supra* note 7, at 32 n.9.

¹² See, e.g., Jost Delbrück, *Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State*, 11 IND. J. GLOBAL LEGAL STUD. 31, 37 (2004); Keith Harper, *Does the United Nations Security Council Have the Competence to Act as a Court and Legislature?* 27 N.Y.U. J. INT’L L. & POL. 103, 126–29 (1994); Frederic L. Kirgis Jr., *The Security Council’s First Fifty Years*, 89 AJIL 506, 520, 522 (1995); Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT’L L. 325, 326 (1995); Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 954 (1994); see also Paul C. Szasz, Remarks, in *The UN Decade on International Law: Progress and Promises*, 89 ASIL PROC. 172, 183 (1995).

¹³ SC Res. 1373 (Sept. 28, 2001), 40 ILM 1278 (2001) (deciding that all states should take wide-ranging measures to combat international terrorism and to prevent and suppress the financing of terrorism); SC Res. 1540 (Apr. 28, 2004), 43 ILM 1237 (2004) (deciding that all states should act to prevent proliferation of weapons of mass destruction and their delivery systems, in particular for terrorist purposes).

¹⁴ Skubiszewski, *supra* note 11, at 1255.

¹⁵ Cf. SC Res. 1373, *supra* note 13, paras. 1, 2; SC Res. 1540, *supra* note 13, paras. 1, 3.

¹⁶ The classic resolutions are expressly or implicitly limited in time until the purpose for which they are adopted—usually to secure performance of an obligation or the cessation of an internationally wrongful act by the addressee—is accomplished. The same applies, in principle, to legislative resolutions. However, there seems at present to be no end to the fight against international terrorism or the proliferation of weapons of mass destruction, the targets of some of the legislative resolutions in question.

¹⁷ SC Res. 1390, para. 2(a) (Jan. 16, 2002), 41 ILM 511 (2002). For similar specific obligations, see SC Res. 1333, para. 8(c) (Dec. 19, 2000), 40 ILM 509 (2001); SC Res. 1267, para. 4(b) (Oct. 15, 1999), 39 ILM 235 (2000).

¹⁸ SC Res. 1373, *supra* note 13, para. 1(c).

¹⁹ The representative of New Zealand defined a “generic resolution” as a “resolution, not in response to a particular fact situation.” UN Doc. S/PV.4568, at 5 (2002); UN Doc. S/PV.4772, at 5 (2003); see also UN Doc. S/PV.4568, *supra*, at 20 (statement by Liechtenstein).

Council put it, that it “does not name a single country, society or group of people.”²⁰ To that extent, the obligations imposed in such resolutions are akin to obligations entered into by states in international agreements. There is thus a basic difference between the classic individualized resolutions and the new legislative or generic resolutions; only the latter should be referred to as international legislation.

II. LEGISLATIVE ACTIVITY OF THE SECURITY COUNCIL

On the basis of the criteria for international legislation just established, the Security Council has legislated on four occasions so far. In Resolution 1373, adopted unanimously, the Council set out a range of abstract measures for all states to undertake in combating terrorism. These included the obligations to prevent and suppress the financing of terrorist acts, freeze the resources of terrorists, and criminalize the perpetration of terrorist acts.²¹ Several provisions were almost identical to provisions in the International Convention for the Suppression of the Financing of Terrorism, which was not yet in force.²² The representative of Angola declared in the Council debate on April 22, 2004: “By adopting resolution 1373 (2001), the Security Council took the unprecedented step of bringing into force legislation binding on all States on the issue of combating terrorism.”²³ The adoption of Resolution 1373 was widely welcomed by the UN member states.²⁴ It was hailed as a “groundbreaking resolution,”²⁵ a “landmark decision,”²⁶ a “historic event,”²⁷ and even “one of the most important resolutions in [the] history [of the Council].”²⁸ During the debate on threats to international peace and security caused by terrorist acts, on January 18, 2002, representatives of thirty-seven states and the observer for Palestine spoke on the implementation of Resolution 1373. No speaker expressed concerns that the Council was legislating in that resolution for the international community,²⁹ although some Council members, it seems, had expected such concerns.³⁰ Even Mexico, which had objected to the creation of the ad hoc international criminal tribunals by the Council as exceeding its powers under Article 41,³¹ did not raise any objections to Resolution 1373.³²

The next, often overlooked example of Security Council legislation was the adoption of Resolutions 1422 and 1487 on the International Criminal Court (ICC).³³ In these resolutions the

²⁰ Maggie Farley, *U.N. Measure Requires Every Nation to Take Steps Against Terrorism*, L.A. TIMES, Sept. 28, 2001, at A6, available in LEXIS, News Library, Allnews File.

²¹ On Resolution 1373, see Jurij Daniel Aston, *Die Bekämpfung abstrakter Gefahren für den Weltfrieden durch legislative Maßnahmen des Sicherheitsrats—Resolution 1373 (2001) im Kontext*, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 257 (2002); Finke & Wandscher, *supra* note 5, at 168–73; Happold, *supra* note 4, at 593–610; see also *An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390*, 97 ASIL PROC. 41–54 (2003) (with contributions by Jane E. Stromseth, Elin Miller, and Danilo Türk).

²² International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 ILM 270 (2000).

²³ UN Doc. S/PV.4950, at 9–10 (2004).

²⁴ See, e.g., UN Doc. A/56/757, at 4 (2001) (India and the fifteen member states of the European Union); UN Doc. A/56/PV.59, at 34 (2001) (Kazakhstan).

²⁵ UN Doc. A/56/PV.48, at 9 (2001) (Turkey); see also UN Doc. A/56/PV.34, at 13 (2001) (Guatemala).

²⁶ UN Doc. A/56/PV.25, *supra* note 2, at 10 (Singapore).

²⁷ UN Doc. S/PV.4413, at 15 (2001) (United Kingdom).

²⁸ UN Doc. S/PV.4453, at 7 (2002) (France).

²⁹ See *id.*; & *id.* (Resumption 1).

³⁰ See the statement of Sir Jeremy Greenstock, the United Kingdom representative on the Security Council and chairman of the Council’s Counter-Terrorism Committee:

I have been very struck by the responsiveness of the membership to the outreach programme of the counter-terrorism Committee. . . . They have come to the meetings that we have had on these items, not with complaints about the Security Council—which they might well have had, given the unique nature, I think, of resolution 1373 (2001)—but in order to bring out the questions they have in their minds about the substance of what we are doing.

UN Doc. S/PV.4432, at 5 (2001) (emphasis added).

³¹ See, e.g., UN Doc. A/55/PV.95, at 3 (2001); UN Doc. A/55/PV.102, at 3 (2001).

³² See UN Doc. S/PV.4453 (Resumption 1), at 26 (2002).

³³ SC Res. 1422 (July 12, 2002), 41 ILM 1276 (2002); SC Res. 1487 (June 12, 2003), 42 ILM 1025 (2003). These resolutions, however, were classified as legislative resolutions by Happold, *supra* note 4, at 609; Andreas

Council addressed a general request to the ICC to defer, for a twelve-month period, investigation or prosecution of any case involving current or former officials or personnel from a contributing state not a party to the Rome Statute of the ICC, over acts or omissions relating to a United Nations-established or -authorized operation. The Council also obliged member states not to take any action inconsistent with this request or with their international obligations. While the initial resolution received unanimous support, on renewal it was adopted by only 12 votes to 3. The resolutions were widely criticized by member states for not specifying a threat to the peace as a precondition for Chapter VII action.³⁴ States also disagreed on whether Article 16 of the Rome Statute³⁵ allowed for such a general request. However, they did not object to the power of the Council to impose obligations of an abstract and general character.

The most recent example of Security Council legislation, Resolution 1540, was adopted unanimously. In that resolution the Council imposed a range of general obligations on all states to keep weapons of mass destruction and their means of delivery out of the hands of nonstate actors.³⁶ This resolution for the first time prompted several member states to voice their "basic concerns over the increasing tendency of the Council in recent years to assume new and wider powers of legislation on behalf of the international community, with its resolutions binding on all States."³⁷ Others denied the Council any "legislative authority"³⁸ and claimed that the enactment of global legislation "is not consistent with the provisions of the United Nations Charter."³⁹ Whether these concerns and objections are justified will now be examined.

III. LEGALITY OF SECURITY COUNCIL LEGISLATION

The Security Council does not operate in a legal vacuum when adopting its resolutions. As the appeals chamber of the ICTY held in the *Tadić* case: "neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)."⁴⁰ The fact that the international system does not allow for any automatic review of the Security Council's decisions does not rule out the possibility that, in practice, matters of *ultra vires* will be dealt with judicially, either indirectly or incidentally.⁴¹ Whether the Council may in fact assume such far-

Zimmermann & Björn Eberling, *Grenzen der Legislativbefugnisse des Sicherheitsrats*, 52 VEREINTE NATIONEN 71, 72-73 (2004).

³⁴ See with regard to SC Res. 1422, UN Doc. S/PV.4568, *supra* note 19, at 3 (Canada); and with regard to SC Res. 1487, UN Doc. S/PV.4772, *supra* note 19, at 5, 7, 15 (Canada, Liechtenstein, Trinidad and Tobago, respectively); UN Doc. S/PV.4568 (Resumption 1), at 7, 9 (2002) (Samoa, Germany).

³⁵ Article 16 of the Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9* (1998), 37 ILM 999 (1998), *corrected through Jan. 16, 2002*, at <<http://www.icc-cpi.int>>, provides:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; the request may be renewed by the Council under the same conditions.

³⁶ Such a resolution had already been envisaged "in the spirit . . . which calls for 'the progressive development of international law'" by David A. Koplow in 1996. David A. Koplow, Remarks, in *Nuclear Non-Proliferation and Weapons Control*, 90 ASIL PROC. 565, 571 (1996).

³⁷ UN Doc. S/PV.4950, *supra* note 23, at 23 (India). For similar concerns, see *id.* at 30 (Cuba); *id.* (Resumption 1), at 5 (Mexico); *id.* at 14 (Nepal); *id.* at 17 (Namibia).

³⁸ *Id.* (Resumption 1), at 3 (Egypt).

³⁹ UN Doc. S/PV.4950, *supra* note 23, at 31 (Indonesia). For similar views, see *id.*, at 32 (Iran); *id.* at 5 (Algeria); UN Doc. A/58/PV.30, at 20 (2003) (Algeria).

⁴⁰ Prosecutor v. Tadić, *supra* note 8, para. 28; see also *id.*, paras. 29-30; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, 54, para. 118 (June 21) (referring to "a situation which the Court has found to have been *validly* declared illegal [by the Security Council]" (emphasis added)). The latter statement suggests that the Court has, at least implicitly, examined the validity of the Security Council's action.

⁴¹ Ian Brownlie, *International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law*, 255 RECUEIL DES COURS 9, 214-15 (1995); see also Susan Lamb, *Legal Limits to United Nations Security Council Powers*, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNIE 361, 365 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999). But see also the decision of Trial Chamber 2 of the International Criminal Tribunal for Rwanda, which held that "such discretionary assessments [as the existence of a threat to the peace] are

reaching powers and enact legislation for the international community is thus not just an academic question.

General Objections to Security Council Legislation

Several general objections may be raised to Security Council legislation. First, a patently unrepresentative and undemocratic body such as the Council is arguably unsuitable for international lawmaking.⁴² However, this objection, although valid, could also be made to any other Council action. It can hardly be maintained that authorizing the use of force requires less democratic legitimacy than imposing an obligation to prevent and suppress the financing of terrorist acts. Second, it may be argued that the International Court of Justice (ICJ) does not know of legislative resolutions as a source of international law.⁴³ This contention does not take into account that Council resolutions are legally based in the United Nations Charter, an international convention in the sense of Article 38(1)(a) of the ICJ Statute, which makes them classifiable as “secondary treaty (or Charter) law.” The fact that the ICJ has been able to apply resolutions of the Council without remarking upon the incompleteness of Article 38⁴⁴ strongly suggests that binding Council resolutions, both of a general and of a particular character, are still properly regarded as coming within the scope of the traditional sources of international law.⁴⁵ This quality would change only if the Council expressly purported to legislate outside the Charter framework, that is to say, for nonmembers of the United Nations. Third, Council practice may be criticized as contrary to the basic structure of international law as a consent-based legal order.⁴⁶ This view overlooks the nature of all binding decisions of the Council as, according to Article 25 of the UN Charter, based on the consent of the member states.⁴⁷ Finally, the assumption of legislative powers by the Council may be said to be difficult to reconcile with its general role under the Charter as a “policeman” rather than a legislature or jury.⁴⁸ Yet the powers of the Council are to be determined not by reference to its general role but on the basis of the provisions of the UN Charter.

Legislation as Action Under Chapter VII of the UN Charter

Article 24 of the UN Charter states that the Council has “primary responsibility for the maintenance of international peace and security,” and provides that the “specific powers granted to the Security Council” to meet this responsibility are found in Chapters VI, VII, VIII, and XII. Of these, Chapter VII is the only one relevant to a binding decision requiring all states to adopt certain measures. As legislative resolutions contain nonforcible and permanent measures, their legality is to be assessed on the basis of Articles 39 and 41 of the Charter.⁴⁹ Under these provisions, the Council “may call upon the Members of the United Nations to apply such

not justiciable.” Prosecutor v. Kanyabashi, Jurisdiction, No. ICTR-96-15-T, at 6, para. 20 (June 18, 1997), available at <<http://www.ictr.org>>.

⁴² Compare the statement of the representative of Paraguay, UN Doc. A/56/PV.36, at 2 (2001): “The effective implementation of resolution 1373 (2001) requires the will and cooperation of all Member States. For this we need a representative, equitable and transparent Council.”

⁴³ See INTERNATIONAL COURT OF JUSTICE STATUTE Art. 38(1).

⁴⁴ See, e.g., Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. U.S.), 1992 ICJ REP. 3 & 114 (Apr. 14) [hereinafter *Lockerbie*].

⁴⁵ But see Skubiszewski, *supra* note 11, at 1261 (regarding lawmaking acts of international organizations as a new source of law distinct from treaties).

⁴⁶ See Martin Kühnemund, *Die Vereinten Nationen und der “Krieg gegen den Terrorismus”* 54–55 (Forschungsstelle Dritte Welt Working Paper 34, 2003), at <<http://www.forschungsstelle-dritte-welt.de/Schriften.htm>>.

⁴⁷ Article 25 of the UN Charter provides: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

⁴⁸ On the police function of the Security Council, see Jochen Abr. Frowein & Nico Krisch, *Introduction to Chapter VII, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 701, 705–06, paras. 12–14 (Bruno Simma ed., 2d ed. 2002); Koskenniemi, *supra* note 12, at 325–48.

⁴⁹ The representative of Colombia expressly referred to Article 41 as the legal basis of Resolution 1373. UN Doc. S/PV.4394 (Resumption 1), at 7 (2001).

measures [not involving the use of armed force]" once it has determined "the existence of any threat to the peace, breach of the peace, or act of aggression."

Two separate, but interrelated, questions require special attention in this connection. First, can general phenomena such as terrorism and the proliferation of weapons of mass destruction be qualified as "threats to the peace" under Article 39 of the Charter and, second, can obligations of a general and abstract character such as to criminalize a certain behavior and to enact certain laws be subsumed under the term "measures" in the sense of Article 41 of the Charter?

General phenomena as "threats to the peace." During the debate in the General Assembly on October 15, 2001, the representative of Costa Rica declared that "resolution 1373 (2001) heralds a new era in international relations. For the first time in history, the Security Council has declared that a particular phenomenon—international terrorism—constitutes, in any circumstances, a threat to international peace and security."⁵⁰ The question whether abstract phenomena can constitute a "threat to the peace" is disputed in the literature. While several authors have argued that the Council may take action only with regard to specific situations or conflicts,⁵¹ others have seen no problem in extending the concept to particular conduct or a situation *per se*.⁵² As a treaty, the Charter of the United Nations is to be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context, and in the light of its object and purpose. Together with the context, any subsequent practice in the application of the treaty shall be taken into account.⁵³ It is this last criterion, "the 'subsequent practice' of the membership of the United Nations at large," that the ICTY appeals chamber in the *Tadić* case seized upon when interpreting the term "threat to the peace."⁵⁴ According to the appeals chamber, "the 'threat to the peace' is more of a political concept."⁵⁵ The determination of a threat to the peace thus requires more than mere normative considerations; it also necessitates an analysis of political realities. For this reason, the UN Charter gives the Council broad, but not unfettered, discretion when determining a threat to the peace.

An examination of the Council practice and the common understanding of the United Nations membership in general shows that "threat to the peace" is a constantly evolving concept. Since the beginning of the 1990s, the understanding of what constitutes a "threat to the peace" has broadened considerably from the narrow concept of the absence of the use of armed force, to the wider concept of situations that may lead to the use of armed force. This shift from a purely formal to a substantive meaning of "threat to the peace" was marked in a statement by the president of the Council at the conclusion of its meeting on January 31, 1992, held at the level of heads of state and government, in discussing the Security Council's responsibility in the maintenance of international peace and security. Speaking on behalf of the members of the Council, the president declared that "[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."⁵⁶ In the same statement, more than twelve years before the adoption of Resolution 1540 in 2004, the Council members had already declared that "[t]he proliferation of all weapons of mass destruction constitutes a threat to international peace and security" and

⁵⁰ UN Doc. A/56/PV.25, *supra* note 2, at 3.

⁵¹ Happold, *supra* note 4, at 598–601; Zimmermann & Eberling, *supra* note 33, at 71–72.

⁵² Harper, *supra* note 12, at 149; Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 195, 344–46 (1993 IV).

⁵³ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 31(1) & (3)(b), 1155 UNTS 331 [hereinafter Vienna Convention].

⁵⁴ Prosecutor v. Tadić, *supra* note 8, para. 30. On the importance of "subsequent practice" for the interpretation of constituent instruments of international organizations, see also Georg Ress, *Interpretation, in THE CHARTER OF THE UNITED NATIONS*, *supra* note 48, at 13, 27–30.

⁵⁵ *Tadić*, *supra* note 8, para. 29.

⁵⁶ UN Doc. S/23500, at 3 (1992), at <<http://projects.sipri.se/cbw/docs/cbw-unsc23500.html>>.

that they “commit themselves to working to prevent the spread of technology related to the research for or production of such weapons and to take appropriate action to that end.”⁵⁷

Since 1992, a wide variety of situations has been classified as a “threat to the peace” by both the Security Council and the General Assembly. These include the proliferation and development of weapons of mass destruction (as well as their means of delivery),⁵⁸ acts of international terrorism,⁵⁹ the use of mercenaries,⁶⁰ emergency situations,⁶¹ and the violent disintegration of states.⁶² Thus, a common understanding, manifested by the “subsequent practice” of the membership of the United Nations at large, can be said to have emerged that the “threat to the peace” of Article 39 may include certain situations per se. Quite conceivably, in future certain environmentally destructive practices,⁶³ illegal arms trafficking, transnational organized crime, drug trafficking, large-scale piracy, global health pandemics, and mass refugee flows will also be considered as threats to the peace. It may be argued that every situation that the Council has identified as a threat to the peace in a particular conflict situation potentially qualifies as a threat to the peace per se. But a reasonable connection between the phenomenon in question and the use of force is required in all cases.⁶⁴ Such a wide interpretation conforms with the object and purpose of Article 39, as it allows the Council fully to carry out its primary responsibility for the maintenance of international peace and security. As Article 1(1) shows, the maintenance of international peace and security includes both the removal and the prevention of threats to the peace. Consequently, there is a proactive (and not just a reactive or remedial) dimension to the actions of the Council, which means that it must be able to deal with abstract as well as specific threats to the peace.

Obligations of a general and abstract character as “measures.” Whether Article 39 also includes general phenomena as threats to the peace is closely related to whether the Council may impose obligations of a general and abstract character on the member states under Article 41. By their very nature, abstract threats require general measures to be taken, while specific threats require measures geared toward the particular situation creating them. Therefore, the Council will usually take measures corresponding to the type of threat in question. Some commentators have argued that Article 41 does not cover the obligations described in the legislative resolutions because they differ in quality from the measures listed there. The obligations imposed in Resolutions 1373 and 1540 would be more akin to obligations entered into by states in international agreements.⁶⁵ However, the term “measures” is wide enough to include both specific and general obligations.⁶⁶ In addition, the list of measures in Article 41 is not exhaustive,

⁵⁷ *Id.* at 4.

⁵⁸ *Id.*; UN Doc. S/PRST/1996/17, para. 4; UN Doc. S/PRST/1998/12, para. 4; SC Res. 1172, pmb. (June 6, 1998); GA Res. 57/63, pmb. (Nov. 22, 2002); GA Res. 58/44, pmb. (Dec. 8, 2003). The “means of delivery” was added only in the preamble to Security Council Resolution 1540, *supra* note 13, as was “the threat of illicit trafficking” in such weapons.

⁵⁹ SC Res. 1368, para. 1 (Sept. 12, 2001); SC Res. 1373, *supra* note 13, pmb.; SC Res. 1377, annex, pmb. (Nov. 12, 2001); SC Res. 1456, annex, pmb. (Jan. 20, 2003); SC Res. 1465, para. 1 (Feb. 3, 2003); SC Res. 1535, pmb. (Mar. 26, 2004); *see also* GA Res. 50/53, para. 7 (Dec. 11, 1995) (recalling “the role of the Security Council in combating international terrorism whenever it poses a threat to international peace and security”); GA Res. 49/60, annex [Declaration on Measures to Eliminate International Terrorism], para. 2 (Dec. 9, 1994) (“Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security . . .”).

⁶⁰ GA Res. 48/92, pmb. (Dec. 20, 1993).

⁶¹ GA Res. 57/337, annex, para. 28 (July 3, 2003).

⁶² GA Res. 53/71, pmb. (Dec. 4, 1998).

⁶³ This was first suggested by Paul C. Szasz, *Restructuring the International Organizational Framework, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS* 340, 360 (Edith Brown Weiss ed., 1992). *See also* Harper, *supra* note 12, at 126 n.101; Tomuschat, *supra* note 52, at 344–45.

⁶⁴ *See* Aston, *supra* note 21, at 287–88, 290.

⁶⁵ *See* Frowein & Krisch, *supra* note 48, at 709, para. 23; Zimmermann & Eberling, *supra* note 33, at 71–72. *But see* Krisch, *supra* note 4, at 884–85 (observing that “the legal situation is far from clear”). Concerns are expressed by Finke & Wandscher, *supra* note 5, at 172.

⁶⁶ *See* Aston, *supra* note 21, at 283; Markus Wagner, *Die wirtschaftlichen Maßnahmen des Sicherheitsrates nach dem 11. September 2001 im völkerrechtlichen Kontext—Von Wirtschaftssanktionen zur Wirtschaftsgesetzgebung?* 63 ZAÖRV 879, 907–09, 913 (2003).

as the formulation “may include” shows. This interpretation has also been confirmed by the appeals chamber of the ICTY, which held in the *Tadić* case:

It is evident that the measures set out in Article 41 are merely illustrative *examples* which obviously do not exclude other measures. All the Article requires is that they do not involve “the use of force.” It is a negative definition.

. . . .

Article 39 [which provides that the Security Council shall decide what measures shall be taken in accordance with Article 41 to maintain or restore international peace and security] leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.⁶⁷

The result, that the Council may impose obligations of an abstract and general character, is also supported by the following consideration: if the Council can require states to freeze the funds of every single person who commits a specific terrorist act, it must—a fortiori—also be able to order states to freeze the funds of all persons who commit such acts. In this sense, the imposition of general obligations is nothing but the generalization of individual obligations.

IV. LIMITS OF SECURITY COUNCIL LEGISLATION

Although the Security Council has a wide margin of discretion in deciding when and where a threat to the peace exists and what measures member states should take to maintain or restore international peace and security, its power is not legally unfettered.⁶⁸ This part examines three possible legal limits to Council legislation: restrictions deriving from the text of the UN Charter, the principle of proportionality, and the concept of the integrity of treaties.

Restrictions Deriving from the Text of the UN Charter

The Council enjoys powers only insofar as they are conferred on it or implied in the UN Charter.⁶⁹ Only resolutions that are *intra vires* the UN Charter acquire binding force in terms of Article 25, which speaks of “decisions of the Security Council *in accordance with the present Charter*.”⁷⁰ The Council’s legislative powers are thus limited by the jurisdiction of the United Nations at large, as well as by the attribution and division of competences within the organization.

According to Article 39, the Council may take action under Chapter VII only to “maintain or restore international peace and security.”⁷¹ The basic restriction of the Council’s legislative power is that it must be exercised in a manner that is conducive to the maintenance of international peace and security.⁷² The Charter does not establish the Council as an omnipotent world legislator but, rather, as a single-issue legislator. This restriction is confirmed by the fact that the Charter allocates to the General Assembly the task of making recommendations for the purpose of progressively developing and codifying international law.⁷³ Most international issues,

⁶⁷ *Tadić*, *supra* note 8, paras. 35, 39; *see also Kanyabashi*, *supra* note 41, at 7, para. 27.

⁶⁸ *See* Frowein & Krisch, *supra* note 48, at 710–12.

⁶⁹ *Id.* at 710, para. 25.

⁷⁰ UN CHARTER Art. 25 (emphasis added); *see* Lamb, *supra* note 41, at 366–67.

⁷¹ *See also* UN CHARTER Art. 24(2) (providing that the specific powers given to the Security Council, *inter alia*, in Chapter VII are granted for the discharge of its duties under the responsibility for the maintenance of international peace and security).

⁷² Compare the statement of the Chinese representative: “Preventing the proliferation of weapons of mass destruction (WMD) and their means of delivery is conducive to the maintenance of international peace and security” UN Doc. S/PV.4950, *supra* note 23, at 6.

⁷³ UN CHARTER Art. 13(1)(a); *see also* Harper, *supra* note 12, at 153.

especially those of an administrative or technical nature, will remain outside the ambit of Security Council legislation. For example, the Council cannot lay down general rules on the breadth of the territorial sea or the drawing of straight baselines in the law of the sea, although it may find that a particular—improper or excessive—territorial sea claim constitutes a threat to international peace and security. This Note argues that in all cases there must be a genuine link between the general obligations imposed and the maintenance of international peace and security. Thus, the Council cannot regulate financial transactions in general but only transactions that may be linked to a threat to the peace; that is, to terrorist acts, the proliferation of weapons of mass destruction, and possibly transnational organized crime, the illegal arms trade, and drug trafficking.

Another restriction of Council legislation may be derived from provisions in the Charter that provide for only recommendatory powers of the Council. According to Article 26, the Council “shall be responsible for formulating . . . plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.” Such plans are not binding on member states,⁷⁴ not least because of their implications for national security and the right to self-defense.⁷⁵ The term “regulation of armaments” is to be understood in the sense of “arms control,” including the reduction, limitation, or elimination of arms and armed forces, as well as the production and possession of and trade in armaments.⁷⁶ While certain types of armaments (such as nuclear, chemical, and biological weapons) or the excessive stockpiling of armaments might per se constitute a threat to the peace, the Council cannot impose general disarmament obligations on states, for example, by prohibiting the development, production, or possession of a particular type of weaponry.⁷⁷ The Council also cannot mandate participation in the UN Register for Conventional Arms, established on a voluntary basis by the General Assembly in 1992,⁷⁸ or limit the military budgets of states. Article 26, however, does not preclude the Council from imposing disarmament obligations on a particular state, if that state’s possession of certain weapons, judged on the basis of its previous conduct, constitutes a threat to international peace and security.⁷⁹

A similar restriction can be derived from Article 36, which provides that at any stage of a dispute likely, if continued, to endanger the maintenance of international peace or of a situation of like nature, the Council may recommend appropriate procedures or methods of adjustment, including reference of legal disputes by the parties to the ICJ. Again, while certain legal disputes (such as boundary disputes) might constitute a threat to the peace per se, the Council cannot impose on states, either in general or in a specific case, the obligation to refer such disputes to the ICJ.⁸⁰

⁷⁴ See Hans-Joachim Schütz, *Article 26, in THE CHARTER OF THE UNITED NATIONS*, *supra* note 48, at 464, 467, para. 11. The General Assembly has only recently reaffirmed the “absolute validity of multilateral diplomacy in the field of disarmament.” GA Res. 58/44, pmb. (Dec. 8, 2003).

⁷⁵ Compare the statement of the representative of Pakistan: “there are grave implications to this effort by the Security Council to impose obligations on States, which their Governments and sovereign legislatures have not freely accepted, especially when some of these obligations could impinge on matters relating to their national security and to their right of self-defence.” UN Doc. S/PV.4950, *supra* note 23, at 15.

⁷⁶ Schütz, *supra* note 74, at 469, para. 18.

⁷⁷ Happold, *supra* note 4, at 605–07; Zimmermann & Eberling, *supra* note 33, at 72. *Contra* Aston, *supra* note 21, at 287; Paul C. Szasz, *The Security Council Starts Legislating*, 96 AJIL 901, 904 (2002); Tomuschat, *supra* note 52, at 344–45.

⁷⁸ GA Res. 46/36 L (Dec. 9, 1991) (Transparency in Armaments). The resolution called upon all member states to provide annually by May 31, to the secretary-general, relevant data on imports and exports of conventional arms to be included in the register. UN member states were also invited to report on their military holdings and procurement through national production and relevant policies.

⁷⁹ See SC Res. 687, paras. 8, 10, 12 (Apr. 3, 1991), 30 ILM 846 (1991).

⁸⁰ The Council has, however, established a commission for the “technical task” of demarcating the precise coordinates of a boundary set out in an agreement between two states. *Id.*, para. 2; SC Res. 773 (Aug. 26, 1992); SC Res. 833 (May 27, 1993), 32 ILM 1465 (1993).

The Principle of Proportionality

Even though the Security Council, when acting under Chapter VII, is not bound to respect international law apart from the Charter,⁸¹ the Charter itself indicates in several provisions that the Council's actions are subject to the principle of proportionality.⁸² These provisions indicate that Council legislation must be *necessary* in order to maintain international peace and security, meaning that the usual ways to create obligations of an abstract and general character (the conclusion of treaties and the development of customary international law) must be inadequate to achieve that aim. Council legislation is always emergency legislation.⁸³ In the Council's open debate on April 22, 2004, the Swiss representative seized upon this point, stating: "It is acceptable for the Security Council to assume such a legislative role only . . . in response to an urgent need."⁸⁴ This sense of urgency was emphasized by several other delegations,⁸⁵ as well as by the president of the Council, who stated with regard to Resolution 1540 that

there was a gap in international law pertaining to non-State actors. So, either new international law should be created, either waiting for customary international law to develop, or by negotiating a treaty or convention. Both took a long time, and everyone felt that there was an "imminent threat", which had to be addressed and which could not wait for the usual way.⁸⁶

A gap or lacuna in the legal framework is not required to signal an urgent need for Council legislation, as is shown by Resolution 1373, some of whose provisions were based on the Convention for the Suppression of the Financing of Terrorism. In that case, the need for Council legislation arose because, at the time, only four states were parties to the Convention, making it a long way from coming into force.

The character of Council legislation as emergency legislation does not mean that the general obligations imposed are provisional or temporary and must be replaced by a multilaterally negotiated treaty that allows all interested states to participate, on an equal footing, in defining their obligations.⁸⁷ Calls by several states for the early conclusion of a binding international legal instrument on the subject matter of the resolution were not included in Resolution 1540.⁸⁸ This does not exclude the possibility that a treaty will subsequently be concluded on that subject matter.⁸⁹ However, in the event of a conflict between the obligations under the resolution and those under a subsequent treaty, the obligations under the resolution will prevail.⁹⁰ If the treaty were intended to replace the resolution, the Council would either have to abrogate the resolution or, at least, endorse the treaty in another resolution or a statement by the president.

⁸¹ HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 294-95 (1950).

⁸² UN CHARTER Arts. 40, 42, 43(1), 51 (providing that the Council may take such action or measures (as it deems) *necessary* to maintain or restore international peace and security); see Frowein & Krisch, *supra* note 48, at 711, para. 30; Kirgis, *supra* note 12, at 517 & n.87.

⁸³ There can be no question of the Security Council's having "in fact replaced the conventional law-making process on the international level," as stated by Krisch, *supra* note 4, at 884.

⁸⁴ UN Doc. S/PV.4950, *supra* note 23, at 28.

⁸⁵ *Id.* at 3 (Brazil); *id.* at 5 (Algeria); *id.* at 7 (Spain); *id.* at 9 (Angola); *id.* at 11 (United Kingdom); *id.* at 20 (Peru); *id.* at 21 (New Zealand); *id.* at 24 (India); *id.* at 25 (Singapore); *id.* at 27 (Sweden); *id.* at 28 (Japan, Switzerland); *id.* at 31 (Indonesia); *id.* (Resumption 1), at 4 (Malaysia for the Non-Aligned Group); *id.* at 5 (Mexico); *id.* at 8 (Republic of Korea); *id.* at 11 (Jordan); *id.* at 14 (Nigeria); UN Doc. S/PV.4956, at 9 (2004) (Romania); see also UN Doc. S/PV.4451, at 19 (2002) (India, with regard to Resolution 1373).

⁸⁶ Press Conference by Security Council President, *supra* note 3.

⁸⁷ For example, the Egyptian delegate stated that any Council action should be "on a temporary basis for a specific, limited time until an internationally ratified treaty can be concluded." UN Doc. S/PV.4950, *supra* note 23, (Resumption 1), at 2; see also *id.* at 4 (Malaysia); *id.* at 15 (Nigeria); *id.* at 17 (Namibia, Kuwait).

⁸⁸ See UN Doc. S/PV.4956, *supra* note 85, at 7.

⁸⁹ China's UN ambassador said that Resolution 1540 "fills the gap" now, but he advocated a global treaty for the longer run. Edith M. Lederer, *U.N. Adopts Resolution to Keep Weapons of Mass Destruction from Terrorists*, AP Newswires, Apr. 28, 2004, available in 2004 Westlaw, Allnewsplus.

⁹⁰ UN CHARTER Art. 103; Vienna Convention, *supra* note 53, Art. 30(1).

In practice, the principle of proportionality will have little limiting effect on Council legislation, as the Charter allows the Council a broad margin of appreciation with respect to the proportionality of its action.⁹¹ Legislation would therefore violate the Charter only if its impact on the member states were manifestly out of proportion to the objective pursued, the maintenance of international peace and security. As with other *ultra vires* decisions of the Council, there is no procedure for reviewing the legality of legislation. The resulting problems are far from being resolved, and in any case are not susceptible of resolution by means of simplified formulations.⁹²

The Concept of Integrity of International Treaties

Several states have argued that the Council does not have the power to take decisions under Chapter VII to amend international treaties.⁹³ For example, the representative of Pakistan declared: "Pakistan strongly adheres to the position that the Security Council, despite its wide authority and responsibilities, is not empowered to unilaterally amend or abrogate international treaties and agreements freely entered into by sovereign States."⁹⁴ South Africa asserted that "the Council's mandate leaves no room either to reinterpret or even to amend treaties that have been negotiated and agreed by the rest of the United Nations membership."⁹⁵ These statements must be seen in the context of the discussion about the legality of Resolutions 1422 and 1487, which turned on the interpretation of Article 16 of the Rome Statute of the International Criminal Court.⁹⁶ The states in question argued that the provision allowed the Council to request the deferral of investigations or prosecutions only in specific cases. A general request, they argued, would amount to an amendment of the treaty.⁹⁷ The discussion was apparently influenced more by the attitude of states toward the International Criminal Court than by the general question of the Council's authority under Chapter VII. But even had Article 16 of the Rome Statute not foreseen a general request, that could not prevent the Council from making such a request if it was necessary for the maintenance of international peace and security. According to Article 103 of the Charter, in the event of a conflict between a request and the Rome Statute, the request would prevail. The ICJ held in the *Lockerbie* case that obligations imposed by the Council take precedence over obligations under international treaties.⁹⁸ A precondition, however, is that the Council may impose the obligation in the first instance. A decision by the Council that states shall not exercise their right under the Nuclear Non-Proliferation Treaty to withdraw from that treaty would contravene Article 26 of the UN Charter, which gives the Council only recommendatory powers in the area of regulation of armaments.⁹⁹ A valid legislative resolution

⁹¹ Frowein & Krisch, *supra* note 48, at 712, para. 30.

⁹² See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 666–67 (6th ed. 2003).

⁹³ UN Doc. S/PV.4772, *supra* note 19, at 10 (Iran); *id.* at 13 (Brazil); *id.* at 25 (Germany); UN Doc. A/58/PV.29, at 9 (2003) (Cuba); UN Doc. S/PV.4568, *supra* note 19, at 3 (Canada); *id.* at 5–6 (New Zealand); *id.* at 11 (France); *id.* at 15 (Costa Rica on behalf of the nineteen member states of the Rio Group); *id.* at 15 (Iran); *id.* at 18 (Ireland); *id.* at 22 (Brazil); *id.* at 23 (Switzerland); *id.* at 26 (Mexico); *id.* at 30 (Venezuela); *id.* (Resumption 1), at 2 (Fiji); *id.* at 5 (Guinea); *id.* at 8 (Malaysia); *id.* at 10 (Syria); *id.* at 14 (Cuba); UN Doc. A/57/PV.22, at 6 (2002) (Liechtenstein).

⁹⁴ UN Doc. S/PV.4772, *supra* note 19, at 21.

⁹⁵ UN Doc. S/PV.4568, *supra* note 19, at 6.

⁹⁶ See *supra* note 35.

⁹⁷ On this controversy, see Claudia Fritsche, *Security Council Resolution 1422: Peacekeeping and the International Criminal Court*, in *VERHANDELN FÜR DEN FRIEDEN—NEGOTIATING FOR PEACE, LIBER AMICORUM TONO EITEL* 107 (Jochen Abr. Frowein et al. eds., 2003); Andreas Zimmermann, "Acting Under Chapter VII (...)"—*Resolution 1422 and Possible Limits of the Powers of the Security Council*, in *id.* at 253.

⁹⁸ *Lockerbie* (Libya v. UK), *supra* note 44, 1992 ICJ REP. at 15, para. 39:

Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court . . . considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.

⁹⁹ *Contra* William Epstein & Paul C. Szasz, *Extension of the Nuclear Non-Proliferation Treaty: A Means of Strengthening the Treaty*, 33 VA. J. INT'L L. 735, 754 (1993).

whose application is not limited in time, owing to the continuing character of the threat addressed, may have the effect of a de facto amendment to existing treaties, that is to say, an alteration of the treaty without altering its text.

Whether the Council may impose existing treaties upon the member states, either by obliging them to become parties or by making the treaty mandatory, is a different question. So far the Council has not done so, although several writers have advocated this practice.¹⁰⁰ In Resolution 1373 the Council only called upon states in a nonbinding provision to “[b]ecome parties as soon as possible to the relevant international conventions and protocols relating to terrorism.”¹⁰¹ While the Council may impose certain treaty obligations on states, as in Resolution 1373, it cannot, as a rule, impose whole treaties, since they contain not just substantive obligations, but also purely technical or administrative provisions whose imposition will not be necessary to address a threat to international peace and security.

V. THE PROCEDURE FOR THE ADOPTION OF INTERNATIONAL LEGISLATION

Security Council resolutions are usually prepared in the course of informal consultations of the whole, which are private gatherings of all the Council members.¹⁰² They are then adopted, frequently without debate, in a formal public meeting of the Council. Members of the United Nations that are not members of the Council do not usually play any role in the drafting of resolutions.¹⁰³ The question arises as to whether acts of international legislation by the Council require participation by the wider UN membership in the legislative process. Bearing in mind the far-reaching consequences of Council legislation, this Note argues that those member states that wish to do so should be given an opportunity to express their views and perceptions on legislative resolutions. As the Philippines representative to the United Nations put it: “Those who are bound should be heard.”¹⁰⁴ According to Article 31 of the UN Charter, “[a]ny Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.” In the light of this wording, it might be argued that no state is “specially affected” if, as in the case of a legislative resolution, the consequences of the resolution touch equally upon the interests of all states. However, Council practice so far has assumed that the interest of a state in participating is not diminished by the resolution’s having the same effect on other states of a region or continent.¹⁰⁵ A narrow interpretation of Article 31 would result in excluding the UN membership from discussion of some of the Council’s most far-reaching decisions, and would be contrary to the object and purpose of the provision, which was devised as a compensatory rule in favor of nonmembers of the Council.¹⁰⁶

A liberal view on participation is also reflected in the practice of the member states. In connection with Resolutions 1422 and 1487, several states requested “that, in accordance with the

¹⁰⁰ Lopez, *supra* note 12, at 954–57 (with regard to the four Geneva Conventions and Additional Protocol I in the context of internal armed conflicts); Szasz, *supra* note 77, at 903 (with regard to the international conventions and protocols relating to terrorism).

¹⁰¹ SC Res. 1373, *supra* note 13, para. 3(d). In the case of Security Council Resolution 1540, *supra* note 13, the U.S. delegate expressly clarified that “Member States not parties to treaties or regimes will not be forced, through this draft resolution, to adopt them.” UN Doc. S/PV.4950, *supra* note 23, at 18. Even in the case of Iraq, the Council in Resolution 687, para. 7 (Apr. 3, 1991), 30 ILM 846 (1991), only “invited” Iraq to ratify the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.

¹⁰² On informal consultations, see Loie Feuerle, Note, *Informal Consultation: A Mechanism in Security Council Decision-Making*, 18 N.Y.U. J. INT’L L. & POL. 267 (1985); Natalie Reid, *Informal Consultations* (Jan. 1999), at <<http://www.globalpolicy.org/security/informal/natalie.htm>>.

¹⁰³ On the drafting of Security Council resolutions, see Michael C. Wood, *The Interpretation of Security Council Resolutions*, 1998 MAX PLANCK Y.B. UN L. 73, 80–81.

¹⁰⁴ UN Doc. S/PV.4950, *supra* note 23, at 2.

¹⁰⁵ See Rudolf Dolzer, *Article 31*, in THE CHARTER OF THE UNITED NATIONS, *supra* note 48, at 573, 577, para. 18.

¹⁰⁶ *Id.* at 576, para. 17.

relevant provision of the Charter of the United Nations [i.e., Article 31] and rule 37 of the provisional rules of procedure of the Security Council,¹⁰⁷ the Council convene a public meeting and invite interested States to speak in the Council's discussions" on the proposed resolution.¹⁰⁸ The reasons given for the requests were that the resolution in question involved "issues of vital interest to *all* Member States"¹⁰⁹ or that it had "implications of direct import to Member States."¹¹⁰ Similarly, during the open debate prior to the adoption of Resolution 1422, the representative of New Zealand declared: "In our view, no decision should be taken by the Council on such issues [those with implications for all members of the United Nations] without full consideration and reflection of the views of all Member States that wish to express them."¹¹¹ According to the wording of Article 31 ("whenever the latter considers"), it seems to be left exclusively to the Council to decide whether the interests of member states are specially affected and, thus, whether to invite them to its discussions. This Note maintains, however, that cases such as international legislation, where it is obvious that vital interests of all member states are (specially) affected, no longer leave any room for discretion on the part of the Council. In such cases, the member states have the right to participate in the Council's discussion and, if no formal meeting is scheduled, the right for the Council to convene a public or private meeting and invite interested member states to speak at it.¹¹² There are also practical reasons for this result. The Council has no way of enforcing legislation unpopular with the wider membership of the United Nations. It is in its interest to involve the member states in the legislative process, hence increasing the legitimacy and acceptance of its legislative acts. Otherwise, they may remain dead letters.

The practice of the Council has undergone a certain evolution. Resolution 1373 was adopted in just over forty-eight hours. The United States began consultations with the other four permanent members on September 26, 2001; the next day, when the Council met in informal consultations, the United States circulated a draft resolution. The draft resolution as prepared during the Council's informal consultations was adopted in a formal public meeting—lasting only five minutes—on September 28, 2001. No Council member spoke on the draft resolution or explained its vote; nonmembers of the Council were not consulted and were not present.¹¹³ Subsequently, however, several nonmembers voiced concern about the way Resolution 1373 had been adopted and called for a more transparent and interactive approach from the Council.¹¹⁴ The representative of Costa Rica declared in the General Assembly:

Resolution 1373 (2001) demonstrates the broad powers of the Security Council. In exercising its powers, however, the Council must act responsibly. In accordance with the provisions of the Charter, the Security Council acts on behalf of all Members of the United Nations. Its members, whether permanent or elected, represent equally all States Members of the Organization and they are, therefore, responsible to them. That is why it is essential

¹⁰⁷ Rule 37 of the Provisional Rules of Procedure of the Security Council, Dec. 21, 1981, UN Doc. S/96/Rev.7, UN Sales No. E.83.I.4 (1983), provides:

Any Member of the United Nations which is not a member of the Security Council may be invited, as the result of a decision of the Security Council, to participate, without vote, in the discussion of any question brought before the Security Council when the Security Council considers that the interests of that Member are specially affected

¹⁰⁸ Letter Dated 6 June 2003 from the Permanent Representatives of Canada, Jordan, Liechtenstein, New Zealand and Switzerland to the United Nations Addressed to the President of the Security Council, UN Doc. S/2003/620. This request was strongly supported by the European Union, which "fully shares the views expressed in the letter concerning the advisability of convening a public meeting and inviting interested States to speak in Security Council discussions." UN Doc. S/2003/639. For similar letters, see UN Docs. S/2002/723 and S/2004/412.

¹⁰⁹ UN Doc. S/2002/723 (emphasis added).

¹¹⁰ UN Doc. S/2003/620.

¹¹¹ UN Doc. S/PV.4568, *supra* note 19, at 5.

¹¹² See Dolzer, *supra* note 105, at 577–78, paras. 22, 23. Several states have even claimed that Article 31 gives a general "right" to be heard by the Council. UN Doc. S/PV.3864, at 17, 57 (1998) (Costa Rica, Iraq); UN Doc. A/53/33, at 19 (1998) (Libya); UN Doc. A/53/PV.40, at 9 (1998) (Ukraine). But this is going too far.

¹¹³ UN Doc. S/PV.4385, at 2 (2001).

¹¹⁴ UN Doc. A/56/PV.36, *supra* note 42, at 2 (Paraguay); UN Doc. A/56/PV.34, *supra* note 25, at 13 (Guatemala); UN Doc. A/56/PV.33, at 3, 16 (2001) (Japan, India); UN Doc. A/56/PV.28, at 5, 16 (2001) (Yugoslavia, Ghana).

for the Council to hold transparent and effective consultations with the other members of the international community when it adopts measures of far-reaching importance.¹¹⁵

The call for a more open and transparent approach was heeded: the adoption of Resolution 1422, on July 12, 2002,¹¹⁶ was preceded by extensive informal consultations and an open Council meeting on July 10, at which representatives of twenty-four member states that were not members of the Council and one permanent observer (Switzerland) spoke.¹¹⁷ Similarly, eighteen states that were not members of the Council participated in the public meeting at which Resolution 1487 was adopted.¹¹⁸ The most comprehensive consultation process so far took place in connection with the adoption of Resolution 1540. The five permanent members of the Council spent some six months working on the text of the draft resolution. On March 24, 2004, the text was shared with the ten elected members of the Council. At the same time, offers were made to different groups of states, such as the Non-Aligned Movement (representing 116 countries), to brief them on parts of that text. The Council members that sponsored the draft resolution went to great lengths to explain the text and listened closely to member states within and outside the Council.¹¹⁹ Informal consultations of the Council members took place on April, 8, 20, and 28. On April 22, at the request of several states, the Council held an open debate with the active participation of fifty-one UN member states, including thirty-six that were not members of the Council.¹²⁰ As a result of these exchanges, the text of the draft resolution was revised three times in one month. During the open debate, the representative of Spain, one of the elected members of the Council, remarked that, "since the Council is legislating for the entire international community," the draft resolution should be adopted "after consultation with non-members of the Council."¹²¹ Consequently, the practice of the Council seems to support the requirement for extensive consultations and exchanges both internal and external, including an open debate to discuss the text of a draft legislative resolution before it is made final. After all, it is difficult to imagine an issue more compelling than international legislation, or one on which it could be more appropriate for the Council to hear the membership's views.

VI. GENERAL PROBLEMS OF SECURITY COUNCIL LEGISLATION

Lack of Clarity of Terms and Obligations

Several states have emphasized that international legislation by resolution must be "clear and unambiguous, to avoid any misinterpretation or discrepancy in its implementation."¹²² Legislative resolutions face two particular problems in this respect. First, resolutions, by their very nature, are not as detailed as treaties. Any resolution that requires states to enact legislation will also have to take into account the multitude of national legal systems and the independence of national parliaments in the exercise of their lawmaking power.¹²³ To meet the concerns of several states that Resolution 1540 would impose requirements on their legislators, the resolution, in paragraph 2, expressly provides that the laws in question shall be adopted and enforced by

¹¹⁵ UN Doc. A/56/PV.25, at 3 (2001).

¹¹⁶ UN Doc. S/PV.4572, at 2 (2002). The meeting at which the draft resolution was adopted, again lasted for only five minutes.

¹¹⁷ UN Doc. S/PV.4568, *supra* note 19, at 2, 29; *id.* (Resumption 1), at 2, 12; *see also* UN Doc. S/2002/937, at 6.

¹¹⁸ UN Doc. S/PV.4772, *supra* note 19, at 2, 28.

¹¹⁹ *See* UN Doc. S/PV.4950, *supra* note 23, at 8.

¹²⁰ *See* Assessment of the Work of the Security Council During the Presidency of Germany (April 2004), UN Doc. S/2004/505, at 8; *see also* UN Doc. S/PV.4950, *supra* note 23, at 2; *id.* (Resumption 1), at 2.

¹²¹ UN Doc. S/PV.4950, *supra* note 23, at 7.

¹²² *Id.* (Resumption 1), at 8 (Republic of Korea). Similar concerns about clarity of language and definition of terms were expressed by Canada, India, Ireland, speaking on behalf of the European Union, and Switzerland. UN Doc. S/PV.4950, *supra* note 23, at 19, 24, 26–27, & 28, respectively.

¹²³ Compare the statement of the Brazilian delegate, UN Doc. S/PV.4950, *supra* note 23, at 4, who recommended that "the text [of the resolution] take into account the independence of national congresses in the exercise of their law-making power."

states “in accordance with their national procedures.” A legislative resolution thus cannot provide more than a framework to be filled in by national legislatures.¹²⁴ In this respect, legislative resolutions are more akin to directives than to regulations in European Community law.

Second, the adoption of resolutions is often secured only by political compromise, which is usually translated into vague and general language. The following may serve as an example: Operative paragraph 1(b) of Resolution 1373 requires all states to “[c]riminalize the wilful provision or collection . . . of *funds* by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out *terrorist acts*.”¹²⁵ As the international community has still not arrived at a consensus on the definition of terrorism,¹²⁶ the resolution does not give a definition of “terrorist acts.” Rather, it allows each member state to define terrorist acts under its domestic legislation. This latitude enabled Syria, for example, to adopt the definition of terrorism contained in the Arab Convention for the Suppression of Terrorism,¹²⁷ “which clearly distinguish[s] between terrorism and legitimate struggle against foreign occupation,”¹²⁸ excluding violent acts by groups such as Hamas, the Al Aqsa Martyrs Brigades, and Islamic Jihad (which are seen as fighting the Israeli occupation of Arab territories in Palestine) from the application of the resolution. But states that adopt the definition of terrorism in the Convention for the Suppression of the Financing of Terrorism¹²⁹ should clearly regard the violent acts of these groups as terrorist acts. The resolution also does not define the term “funds.” According to Article 1(1) of the Convention for the Suppression of the Financing of Terrorism, this term means

assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

The term is thus stretched far beyond its ordinary meaning, which is “pecuniary resources,” to cover tangible and intangible assets. Which meaning of the term “funds” is signified in the resolution is unclear.¹³⁰

An initial review of the reports of states to be submitted under Resolution 1373 pointed to another problem. Many states equated the “financing of terrorist acts” in paragraph 1(a) of the resolution with money laundering, and dealt with it only in that context. But while money laundering and the financing of terrorism are often related, these crimes are not identical. Also, money used to finance terrorism is not necessarily generated by illegal business transactions; on the contrary, assets and profits acquired by legitimate means and even declared to tax authorities can be used to finance terrorist attacks. Similarly, many states claimed that the crime of financing terrorism was covered by the criminal provisions on “aiding and abetting” or

¹²⁴ Compare the statement of the French delegate, *id.* at 8, who observed that “[t]he Council is establishing the goals, but it leaves each State free to define the penalties, legal regulations and practical measures to be adopted.”

¹²⁵ SC Res. 1373, *supra* note 13, para. 1(b) (emphasis added).

¹²⁶ The General Assembly’s Sixth Committee is currently considering a draft Comprehensive Convention on International Terrorism, which would include a definition of terrorism if adopted. For the suggested definition, see Article 2 of the draft Convention. Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996: Sixth Session, UN GAOR, 57th Sess., Supp. No. 37, Annex II, at 6, UN Doc. A/57/37 (2002).

¹²⁷ Arab Convention on the Suppression of Terrorism, Apr. 22, 1998, Arts. 1, 2, UNITED NATIONS, INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM 152, UN Sales No. 01.V.3 (2001), available at < <http://edoc.mpil.de/conference-on-terrorism/related/1998CairoArabConvention.pdf> >.

¹²⁸ UN Doc. S/PV.4453, *supra* note 28, at 9 (also stating that “foreign occupation is the most brutal form of terrorism; therefore, resistance to foreign occupation—especially Israeli occupation of Arab territories in Palestine, the Syrian Golan and southern Lebanon—constitutes legitimate struggle”; *id.* at 8).

¹²⁹ International Convention for the Suppression of the Financing of Terrorism, *supra* note 22, Art. 2(1)(b).

¹³⁰ Aston, *supra* note 21, at 262 n.26; see also *id.* at 262–64. For further examples of unclear terms, see Sven Peterke, *Die Bekämpfung der Terrorismusfinanzierung unter Kapitel VII der UN-Charta. Die Resolution 1373 (2001) des UN-Sicherheitsrats*, 14 HUMANITÄRES VÖLKERRECHT 217 (2001); Wagner, *supra* note 66, at 901–02.

conspiracy. The group of experts that examined the reports, however, had doubts whether these auxiliary offenses covered all acts of the financing of terrorism as set out in paragraph 1 (b) of the resolution.¹³¹ Thus, while many states declared that they had implemented the resolution, they had in fact not done so.

The Council in Resolution 1540 sought to rectify some of these problems by defining some of its terms. The definitions are set out, for the first time, in a starred footnote attached to the text and are intended "for the purpose of this resolution only." However, such definitions are not of much help if they themselves are couched in rather vague terms.¹³² For example, the term "related materials" is defined as "materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery." This definition leaves many questions open. Which multilateral treaties and agreements, exactly, are "relevant"? More important, do these treaties and arrangements bind states that are not parties to them? The absence of a clearly defined list may lead to conflicting interpretations of "related materials" and to a multitude of national control lists.¹³³ The unclear language, vague definitions, and lack of specific standards may result in time-consuming and painstaking legislative processes at the national level, which may prolong implementation of the resolution.

In the case of international lawmaking by treaty, at least some of these problems may be resolved by recourse to the *travaux préparatoires*, in accordance with Article 32 of the Vienna Convention on the Law of Treaties.¹³⁴ Articles 31 to 33 of the Vienna Convention are not directly applicable here, but the methods they set forth for the interpretation of treaties may, with certain qualifications, be applied by analogy to resolutions of the Security Council.¹³⁵ Nevertheless, no such supplementary means of interpretation will usually be available when it comes to international lawmaking by resolution. Although there have been open debates in which both members and nonmembers of the Council have expressed their views on a draft resolution, the text of these draft resolutions, as a rule, had been negotiated in informal consultations of the whole.¹³⁶ A significant difference between these informal consultations of the whole and formal meetings of the Council is that no official records are kept of the consultations. The UN Secretariat takes notes as well as sound recordings for its own internal purposes, but they are not accessible to others.¹³⁷ Consequently, the negotiating history of legislative resolutions does not appear on the public record, normally leaving unknown the positions taken by individual Council members, how agreement on the text was reached, and the motivation behind the agreement.

Timely Implementation

Legislative resolutions do not contain any time frame or deadline for their implementation. The dates set by these resolutions for states to present their first report to the committees monitoring implementation are not implementation deadlines.¹³⁸ While sanctions resolutions are

¹³¹ See Walter Gehr, Recurrent Issues (Briefing for Member States on 4 April 2002), at <<http://www.un.org/Docs/sc/committees/1373/rc.htm>>.

¹³² Several states have voiced concerns about the definitions in Security Council Resolution 1540. See, e.g., UN Doc. S/PV.4950, *supra* note 23, at 15 (Pakistan); *id.* at 24 (India); *id.* at 30 (Cuba); *id.* at 34 (Syria).

¹³³ The Security Council recognizes the utility of having national control lists and calls upon all member states to develop such lists. SC Res. 1540, *supra* note 13, para. 6.

¹³⁴ Vienna Convention, *supra* note 53, Art. 32.

¹³⁵ Wood, *supra* note 103, at 94; see also Stefan Talmon, *The Statements by the President of the Security Council*, 2 CHINESE J. INT'L L. 419, 438 (2003).

¹³⁶ The verbatim protocol for all four resolutions in question records that the text of the draft resolutions had been "prepared in the course of the Council's prior consultations."

¹³⁷ Wood, *supra* note 103, at 94 n.33.

¹³⁸ Resolution 1373, in paragraph 6, gives a ninety-day report-back date. As many states complained that ninety days were too little, Resolution 1540, in paragraph 4, now provides for a six-month report-back date.

supposed to be implemented immediately, implementation of legislative resolutions depends largely on the obligations imposed and the implementation requirements in individual states. Perhaps the only rule that can be established in this connection is that they are to be implemented without undue delay, that is to say, as soon as reasonably practicable, in the light of individual circumstances. In particular, considerable delays may be generated where implementation of the obligations requires complex national legislation. The Council's adoption of legislative resolutions, unlike the treaty-making process, does not involve national parliaments; there is therefore no guarantee that national parliaments will implement the legislative obligations imposed upon the state by the Council. In contrast to sanctions resolutions, which mainly regulate the states' external economic and diplomatic relations, legislative resolutions deal with matters touching upon the states' internal affairs. The whole implementation process may thus fall afoul of national politics. Rules prescribed by the Council may easily be watered down by national legislators for extraneous reasons. Concerns about civil liberties or the consistency of the rules in question with constitutional provisions may provoke widespread public opposition, which may prevent or, at least, delay implementation.¹³⁹ Last, some states may simply lack the technical expertise or financial resources to implement all the concerns contained in a legislative resolution. The Counter-Terrorism Committee (CTC), established by the Council to monitor the implementation of Resolution 1373,¹⁴⁰ has sought to deal with this issue by identifying each state's specific needs and matching that state with one capable of providing the necessary assistance. Over fifty states have expressed interest in receiving assistance to enable them to implement Resolution 1373 adequately.¹⁴¹

Of the four resolutions in question, two—Resolutions 1373 and 1540—have imposed legislative and administrative obligations on states. With regard to the latter resolution, it is still too early to evaluate implementation practice, but the former has been in place for three years. According to paragraph 6 of Resolution 1373, all states must report to the CTC on the steps they have taken to implement it no later than ninety days from the date of its adoption, and thereafter according to a timetable to be proposed by the CTC. That most states, at least initially, have diligently fulfilled their reporting requirements does not say much about the implementation of the substantive obligations concerned.¹⁴² Speaking in the Council in April 2004, the representative of India declared: "Although resolutions such as resolution 1373 (2001) were adopted unanimously, the limitations in their implementation underscore the need for caution on the Security Council being used as a route to short-circuit the process of creating an international consensus."¹⁴³ A survey of the reports submitted to the CTC gives a rather sobering picture. As of June 30, 2004, seventy-one states had not met the deadline set by the CTC.¹⁴⁴ After the initial reporting activity, a certain compliance fatigue seems to have set in among the UN member states. The CTC has asked forty-eight states to submit a fourth report (all were due in 2004), which indicates that these states have still not fully complied with the resolution. The number would probably be much higher if, in the first instance, all states had submitted their second or third report as requested by the CTC.¹⁴⁵ Several states that submitted reports during

¹³⁹ See in this connection the statement of the Indian delegate in the Security Council: "India will not accept externally prescribed norms or standards, whatever their source, on matters pertaining to domestic jurisdiction of its Parliament, including national legislation, regulations or arrangements which are not consistent with its constitutional provisions . . ." UN Doc. S/PV.4950, *supra* note 23, at 24.

¹⁴⁰ SC Res. 1373, *supra* note 13, para. 6.

¹⁴¹ Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AJIL 333, 339 (2003). On the CTC in general, see Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism Since 11th September*, 35 CORNELL INT'L L.J. 475, 482–86 (2002).

¹⁴² *But see* Krisch, *supra* note 4, at 885.

¹⁴³ UN Doc. S/PV.4950, *supra* note 23, at 23.

¹⁴⁴ UN Doc. S/PRST/2004/26.

¹⁴⁵ As of July 20, 2004, thirty-three states still had to submit their second report and thirty-eight states still had to submit their third report. Reports are available online at Reports from Member States, <http://www.un.org/Docs/sc/committees/1373/submitted_reports.html>.

2004 declared that they were still in the process of adopting the legislation necessary to comply fully with Resolution 1373.¹⁴⁶ When considering the present implementation record of states, one should remember that the monitoring task of the CTC is broken down into three stages: in stage *A*, the CTC is to review whether the states have adequate legislation in place to cover all aspects of Resolution 1373; in stage *B*, the committee is to focus on whether the states have effective executive machinery in place to implement their legislation; and only in stage *C* is it to examine the implementation of their legislation. Three years after its inception, the CTC is still mainly concerned with stage *A*.

Abstract threats may quickly become material. Any delay in the implementation of legislative resolutions can have serious consequences, as the following example may illustrate. In Resolution 1373, the Council required all states to

[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.¹⁴⁷

Germany took almost one year to implement this provision. A new paragraph was entered into the German Criminal Code but came into force only on August 30, 2002.¹⁴⁸ On April 11 of that year, however, Al Qaeda had bombed the synagogue La Ghriba on the Tunisian island of Djerba, killing twenty-one people, including fourteen German tourists. Shortly before launching his attack, the suicide bomber had called a German Qaeda sympathizer. During interrogations the accused admitted close contacts with Al Qaeda. But he could not be prosecuted for supporting Al Qaeda because at the time of the attack, as the German Federal Supreme Court held, supporting foreign terrorist organizations such as Al Qaeda was not yet a crime under German law.¹⁴⁹

VII. CONCLUSION

Legislation by the Security Council is a powerful instrument for the maintenance of international peace and security—in theory at least! It allows the Council to take a proactive or even preemptive approach to the discharge of its primary responsibility under the Charter. After all, preventing threats to the peace is an essential element in maintaining international peace and security.¹⁵⁰ Once a general phenomenon such as international terrorism has been identified as a threat to the peace, the Council can take preventive general action without waiting for the threat to materialize. Instead of dealing with each specific terrorist organization as it emerges, the Council can deal with terrorist organizations in general, enabling it to have measures in place when another terrorist organization is set up, or even to prevent its foundation.

In practice, however, Council legislation is fraught with problems, the most significant being the lack of clarity of the legislative acts and the question of implementation. It may be possible to monitor the “classic Article 41 measures,” which comprise the interruption of economic relations and means of communication, and the severance of diplomatic relations. But it most definitely is not possible to monitor the adoption or, more important, the enforcement of complex

¹⁴⁶ See, e.g., UN Doc. S/2004/360, at 3 (Andorra); UN Doc. S/2004/158, at 3 (Jamaica); UN Doc. S/2004/374, at 5 (Niger); UN Doc. S/2004/179, at 4 (Qatar); UN Doc. S/2004/127, at 3 (Republic of Korea); UN Doc. S/2004/170, at 9 (South Africa); UN Doc. S/2004/429, at 4–5 (Timor-Leste).

¹⁴⁷ SC Res. 1373, *supra* note 13, para. 2(e).

¹⁴⁸ The relevant provision is §129 b of the German Criminal Code, which permits the prosecution of individuals who support terrorist organizations based abroad. Prior to this change in the law, the existence of an independent suborganization in Germany was the criterion that had to be fulfilled in order for a crime to be constituted. For the text of the provision, see Thirty-fourth Criminal Law Amendment Act, v. 22.8.2002 (Bundesgesetzblatt, Teil I S.3390).

¹⁴⁹ German Federal Supreme Court, Order of June 13, 2003, No. StB 6/03. See the Court's Press Release No. 73/2003 (June 13, 2003), at <<http://www.bundesgerichtshof.de>>.

¹⁵⁰ UN CHARTER Art. 1(1).

criminal, financial, and other laws or the establishment of export and transshipment controls by 191 UN member states. Moreover, it is a misconception to equate the submission of reports to the various implementation committees with compliance. Resolutions 1373 and 1540 are akin to directives in European Community law. They are binding on the member states as regards their aims but leave to the member states the choice of ways and means of reaching these aims. The European Commission, which monitors the implementation of these directives in the twenty-five member states, employs some twenty-four thousand permanent staff,¹⁵¹ while the Assessment and Technical Assistance Office of the Counter-Terrorism Committee, which analyzes the reports submitted by states on their implementation of Resolution 1373, consists of about twenty experts.¹⁵² This discrepancy demonstrates that international legislation by the Council can be effective only with the full support and cooperation of the wider UN membership. The Council would be well-advised to legislate only to an extent that reflects the general will of the member states.

¹⁵¹ EUROPEAN COMMISSION, *SERVING THE PEOPLE OF EUROPE: HOW THE EUROPEAN COMMISSION WORKS* 6 (July 2002), at <http://europa.eu.int/comm/publications/booklets/move/34/txt_en.pdf> .

¹⁵² UN Doc. S/2004/642, at 6, para. 14. For concerns about the CTC's monitoring capability, see also Rosand, *supra* note 141, at 341.

