

**Is the adoption of resolutions containing
simultaneously binding, abstract and general norms
coherent with the competencies of the United Nations
Security Council?**

– Security Council Resolutions 1373 of 2001 and 1540 of 2004 in
context

Candidate number: 150

Supervisor: Yue Liu

Date of delivery: 15 August 2006

Number of words: 35 303.

Thank you

I thank my supervisor Yue Liu for her time and helpfulness. I thank Ole Kristian Fauchald for reading through the paper draft, for his valuable comments and for his encouragement.

I thank my family for its continued and unconditional believing in me.

I thank my friends for their important support and shared perspectives.

Love,

*“It was to keep the peace, not to change the world order,
that the Security Council was set up”¹*

¹ ICJ *Namibia*, 1971, page 294, dissenting opinion of Judge Fitzmaurice.

Table of contents

<u>1</u>	<u>INTRODUCTION</u>	<u>6</u>
1.1	DESCRIPTION OF THE MAIN PROBLEM	6
1.2	PRESENTATION OF RESOLUTIONS 1373 AND 1540	8
1.3	LIMITATIONS TO THE THESIS THEME	10
1.4	LEGAL FRAMEWORK, WORKING METHODS AND MOTIVATION	11
1.5	STRUCTURE	14
<u>2</u>	<u>RESOLUTIONS 1373 AND 1540 – CONTAINING NORMS OF SIMULTANEOUSLY BINDING, ABSTRACT AND GENERAL CHARACTER</u>	<u>15</u>
2.1	INTRODUCTION	15
2.2	DISJOINT PRESENTATION OF THE BINDING, ABSTRACT AND GENERAL CHARACTER OF THE RESOLUTIONS	16
2.2.1	THE ABSTRACT CHARACTER OF THE RESOLUTIONS	16
2.2.2	THE GENERAL CHARACTER OF THE RESOLUTIONS	19
2.2.3	THE BINDING CHARACTER OF THE RESOLUTIONS	20
2.3	SIMULTANEOUSLY BINDING, ABSTRACT AND GENERAL RESOLUTIONS <i>CONTRA</i> BINDING, ABSTRACT OR GENERAL RESOLUTIONS	22
2.3.1	ICTY AND ICTR	22
2.3.2	ECONOMIC SANCTIONS	24
2.3.3	ABSTRACT AND GENERAL, BUT NOT BINDING RESOLUTIONS	25
2.4	IS THE ADOPTION OF BINDING RESOLUTIONS OF ABSTRACT AND GENERAL CONTENTS ‘TRUE INTERNATIONAL LEGISLATION’?	29
2.5	CONCLUSIONS ON RESOLUTIONS 1373 AND 1540 RESOLUTIONS CONTAINING NORMS OF SIMULTANEOUSLY ABSTRACT, GENERAL AND BINDING CONTENTS	32

<u>3</u>	<u>IS THE ADOPTION OF BINDING RESOLUTIONS CONTAINING BINDING NORMS OF ABSTRACT AND GENERAL CHARACTER COHERENT WITH THE CHARTER OF THE UNITED NATIONS?</u>	<u>34</u>
3.1	THE ORDINARY MEANING OF THE TERMS – THE TEXTUAL APPROACH	36
3.1.1	‘THREAT TO THE PEACE’	37
3.1.2	A CLOSE INTERCONNECTION	41
3.1.3	‘MEASURES SHORT OF ARMED FORCE’	43
3.2	THE SYSTEMATIC APPROACH AND THE HISTORIC- AND HISTORIC-SUBSEQUENT PRACTICE APPROACHES	45
3.3	CONCLUSIONS ON THE QUESTION ON THE ADOPTION OF ABSTRACT-GENERAL NORMS AND COHERENCE WITH THE CHARTER OF THE UNITED NATIONS	49
<u>4</u>	<u>DYNAMIC-TELEOLOGICAL INTERPRETATION OF THE COMPETENCIES OF THE SECURITY COUNCIL THROUGH THE <i>IMPLIED POWERS</i> RULE</u>	<u>51</u>
4.1	THE IMPLIED POWERS RULE	52
4.2	THE CHARTER AS A ‘CONSTITUTION’ IN THE WEAKER SENSE OF THE NOTION	53
4.3	THE CHARTER OF THE UNITED NATIONS AS A ‘CONSTITUTION’ IN THE STRONGER SENSE OF THE NOTION AN THE IMPLICATIONS OF THIS	57
4.3.1	A CONSTITUTION IN THE STRONGER SENSE?	57
4.3.2	THE NEED FOR THE SECURITY COUNCIL TO ADOPT RESOLUTIONS CONTAINING SIMULTANEOUSLY BINDING, ABSTRACT AND GENERAL NORMS TO FULFIL ITS OBLIGATIONS	62
4.3.3	POTENTIAL IMPLICATIONS OF ANY <i>IMPLIED POWERS</i> TO ADOPT RESOLUTIONS CONTAINING NORMS OF SIMULTANEOUSLY BINDING, ABSTRACT AND GENERAL CONTENTS	63
4.3.4	CONCLUSIONS ON THE CHARTER AS A ‘CONSTITUTION’ IN THE STRONG SENSE AND THE IMPLICATIONS OF THIS	68
4.4	CONCLUSION ON DYNAMIC-TELEOLOGICAL INTERPRETATION OF THE COMPETENCIES OF THE SECURITY COUNCIL THROUGH THE IMPLIED POWERS RULE	70
<u>5</u>	<u>SUBSEQUENT PRACTICE AND IMPLEMENTATION</u>	<u>71</u>
5.1	INTRODUCTION TO THE SUBSEQUENT PRACTICE APPROACH	71

5.2 PRACTICE OF THE SECURITY COUNCIL	73
5.2.1 PARTICULARLY ON THE COUNTER TERRORISM COMMITTEE	74
5.2.2 WEIGHT OF THE PRACTICE OF THE SECURITY COUNCIL	76
5.3 SUBSEQUENT PRACTICE OF- AND IMPLEMENTATION BY THE MEMBER STATES	80
5.3.1 INTRODUCTION	80
5.3.2 PARTICULARLY ON REPORTING TO THE COUNTER TERRORISM COMMITTEE	81
5.3.3 PARTICULARLY ON THE PRACTICE REGARDING RESOLUTION 1540	84
5.3.4 WEIGHT OF THE PRACTICE OF- AND THE IMPLEMENTATION BY THE MEMBER STATES	87
5.4 CONCLUSIONS ON SUBSEQUENT PRACTICE AND IMPLEMENTATION	91
<u>6 CONCLUSIONS</u>	<u>95</u>
6.1 SUMMARY	95
6.2 LAW MAKING CONTRA LAW BREAKING	99
6.2.1 THE RESOLUTIONS WERE <i>ULTRA VIRES</i>	99
6.2.2 THE RESOLUTIONS WERE <i>INTRA VIRES</i> OR SUBSEQUENTLY HEALED	100
6.2.3 LIMITATIONS TO THE POTENTIAL POWERS OF THE SECURITY COUNCIL	102
6.3 DE LEGE FERENDA	104
<u>7 BIBLIOGRAPHY</u>	<u>107</u>
7.1 BOOKS AND ARTICLES	107
7.2 CASES	127
7.2.1 DECISIONS BY THE INTERNATIONAL COURT OF JUSTICE	127
7.2.2 DECISIONS BY THE PERMANENT COURT OF INTENTIONAL JUSTICE	129
7.2.3 DECISIONS BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA	130
7.3 ATTACHMENTS	131

1 Introduction

1.1 Description of the main problem

The Security Council has on two occasions adopted binding resolutions containing norms of abstract-general contents: Resolution 1373 of 28 September 2001, on international terrorism, and Resolution 1540 of 28 April 2004 on the proliferation of weapons of mass destruction. Innovative is, that the resolutions defined the phenomena of international terrorism and proliferation of weapons of mass destruction as threats to the peace *as such*², that is, that the resolutions refers not to a particular situation, but to every occurrence of the phenomena. Even more innovative is that the resolutions contain simultaneously binding, abstract and general norms, which have no timely or geographical limitations. Resolutions 1373 and 1540 are for these reasons both highly innovative and equally hotly debated.

The main reason for the debate is that the Security Council through adopting Resolutions 1373 and 1540 arguably takes on the role of an international legislature, that is: the role of adopting binding norms applicable on an indeterminate number of addressees in an indeterminate number of cases. Critics have found their main arguments in key notions like ‘democracy’, ‘transparency’, ‘legitimacy’ and most importantly ‘legality’; sponsors praise the Security Council for adapting quickly to global challenges and for posing an

² SC-Res. 1373 of 28 September 2001, preamble paragraph 3: “*Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security*”. SC-Res. 1540 of 28 April 2004, preamble paragraph 1: “*Affirming that proliferation of nuclear, chemical and biological weapons (...) constitutes a threat to international peace and security*”.

efficient alternative to the traditional treaty-making process on the area of public international law.

The question, which will be answered in the present paper, is whether or not the Security Council was in the possession of the necessary powers to adopt Resolutions 1373 of 2001 and 1540 of 2004. In other words: were the Resolutions adopted *ultra vires* or *intra vires*? The question will be attempted answered on a general basis which makes the main question of the present paper whether or not the adoption of simultaneously binding, abstract and general is coherent with the competencies of the United Nations Security Council.

Traditionally, the Security Council has had the role of the “world police”; in which it responds to particular situations and makes bindings decisions as far as this is necessary to restore international peace and security. As part of this police-role, the Security Council may adopt binding resolutions of far-reaching contents. In the past, resolutions have been adopted with either abstract *or* general *or* binding contents or containing norms combining two of these factors. Adopting resolutions containing simultaneously binding, abstract *and* general norms is obviously a great step forward from what has previously been understood under this “world police” –role. A competence to adopt binding abstract-general norms would dramatically change, or even re-define the role of the Security Council, implying disruptions in the balance between the organs of the Organization and widespread consequences on the public international law area.

In the adoption of resolutions containing norms of simultaneously binding, abstract and general contents, a great potential is clearly present. Resolutions by the Security Council prevail – so Article 103 of the Charter – over any other international treaty. That is: the resolutions have great consequences for the Member States, both for treaties made and for treaties to come in the future. The ordinary procedures for creating international obligations, or “soft law” for states would be disregarded through this one-sided procedure of the Security Council.

More than interfering in the international public law sphere, the Resolutions 1373 and 1540 influence the national legislature. The norms contained in the resolutions are of such a character that they may only be properly implemented through inner state legislation, that is, if Security Council Resolutions are not automatically part of the internal law. If the Member States fail to provide such legislation, this would be non-compliance with the Resolutions and would, in the worst case, open for sanctions against these non-complying states. This need for internal legislation is problematic in relation to the sovereign equality of states manifested in the Charter of the United Nations, in particular because of the simultaneously binding, abstract and general contents of the norms.

As to the use of terminology, the adoption of binding abstract-general resolutions has been referred to as ‘true international legislation’ and the role of the Security Council as a ‘true international legislature’. The use of the notions has been widely discussed in the literature. However, aside from the utilization of differing terminology, the core material content of these notions is the same: simultaneously binding, abstract and general norms. The present writer will for this reason use the notion ‘binding resolutions of abstract-general contents’ to avoid confusion.³

1.2 Presentation of Resolutions 1373 and 1540

The unanimously adopted Resolution 1373 of 28th of September 2001 on international terrorism contains binding norms, which lie several and far-reaching obligations on the Member States. Their main obligation under the Resolutions is to prevent and suppress the financing of terrorist acts. This is of course a relative vague obligation, but the following paragraphs are of a more concrete character; for example are the Member States obliged to criminalize the financing of terrorist acts and to prohibit its nationals

³ See discussion below in part 2.4.

from making finances available to terrorists. The states as such shall avoid providing active or passive support to terrorist entities. The duties put on the Member States are for this reason of a very concrete nature, giving them distinct obligations and implying far-reaching consequences for both the Member States as such and for any affected individuals.

Resolution 1540 on proliferation of weapons of mass destruction (WMD) was unanimously adopted on the 28th of April 2004 and contains binding norms putting several and far-reaching obligations on the Member States.⁴ Like Resolution 1373, it puts demands on inter-state legislation and has in turn a great effect on any affected individuals. The main obligation after Resolution 1540 is for the Member States to refrain from providing support to non-state actors, either trying to acquire or attempting to use weapons of mass destruction. Such activities shall be prohibited in national law. The States shall establish domestic controls, and the resolution establishes several concrete obligations on the Member States to ensure this: they shall account for- and secure WMD and they shall establish physical protection measures, effective border controls and effective national export controls.

Simultaneously to adopting the described simultaneously binding, abstract and general norms, the Security Council in Resolutions 1373 and 1540 established two committees for monitoring the implementation of the resolutions. These have had an important role not only in monitoring, but as well in interpreting the obligations under the Resolutions and advising the Member States on how to best implement the Resolutions. In this manner, the committees arguably function as administrative organs on the areas of counter terrorism and counter proliferation of weapons of mass destruction.

⁴ The resolution uses the notions “proliferation of nuclear, chemical and biological weapons, as well as their means of delivery”. For the sake of simplicity, the present author uses the notion weapons of mass destruction (WMD) meaning the same.

Resolutions 1373 and 1540 are both resolutions containing norms of simultaneously binding, abstract and general character. They are applicable to a not particular number of situations, are of no timely and geographic limitations and have widespread effect both for the national legislation of the Member States as well as for the legal position of any affected individuals.

1.3 Limitations to the thesis theme

In answering the question on the legality of the Security Council adopting resolutions of simultaneously binding, abstract and general contents, several sub-questions arise. However, answering all those would heavily overload the paper capacity and go beyond the purposes of the present theme. For this reasons, some limitations must be made.

In the discussions on the latest developments in of the competencies of the Security Council, some writers have used the notion ‘true international legislation’ or similar notions to describe Resolutions 1373 and 1540. As part of any legislative discussion, the question on how the Security Council enacts its resolutions would arguably be an inevitable question to answer. However, ‘true international legislation’ will not be a part of the thesis as such, not involving a discussion on the executive powers of the Security Council as well as questions on the area of political science. In the present paper, the notion as such will be discussed below in part 2.4.

As the paper title says, only binding resolutions of abstract-general contents will be addressed: not resolutions, which are either binding or general or abstract, or a combination of two of the factors. However, typical examples of the different types of resolutions will be presented for the purposes of illuminating the differences to binding abstract-general resolutions.

The present paper will limit itself to the consequence-side of the resolutions. That is: it will only be discussed if the adoption of binding abstract-general resolutions is within the Security Councils competences under the Charter, whereas the competences of the Security Council to address certain dangers or phenomena as ‘threat to the peace’ not will be addressed.

There is of course a close connection between ‘threat to the peace’ as alternative criteria for application of Chapter VII in Article 39 and the binding non-military measures, which can be taken under Chapter VII, as found in Article 41. A negative answer to the question if the Security Council may determine abstract phenomena as ‘threat to the peace’ will of course lead to a negative answer to the question on adoption of binding abstract-general norms under Article 41, as the two questions are closely intertwined. For the purposes of the present thesis, it will, however, be assumed that the addressing of abstract dangers as a ‘threat to the peace’ does not exceed the margin of interpretation given the Security Council under Chapter VII of the Charter.⁵

1.4 Legal framework, working methods and motivation

The legal framework of the present thesis is in the first line the Charter of the United Nations and the Law of the United Nations. Important sources for illuminating the main question of the present paper is the Resolutions 1373 and 1540 and other resolutions of the Security Council, statements by the Council and by other organs of the Organization, implementation of the Member States, judgements by the ICJ and international tribunals as well as legal literature to the subject.

⁵ For an in-dept discussion, see Aston 2005, page 80 ff.

Security Council Resolutions are binding on the Member States.⁶ The implementation, however, varies between different Member States: the Resolutions might have direct effect in line with a national law, or it might be required to adopt separate national laws it is binding in the state. The responsibility of the Member States under international public law to implement the resolutions is, however, the same, independent from system of implementation.

Security Council Resolutions adopted under Chapter VII of the Charter are the single opportunity there is in the international community to adopt binding measures without going through the process of negotiating a treaty on the subject. This is a powerful instrument, in which the Members of the Security Council are given both great powers and great responsibilities: the Council has got the “*primary responsibility for the maintenance of international peace and security*”⁷, it might in the deployment of this intervene in matters which are normally of domestic character⁸ and its decisions prevail over other international obligations.⁹

The norms found in the Charter of the United Nations are divided into primary norms, which put obligations on states, and secondary norms, which regulate the creation, modification and implementation of the primary norms.¹⁰ The secondary norms are of the most relevance for the present paper. The Charter of the United Nations will in the first line be interpreted to find whether it gives the Security Council the competences to adopt binding norms of abstract-general contents or not, before recourse might be taken to the general norms of public international law.

⁶ Articles 25 and 48 of the Charter

⁷ UN-Charter, Article 24.

⁸ UN-Charter, Article 2 number 7.

⁹ UN-Charter, Article 103.

¹⁰ Marschik, page 459; Zemanek 1997, page 63 and 233-236.

As to the implementation of the resolutions, legal sources are found both in reports filed to the sub-organs established by the Security Council to supervise the implementation of the Resolutions as well as other documents created before, under and subsequent to the adoption of the Resolutions 1373 and 1540.

Judicial literature has been applied to a great extent in the present paper. The main reason for this is that there is a lack of other sources of more weight on the subject. The question on the adoption of binding resolutions of abstract and general contents was until the adoption of Resolution 1373 in 2001 a theoretic question, which again makes the amount of judicial sources somewhat limited. For this reason, discussions in the literature become more important. To this comes that there are few available scripts focusing on just the adoption of simultaneously binding, abstract and general, something, which necessitates a broader spectre of both literature and other sources of weight to find information to encompass all the different sub-questions.

The motivation of the present writer has been the highly contemporary and important character of the paper theme. Aspiring later studies in international politics, the paper theme has provided the present writer with interesting problems and ideas, of which some of course are outside the limitations of the paper theme. The process of writing the paper has of course been challenging, but clearly intellectually rewarding. The present writer has had the pleasure of researching for the paper in Berlin, utilizing the facilities of both the Humboldt Universität zu Berlin as well as the Staatsbibliothek zu Berlin. The texts applied for the paper are in either English or German language.

1.5 Structure

In the first part of the paper, Chapter 2, the resolutions as such will be thoroughly analyzed. It will be illuminated why Resolutions 1373 and 1540 are of simultaneously binding, abstract and general character, why they are innovative, and why they pose a counterpoint to other resolutions previously adopted by the Security Council.

In the second part of the paper, Chapter 3, it will be discussed if the Security Council within the frames for its competences found in the Charter of the United Nations may adopt resolutions containing norms of simultaneously binding, abstract and general character. That is: the Charter of the United Nations will be interpreted to find whether or not it gives the Security Council the competences to adopt such norms.

If the answer to this is a negative one, which it arguably might be, recourse will be taken to the rules of interpretation found in public international law to determine if this would lead to a dissimilar result. The analysis will focus on an evolutionary and dynamic interpretation, in particular the *implied powers* rule, discussed in Chapter 4, before moving on to an analysis of the subsequent practice of the Security Council and the subsequent practice and implementation of the Member States in Chapter 5.

In the conclusive part of the paper, a main question will be if the Security Council is breaking law by adopting binding resolutions of abstract-general contents, or if it is in fact making new law for the international community. As the questions of legitimacy and democracy are important when it comes to discussing if the Security Council should have the competences to adopt binding resolutions of abstract-general contents the *de lege ferenda*, these points will be discussed in the conclusive paragraphs, summing up the most important argumentation and the proposed future strategies for the Security Council to exercise its law-making function.

2 Resolutions 1373 and 1540 – containing norms of simultaneously binding, abstract and general character

2.1 Introduction

The Security Council Resolutions 1373 and 1540 are binding Security Council Resolutions, which contain norms of abstract and general character. In this Chapter, this simultaneously binding, abstract and general character of the Resolutions will be illuminated. In order to make the differences to Resolutions previously adopted by the Security Council clear, Resolutions 1373 and 1540 will be compared to previously hotly discussed resolutions, which are of either abstract-general but not binding or general and binding but not abstract character. Through this comparison, the innovative character of Resolutions 1373 and 1540 will be illuminated.

The Resolutions 1373 and 1540 contain norms, which put far-reaching obligations on the Member States. These norms have a particularly widespread impact: *Firstly* as they are general, that is: applies to a non-particular number of subjects or addressees in a not particular number of cases. *Secondly* as they are abstract, that is: not limited to a particular case, but applicable to any occurrence of certain phenomena. *Thirdly* as they are binding: as the Resolutions shall be both accepted and carried out by the Member States. The presence of these three factors simultaneously significantly differentiates the norms found in Resolutions 1373 and 1540 from previously adopted Resolutions by the Security Council.

2.2 Disjoint presentation of the binding, abstract and general character of the Resolutions¹¹

2.2.1 The abstract character of the resolutions

That a norm is of an abstract character would imply that it is not dependent on a concrete situation, and that it was applicable in any situation filling certain criteria.¹² In this lies that the norm is not subject to timely or geographical restraints and that it is not interconnected with the presence of a certain situation. Norms of abstract contents are applicable on a not-particular number of hypothetical cases or situations.¹³

The norms of Resolutions 1373 and 1540 put general obligations on the Member States without confining itself to the concrete case. The fields of application for the Resolutions are not limited to a particular case of terrorism or a particular case of proliferation of weapons of mass destruction. The norms of the Resolutions 1373 and 1540 are, because they are applicable on every case of terrorism and on every case of proliferation of weapons of mass destruction with no limitation to any concrete situation, of an abstract

¹¹ There are arguably vague lines between the general and the abstract parts of particular resolutions, as illustrated by Happold , page 597: “*For a particular norm to be truly general in nature, it needs to be applicable to all persons or particular classes of persons (rather than to specified individuals), in all circumstances or in all situations where particular criteria have been satisfied (rather than to specific situations or conduct). In other words, it should be composed of abstract legal propositions.*” The vague contents could though be a result of differing use of terminology. A presentation of the different aspects will though for the purposes of clarity in the present paper be presented disjoint.

¹² However, seemingly abstract regulations might materially only have consequences for a limited group, thus one must view to the material contents of the norm to determine if it is truly abstract or merely seeming so.

¹³ Wagner, page 268.

character;¹⁴ they are applicable on the phenomena *per se*. The norms found in the resolutions are not limited to the concrete case, but may be applied to an indefinite amount of hypothetical cases, and is not contextually limited to disciplining a particular country.

The abstract field of application is particularly clear in the preambles of Resolutions 1373 and 1540. Even the resolutions had particular incidents as direct reasons for being adopted,¹⁵ they do respond to terrorism and to the proliferation of nuclear, chemical or biological weapons *as such*.

In Resolution 1373 the Security Council states that “*any act of international terrorism[,]* constitute a threat to international peace and security”¹⁶ and in Resolution 1540 of 2004, it affirms that “*proliferation of nuclear, chemical and biological weapons, as well as their means of delivery,[*]* constitutes a threat to international peace and security”. These statements are determinations in the sense of Article 39, and determine the phenomena *as such* to be threats to the peace. Through this abstract determination, it is opened for the adoption of resolutions of binding abstract-general contents.¹⁷

The abstract character of the provisions in the Resolutions 1373 and 1540 is clear when it comes to the language, in which the resolutions are kept. The norms of the resolutions are more similar to norms of treaties as to norms found in previously adopted Security Council resolutions. In Resolution 1373, the language of the Resolution has its source in

¹⁴ More precisely, the norms relate themselves to every case of financing of international terrorism and to every case of proliferation of weapons of mass destruction.

¹⁵ SC-Res. 1373 of 2001 is clearly a response to the incidents in the USA September 11th 2001.

¹⁶ SC-Res. 1373 of 2001, preamble paragraph 2.

¹⁷ Furthermore, the fact that the phenomena are addressed *as such* in the resolutions would arguably make it logically inevitable for any norm aimed to fight these phenomena to be of an abstract character. Zimmermann/Elberling, page 71; Talmon page 181: “*By their very nature, abstract threats require general measures to be taken*”; Aston 2005, page 80; Herdegen 1995, pages 103 and 107.

the fact that the resolution to a large extent is based upon different existing conventions¹⁸ on the counter terrorism area. The norms found in Resolution 1540 were adopted more independent of existing treaty material, but they are still kept in a treaty style language.¹⁹

A proper implementation of the Resolutions requires significant national legislative measures.²⁰ For example shall the Member States criminalize the collection of funds for terrorist purposes²¹, and “*adopt and enforce appropriate effective laws*” to stop the proliferation on WMD.²² Resolutions 1373 and 1540 are without timely or geographic limitations.²³ Neither Resolution 1373 nor Resolution 1540 contains explicit regulations on when its functioning time comes to an end.²⁴ This means that the Resolutions 1373 and 1540 can only be changed through a new resolution containing counter-norms, which must be adopted through the same rules of procedure and right to veto as the first resolution.²⁵ Presumably, the resolutions will remain in force until the global threats of

¹⁸ Common for these conventions is that they, because of lacking ratification, were not yet in force at the time the Security Council adopted Resolution 1373.

¹⁹ This finds its explanation in the fact that the resolution – according to the negotiations leading up to it – should “*close gaps in existing treaty framework*”.

²⁰ SC-Res. 1373, operational paragraph 1 letter b: “*Criminalize the wil[l]ful provision or collection (...) of funds (...) to carry out terrorist acts*”.

²¹ Ibid.

²² SC-Res. 1540 of 2004, operational paragraph 2: “[A]dopt and enforce appropriate effective laws”.

²³ See Aston 2002, page 258, 269; Zimmermann/Elberling, page 71 and 72; Szasz, page 901.

²⁴ The Committee established to supervise the implementation of Resolution 1504 has got an official functioning time of two years. This, however, does not affect the functioning time of the norms of the Resolution.

²⁵ The “reverse veto”; UN-Charter Art 27; Frowein/Krisch page 714, margin number 38; Caron, page 578 ff. From an interpretation of the Charter, only the Security Council itself is in the position to end or to modify its actions. This 'reverse veto' makes the initial decision more important as the resolution is difficult to reverse once it is adopted.

proliferation of weapons of mass destruction and international terrorism have come to an end. This, however, could last decades.²⁶

2.2.2 The general character of the resolutions

Through addressing their norms at “*all states*”, the Resolutions 1373 and 1504 aim at a global field of application,²⁷ which means that the resolutions are not limited to a particular area or to particular states. The resolutions are generally applicable.

Furthermore, “*all states*” implies an expansion of the circle of addressees under Article 41, a tendency, which has been present in the practice of the Security Council the last decade.²⁸ This practice suggests that as the Security Council views as well Non-Member States as Member States bound by its Resolutions.

Non-Member States may clearly be indirectly bound to comply with Security Council Resolutions through Article 2 (6) of the Charter. According to Article 2 (6), the Member States shall ensure that Non-Members act in accordance with the principles of the United Nations as far as this is necessary for *the maintenance of international peace and security*.²⁹ Any resolution under Chapter VII would necessarily be adopted to maintain international peace and security³⁰ and would thus be binding on Non-Member States.³¹

²⁶ Rosand, page 550.

²⁷ The notion ‘*global resolutions*’ might be applied: Stromseth page 41; Rosand, page 544: “*The threat of terrorism is a global one and the resolutions are therefore of a global nature*”.

²⁸ See SC-Res. 661 of 1991 *Iraq and Kuwait*; SC-Res. 1127 of 1997 *Angola*; SC-Res. 1297 of 2000 *Eritrea and Ethiopia*.

²⁹ UN-Charter Article 2 number 6.

³⁰ See UN-Charter, Article 39. The Security Council has for this reason for more than a decade addressed “*all states*” in its resolutions under Chapter VII.

³¹ See Delbrück 2002, page 460; Frowein/Krisch, page 715, argue against binding force for enforcement

Switzerland, however, as the most important Non-Member State rejects any obligation to follow Resolutions under Chapter VII and claims an “autonomous basis” for applying binding Security Council resolutions.³² Given the minor amount of Non-Member States, this discussion will not be continued here.³³

2.2.3 The binding character of the Resolutions

The Security Council states in the introductory to the operational paragraphs of Resolutions 1373 and 1540: “*acting under Chapter VII*”.³⁴ This reference to Chapter VII means that the Council opens for taking binding measures. In the operational paragraphs of the Resolutions, the Council states that “*all states shall*”,³⁵ which implies an intention of the Security Council that the norms shall be binding on the Member States.³⁶ In accordance with Article 25 of the Charter, the Member States shall ‘*accept and carry out the decisions of the Security Council*’.³⁷ In order to be binding on the Member States, the norms found in the resolutions must be suitable to establish some concrete obligations on

measures against non-member States. The limited amount of Non-Member states makes the question mainly theoretic.

³² The Report of the Swiss Federal Council of July 1st 1998 in Bundesblatt No. 46 of 24th November 1998, pages 52-76; as quoted in Frowein/Krisch page 715.

³³ It will in the further be referred to “Member States” even if as well Non- Member States could be encompassed.

³⁴ SC-Res. 1373 of 2001 and SC-Res. 1540 of 2004, Introductory paragraphs to operational paragraphs.

³⁵ SC-Res. 1373 of 2001 operational paragraph 1 and 2; SC-Res. 1540 of 2004 operational paragraph 1, 2 and 3.

³⁶ Generally on signs of binding character of Security Council Resolutions: Wood, page 82 ff.

³⁷ The notion “*to accept and carry out the decisions of the Security Council in accordance with the present Charter*” is, however, not unambiguous: Delbrück 2002, page 455.

the Member States,³⁸ something which the binding norms found in Resolutions 1373 and 1540 largely are.³⁹

The general binding force of measures short of armed force adopted under Article 41 is from the wording “*call upon the Members of the United Nations*” is not clear.⁴⁰ In the preparatory works to the United Nations Charter, however, the relevant committee at the San Francisco Conference referred to “obligations” as it discussed what was later to become Article 41.⁴¹ The Security Council has in its practice regarded measures adopted under Article 41 as binding, and this binding character of measures under Article 41 has been recognized by both Member States and by international tribunals.⁴²

In adopting Resolutions 1373 and 1540, the Security Council established the Counter Terrorism Committee (CTC) and the Committee established subsequent to Resolution 1540.⁴³ These Committees consist of all the Members of the Council, and the Member States are obliged to report on measures taken to implement the resolutions. The subsequent practices of the two committees have indeed shown that the Security Council

³⁸ Wagner, page 904.

³⁹ This character is particularly clear where it is put duties on the national legislature, for example in Resolution 1373 of 2001, operational paragraph 1 letter b, after which the states shall criminalize the provision or collection of means to finance terrorism, and in operational paragraph 1 letter d, after which the states shall prohibit national institutions and entities to offer direct or indirect services to persons involved in the financing of terrorism. It might, however, be discussed if the notion “*prevent and suppress the financing of terrorist acts*” as found in Resolution 1373 operation paragraph is adequately concrete to establish obligations for the Member States: Wagner, page 904.

⁴⁰ Frowein/Krisch, page 739, margin number 8.

⁴¹ UNICIO (United Nations International Conference on International Organization) XII, page 508: “*obligations resulting from paragraph 3, section B*” [which later became Article 41.]

⁴² See ICJ *Lockerbie, Provisional measures*, 1992, page 15, paragraph 39: “(…) *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; (...) the Court, (...) considers that prima facie this obligation extends to the decision contained in resolution 748 (1992) (...)*”.

⁴³ These committees are subsidiary organs of the Security Council, Article 29 of the Charter.

views the Resolutions as binding on the Member States. It is for these reasons clear that the norms found in Resolutions 1373 and 1540 are binding on the Member States.⁴⁴

2.3 Simultaneously binding, abstract and general resolutions *contra* binding, abstract or general resolutions

The question, which will be answered here, is what separates Resolutions 1373 and 1540 from resolutions previously adopted by the Security Council. In sum, Resolutions 1373 and 1540 are of simultaneously binding, abstract and general character, whereas the other resolutions, though some hotly debated for being “*quasi legislative*” are of *either* abstract-general but not binding character *or* of binding and general, but not abstract character. What exactly lies in this will be illuminated through examples from the practice of the Security Council. The cases have all been selected because of their far-reaching consequences and because they in the contemporary debate have been hotly discussed as resolutions where the Security Council meet the borders of its competencies.

2.3.1 ICTY and ICTR

The resolutions establishing the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY)⁴⁵ and for Rwanda (ICTR)⁴⁶ have been described as “*legislative*”⁴⁷, “*quasi-legislative*”⁴⁸ and “*precariously close to international legislation*”.⁴⁹

⁴⁴ That is: binding are the operational parts of the Resolutions where it is stated that “all states shall” and which are suitable to put obligations on the Member States.

⁴⁵ SC-Res. 827 of 1993.

⁴⁶ SC-Res. 955 of 1994.

⁴⁷ Koskeniemi 1995, page 326. “*The setting up of two ad hoc international war crimes tribunals to issue binding judgments seems already precariously close to international legislation.*”

The statutes of the Tribunals contain both material and procedural rules to be applied by these. For the purposes of the present paper, it is the procedural provisions which are of the most relevance. These provisions require an amount of states to change their domestic legal process.⁵⁰ Firstly, all states are obliged to cooperate with the Tribunals in the prosecution of persons accused of committing crimes within the jurisdiction of the tribunals and shall give effect to the requests of the Tribunals for judicial assistance.⁵¹ Secondly, the Member States must postpone or adjourn domestic criminal proceedings when so requested by the Tribunals.⁵² Thirdly, the judgements of the ICTY and ICTR may not be retried through subsequent prosecution or retrials before national courts.⁵³ Fourthly, States shall give effect to orders issued by the ICTY for the surrender of person's accused of crimes falling under the jurisdiction of the Tribunals. The norms in the resolutions are thus directed to indeterminate addressees and might be applied repeatedly until all justiciable cases have been tried.⁵⁴

However, the norms applied by the Tribunals are not materially new, but existing humanitarian law.⁵⁵ The jurisdiction of the Tribunals is limited to specific situations⁵⁶ and

⁴⁸ Kirgis, page 522, "*quasi-legislative measures*"; Wood page 78, "*quasi-judicial organs*"; Frowein/Krisch page 708, margin number 19.

⁴⁹ Koskenniemi, page 326.

⁵⁰ Rosand, page 549.

⁵¹ ICTY Statute, Article 29; ICTR Statute, Article 28.

⁵² ICTY Statute, Article 9.

⁵³ ICTY Statute, Article 10.

⁵⁴ Kirgis, page 522.

⁵⁵ UN Secretary-General, UN Doc. S/25704, in ILM (International Legal Materials) 1993 page 1167, on the ICTY: "*the Security Council would not be creating or purporting to 'legislate' that law. Rather more, the International Tribunal would have the task of applying existing international humanitarian law.*" This is "*beyond any doubt part of customary law*"; *ibid*, page 1170; Happold, page 596; Aston page 68.

⁵⁶ UN Secretary-General, *ibid*, page 1167, on the establishment of the ICTY: "*As an enforcement measure under Chapter VII the life span of the international tribunal would be linked to the restoration and*

is circumscribed by their constituent documents.⁵⁷ By establishing the Tribunals it was emphasized that to establish these were an *ad hoc* operations.⁵⁸ In its *Tadic-Jurisdiction* decision⁵⁹, the ICTY stated that the tribunal was established as “*as an instrument for the exercise of its own principal function of the maintenance of peace and security, i.e. as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia*”.⁶⁰

As the Resolutions establishing the ICTY and ICTR have a field of application limited to crimes of a certain character performed within particular areas in a particular time, and as the Tribunals will be in force only until their mandate has been fulfilled, the norms found in Resolutions 827 and 955 are not of abstract character even if they put widespread obligations are put upon the Member States.

2.3.2 Economic sanctions

Economic sanctions (embargos)⁶¹ adopted under article 41 of the Charter have been hotly criticized for its widespread implications and have been described as acts of international

maintenance of international peace and security in the territory of the former Yugoslavia.” In its Resolution 827 on the establishment of the ICTY, the Security Council clearly refers to the situation in the former Yugoslavia, points to “*the particular circumstances*” and describes the establishment of the ICTY as an “*ad hoc*”-measure. See Happold, page 596.

⁵⁷ Happold, page 596.

⁵⁸ Ibid.

⁵⁹ Here: ICTY *Tadic, Decision on the defence motion for interlocutory appeal on jurisdiction*, 2 Oktober 1995.

⁶⁰ Ibid, paragraph 8.

⁶¹ For example: Embargoes against Afghanistan, binding on all states: Resolution 1267 of 1999 and Resolution 1333 of 2000; Sanctions regimes in Iraq, the former Yugoslavia and Sierra Leone.

legislation.⁶² The norms found in the resolutions imposing embargos on certain products, services and actions over years have the function that it regulates State behaviour world wide over extended periods of time. This might at first glance seem like abstract and general resolutions of binding character.⁶³ The norms are suitable for repeated application over time,⁶⁴ apply to a wide circle of addressees and might even be described as legislative in form.⁶⁵

Economic sanctions are, however, issued in response to a particular situation or to a particular conduct.⁶⁶ Even if the sanctions are applicable to a not yet specified number of cases, they are linked to this country-specific or entity-specific situation. The sanctions are thereto only of preliminary effect; the measures will end as soon as threat to the peace – the situation or conduct leading to the sanctions – no longer exists.⁶⁷ This makes economic sanctions under Article 41 not abstract-general⁶⁸, but concrete-general.⁶⁹

2.3.3 Abstract and general, but not binding resolutions

On several occasions, the Security Council has addressed questions on a general and abstract basis, but in none of these situations the Security Council has moved on to

⁶² Kirgis, page 520.

⁶³ Ibid.

⁶⁴ Aston, page 268.

⁶⁵ For example did the embargos in Iraq, the former Yugoslavia and in Sierra Leone have widespread impact on the communities as it established and kept for years embargoes on specific services, products and actions. Frowein/Krisch, page 708, margin number 21.

⁶⁶ Happold, page 597.

⁶⁷ Frowein/Krisch, page 709, margin number 21. The problem of the “reverse veto” has though had implications for sanctions regimes, for example in Iraq.

⁶⁸ Or, in the words of Happold, page 597: “*not composed of abstract legal propositions*”.

⁶⁹ Aston 2002, page 268.

adopting binding norms of abstract and general character. These Resolutions are attempts to set standards for the international community on a soft-law-basis. Common for all these resolutions is that they are with no timely or geographic limitations, and that they address the phenomena and not the situations.

Non-binding resolutions of abstract and general contents have been made on a wide spectre of areas, for example when it comes to the importance of protection of civilians, with particular emphasis on children⁷⁰ and women.⁷¹ The Security Council has in these resolutions emphasised its primary responsibility for the maintenance of international peace and security⁷² and the consequent impact on durable peace and on reconciliation.⁷³

In other non-binding resolutions of abstract and general contents, the Security Council has addressed the pandemic of HIV/AIDS,⁷⁴ humanitarian questions⁷⁵ and the illicit trade in small arms and light weapons.⁷⁶ On the areas of international terrorism and of

⁷⁰ SC-Res 1265 of 1999; SC-Res 1296 of 2000; SC-Res 1314 of 2000. In SC-Res. 1261 of 1999 the Council expressed its grave concern at the harmful and widespread impact of armed conflict on children and the long-term consequences this has for durable peace, security and development. This was repeated in SC-Res. 1379 of 2001, preamble. In SC-Res. 1539 of 2004, preamble, the Council strongly condemned the recruitment and use of child soldiers, the killing and maiming of children, rape and other sexual violence mostly committed against girls, abduction and forced displacement, denial of humanitarian access to children, attacks against schools and hospitals as well as trafficking, forced labour and all forms of slavery and all other abuses committed against children affected by armed conflict.

⁷¹ SC-Res 1265 of 1999; SC-Res 1296 of 2000; SC-Res 1325 of 2000; Presidential Statement S/PRST/2002/6.

⁷² SC-Res. 1460 of 2003, preamble; SC-Res. 1539 of 2004, preamble.

⁷³ SC-Res. 1325 of 2000, preamble.

⁷⁴ SC-Res.1308 of 2000, pp 11, stressing that if the pandemic remains unchecked, it might pose a threat to international peace and security.

⁷⁵ SC-Res. 1296 of 2000, operational paragraph 5; SC-Res. 1314 of 2000, operational paragraph 9.

⁷⁶ SC-Res. 1366 of 2001, preamble, however focusing on Africa: *"Expressing serious concern over the threat to peace and security caused by the illicit trade in and the excessive and destabilizing accumulation*

proliferation of WMD, Resolutions containing not-binding norms of abstract-general contents have been adopted prior to Resolutions 1373 and 1540.⁷⁷ These resolutions all have the Membership as such as addressees and have no temporal or geographical limitations. However, they contain no binding norms putting obligations on the Member States.

In Resolutions 1172 of 1998 and Resolution 1368 of 2001, the Security Council in non-binding resolutions determined that the phenomena of proliferation of WMD⁷⁸ and international terrorism⁷⁹ represented a ‘threat to the peace’.⁸⁰ The Security Council did not adopt binding norms⁸¹ following these determinations, but a potential was clearly present.⁸²

of small arms and light weapons in areas of conflict and their potential to exacerbate and prolong armed conflicts”; SC-Res. 1209 of 1998; SC-Res. 1467 of 2003.

⁷⁷ SC-Res. 1189 of 1998: The SC calls upon “*all States to adopt (...) effective and practical measures for (...) the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators*”

⁷⁸ SC-Res. 1172 of 6 June 1998, preamble paragraph: The Security Council addressed the proliferation of all weapons of mass destruction and stated that such activities “*constitutes a threat to the international peace and security*”.

⁷⁹ SC-Res. 1386 of September 12th 2001, operational paragraph one: “*regards such acts, like any act of international terrorism, as a threat to international peace and security*”.

⁸⁰ It is clear that both resolutions are reactions on particular incidents; the terrorist incidents in the USA 2001, and nuclear tests conducted by India and then Pakistan in 1998. This does not take away the general character of the determinations made. The thoughts on Resolution 1459 of 28th January 2003 and the unclear limitations apply here as well, see following paragraphs.

⁸¹ SC-Res. 1369 of 2001, operational paragraph 4: “*calls upon*” the states to “*redouble their efforts to prevent and suppress terrorist acts*”; SC-Res. 1172 of 1998, operational paragraph 14: “*calls upon*” the states to “*become Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*”.

⁸² Any determination under Article 39 opens for an adoption of binding measures under Chapter VII of the Charter.

In Resolution 1459 of 28th January 2003, the Security Council notes the linkage between the illicit trade in rough diamonds and the fuelling of armed conflict⁸³, supports the Kimberly Process Certification Scheme (KPCS) and encourages its further development.⁸⁴ The resolution refers to norms of abstract and general character, but the Resolution does not put binding obligations on the Member States.

The Resolution illustrates the blur lines between addressing particular situations and addressing phenomena as such: The Kimberly Process Certification Scheme is rooted in the sanctions regimes in Angola and Sierra Leone,⁸⁵ sanctions regimes, which demanded a system to determine the origin of diamonds in order to ensure the sanctions to have effect. However, its circle of addressees is far wider than what would follow from an ordinary embargo.

⁸³ SC-Res. 1459 of 2003, preamble paragraph one. The SC notes “*with deep concern the linkage between the illicit trade in rough diamonds from certain regions of the world and the fuelling of armed conflicts that affect international peace and security*”; See also SC-Res. 1173 of June 12th 1998 and Resolution 1306 of July 5th 2000.

⁸⁴ SC-Res. 1459 of 2003, operational paragraph one. The Kimberly Process Certification Scheme is a system, which mainly shall determine the origin of diamonds in order to prevent trafficking of “conflict diamonds”. See SC-Res. 1295 of 2000.

⁸⁵ Krisch, page 892.

2.4 Is the adoption of binding resolutions of abstract and general contents ‘true international legislation’?

A discussion on whether or not the adoption of binding resolutions of abstract and general contents might be referred to as ‘true international legislation’ is of interest in order to place the present paper in the contemporary debate.⁸⁶ Of course, the classification would depend on the definition applied.⁸⁷ Arguably, a certain parallel must be drawn to legislation in national legislative systems.⁸⁸ This implies that norms, which are to fall under the definition of ‘true international legislation’, must possess the same basic characteristics as legal norms on the national level. These characteristics are the provision of legal consequences and that they are binding for a not particular circle of addressees and are applicable on a not limited number of hypothetical cases.⁸⁹ Applying

⁸⁶ See for example Guillaume, page 8: “By a broadened interpretation of its mandate, it is now assuming not only powers of action, but also legislative powers in the interest of international peace and security.”

⁸⁷ A widely accepted definition of ‘international legislation’ is provided by Yemin in *Legislative Powers in the United Nations and Specialized Agencies*, 1969, page 6: ‘True international legislation’ might be defined as acts, which are unilateral in form, create or modify some element of a legal norm. This legal norm should be general in nature, that is: directed to indeterminate addressees and capable of repeated applications in time. There is no general consensus on the definition; Skubiszewski, page 1255. See Aston 2005, page 52 ff; Alvarez 2003 page 120; Happold, page 597-98; Kirgis, page 520; Rosand, page 2; further references to attempted definitions are found in Skubiszewski, page 1255 ff.

⁸⁸ The contents of the notion ‘true international legislation’ might be attempted defined as a parallel to national legal systems or not, see Aston, page 46 ff. Skubiszewski, page 1255, finds this national parallel a logical necessity: “In logic, the notion international legislation should mean such law-making among States or inter-governmental organizations which in its basic features remains identical with legislation in a state”. See also Talmon, page 176.

⁸⁹ Aston 2002, page 268: “Eine rechtsverbindliche Anordnung hat im nationalen Recht aber nur dann den Charakter einer Rechtsnorm, wenn sie für eine unbegrenzte Anzahl hypothetischer Fälle für einen unbestimmten Kreis von Normadressaten eine Rechtsfolge vorsieht, wenn sie also abstrakt-genereller Natur ist.“ Skubiszewski 1965, page 202: “That a law-making resolution lays down general and abstract

this definition, binding norms of abstract and general contents are ‘true international legislation’.

However, in national systems, there are branches of power endowed with the power to enforce the legislation provided by the legislature. Such an “*international executive*” is not existent in the international community today.⁹⁰ The powers of the Security Council to enforce its Resolutions are mainly political. This is the main argument against applying the notion ‘true international legislation’ from a national parallel on binding resolutions containing abstract- general norms by the Security Council. On the other side, it might be argued that Security Council Resolutions adopted under Chapter VII will to a large degree be followed by meaningful sanctions⁹¹ suggesting that the norms will be convincingly enforced.⁹² Furthermore, the most distinctive sign of a normative legislative act is its general applicability⁹³ that is, the abstract-general character of the norm. This characterization would apply well on Resolutions 1373 and 1540.⁹⁴

runes of conduct is an obvious requirement (...). Hence, the binding resolutions of international organisations must be divided, for our purposes, into those which create law and those which are executive in character (...).

⁹⁰ Even if the Security Council is referred to as the “*world police*”, the UN possesses no own executive forces.

⁹¹ The Security Council has for example defined the non-compliance with its resolutions a ‘threat to the peace’ and thereafter adopted binding resolutions under Chapter VII in response to this non-compliance: SC-Res. 748 of 1992 on Libya/Lockerbie: “*the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in Resolution 731 (1992) constitute a threat to international peace and security*”; SC-Res. 1070 of 1996 on Sudan; SC-Res. 1333 of 2000 on Afghanistan. See Allain, page 102-107.

⁹² See Alvarez 2003 page 120.

⁹³ Tomuschat 1993, page 346.

⁹⁴ Authors have for this reason found the Resolutions ‘truly legislative’: Aston 2005, page 69 and 89; Finke/Wandscher, page 171; Dicke, page 163; Szasz, page 901; Talmon, page 118; Stromseth 2003, page 41.

In the view of the present writer, this general applicability of resolutions of simultaneously binding, abstract and general character is a decisive argument in direction of determining such resolution ‘true international legislation’,⁹⁵ despite the lack of an international executive force. The Council might for this reason arguably be referred to as a “*world legislature*”.⁹⁶ The conclusion on the question, however, remains open. It is clear that ‘true international legislation’ defined through parallels to national parameters would be a new encounter in public international law, where “hard law” traditionally is created either through treaties between states or by means of “law-creating” customary practice. Before 2001, the question on the competences of the Security Council to adopt ‘true international legislation’ was, a merely theoretical question, and was, when even asked, answered negatively.⁹⁷

⁹⁵ Pro that the Resolutions 1373 and 1540 (only 1373 when the articles are from pre 2004) are: Aston 2005, page 258; Stromseth, page 41 (“*legislative in nature*”); Rosand, page 544; Alvarez AJIL 2003, page 874-875; Szasz page 901 ff.; Happold page 593: “*True legislative act*”.

⁹⁶ As which it has been referred to on several occasions: Referred to “*legislator*” in: Alvarez, War on Terrorism 2003, page 238 and 241; Happold, page 596; Krisch 2003, page 883. Referred to as “*world legislator*” (“*Weltgesetzgeber*”) in Dicke, page 163; Finke/Wandscher, page 172; Krisch Rise and Fall 2003, page 884: “*by means of its enforcement powers, the Security Council has in fact replaced the conventional law-making process on the international level*”.

⁹⁷ Oppenheim page 114: “*there is no machinery of international legislation*”; ICTY Tadic page 32, paragraph 43: “*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.*”

2.5 Conclusions on Resolutions 1373 and 1540 resolutions containing norms of simultaneously abstract, general and binding contents

Security Council Resolutions 1373 of 2001 and 1540 of 2004 are resolutions, which are at the same time abstract, general and binding. The abstract character is emphasized through the statements in the preambles of the Resolutions where phenomena as such are viewed as threats to the peace. This is continued in the operational paragraphs, through which international terrorism and proliferation of weapons of mass destruction shall be prevented. The norms are without any timely or geographic limitations, are applicable on every occurrence of a certain phenomena and demand widespread inner-state legislation.

The simultaneously abstract, binding and general character of the Resolutions makes the Resolutions novelties in the practice of the Security Council, as they are clearly differentiable both from previously adopted resolutions⁹⁸, like sanctions regimes, International Criminal Tribunals and other peace-enforcing measures and resolutions setting non-binding standards on different areas, even if these have had widespread impact.⁹⁹

It is clear that the Security Council previously has adopted binding measures in relation to single acts of terrorism or of proliferation of weapons of mass destruction. However,

⁹⁸ These previously adopted norms might be described as “*judicial law-making*”: The Court applies an existing rule in light of a particular situation and thereby creates a new rule, which is limited to refining and developing the older norm: Happold, page 598.

⁹⁹ The lines between the different categories might though appear ambiguous, as for example in the previously mentioned resolution 1459 of 2003 on the Kimberly Certification Scheme; where the Security Council noted “*with deep concern the linkage between the illicit trade in rough diamonds from certain regions of the world and the fuelling of armed conflicts that affect international peace and security*”. Ambiguity is for example as well found in SC-Res. 1172 of 6 June 1998.

there is a great difference from binding measures in concrete cases to binding norms applicable to the phenomena on a general basis.¹⁰⁰

The Resolutions 1373 and 1540 are of great importance not only for the Member States, but furthermore for a potentially large amount of individuals and entities as the Resolutions oblige the states to adopt new inner-state legislation, including criminal law, on numerous areas.¹⁰¹

Because of their simultaneously abstract, general and binding character, the resolutions resemble national legislation. At least concerning the material contents, the Resolutions 1373 and 1540 might be referred to as ‘true international legislation’.¹⁰² Whether one agrees upon the use of the notion ‘true international legislation’ or not does not change the fact that what separates the Resolutions 1373 and 1540 from previously adopted Security Council Resolutions is their simultaneously binding, abstract and general contents.

¹⁰⁰ Talmon, page 182 seem to hold the opposite opinion: *“If the Security 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.”*

¹⁰¹ In particular operational paragraph 1 letters b,c and d and 2 letter e of Resolution 1373 and operational paragraph 2 of Resolution 1540.

¹⁰² UN Doc. A/56/PV.25 of 2001, page 3, “In short, for the first time in history, the Security Council enacted legislation for the rest of the international community” (the representative of Costa Rica on Resolution 1373). Aston 2002, page 267: *“Dieses neue Verständnis des Gefahrenbegriffs bedeutet nicht nur einen qualitativen Sprung auf der Tatbestandsebene des Art. 39 VN-Charta, sondern hat auch auf der Rechtsfolgenseite zu Maßnahmen des Sicherheitsrats geführt, die aufgrund ihres echten legislative Charakters ohne Präzedenzfall sind.“*

3 Is the adoption of binding resolutions containing binding norms of abstract and general character coherent with the Charter of the United Nations?

In the Tadic- Decision in the ICTY, *Judge Sidhwa* in a separate opinion stated “*since the Tribunal to be established was of a limited nature, for a limited purpose, for a limited time, for a limited territory and for offenders who had committed offences within the territory of the former Yugoslavia, the decision was valid and fair, and squarely fell within Art. 41 of the Charter.*”¹⁰³

It might be argued that following the counter argumentation to this statement, Resolutions 1373 and 1540 are established to concur an abstract danger, they are global without any timely or geographic limitations and do not limit themselves to any particular situations. Until 2001, the question of whether the Security Council had the competence adopt resolutions containing norms of simultaneously binding, abstract and general character was a mere theoretic question.¹⁰⁴ It has been argued that the Security Council in the principle is not in the position to create general rules binding on the Member States¹⁰⁵ and that the powers of the Security Council are limited to the concrete case only.¹⁰⁶ To conclude from this that the resolutions were adopted *ultra vires*, would, however, be too hasty. A determination on whether or not the Security Council had the competences to adopt Resolutions 1373 and 1540 must in the first place be made through an

¹⁰³ ICTY Tadic (Appeals Chamber), page 562.

¹⁰⁴ Aston page 63; evident in Kirgis, page 520.

¹⁰⁵ Arangio-Ruiz page 629-630, Stein page 61-63, Kelsen page 295.

¹⁰⁶ Frowein/Krisch page 709 margin number 22.

interpretation of the relevant notions of the United Nations Charter: ‘threat to the peace’ as found in Article 39, and ‘measures short of armed force’ as found in Article 41.

Through a determination under Article 39, the Security Council opens for taking measures under Chapter VII, including under Article 41. In this lies that the Security Council must make a determination on the existence of a “threat to the peace, breach of the peace, or an act of aggression” before any binding measures might be adopted.

The interpretation is based upon that the Security Council as well when it acts under Chapter VII is bound by public international law in so far that it has to respect limits to its powers set forwards by the Charter of the United Nations, which again implies that the discussion is based upon the idea that there are in fact limitations for the powers of the Security Council.¹⁰⁷

¹⁰⁷ See ICTY Tadic (Appeals Chamber), ILM 1996, page 32 ff; ICTR Kanyabashi. Even if it arguably is a difference between the law and the practice, a reference to the actual power of the Security Council would not be satisfactory. See Wagner, page 906. Koskeniemmi, page 327: “*Authority is a normative and not a factual category.*”

3.1 The ordinary meaning of the terms – the textual approach

The question, which will be answered in this paragraph, is if the Security Council within the ordinary meaning of the Charter terms may adopt binding resolutions containing norms of simultaneously binding, abstract and general nature.

The Vienna Convention on the Law of the Treaties¹⁰⁸ (VCLT) Article 31 (1) sets the rule that the provisions of the Charter are to be interpreted “*in accordance with the ordinary meaning to be given to the terms of the treaty*”.¹⁰⁹ The ordinary meaning of a term might only be determined when its context is taken into concern.¹¹⁰ To take the context into concern in the textual interpretation is coherent with the dynamic-evolutionary method of interpretation.¹¹¹ In this dynamic-evolutionary method, both the will of the parties and the purpose of the international Organization are arguments to be taken into concern in the interpretation process.¹¹²

¹⁰⁸ The Vienna Convention on the Law of Treaties, adopted 22 May 1969, entry into force 27 January 1980. The provisions of the VCLT apply *per analogy*, as the Charter is adopted subsequent to the VCLT; ICJ *Namibia* (1971), page 47: (regarding Article 60 VCLT) the provisions of the VCLT “ (...) *may in many respects be considered as a codification of existing customary law on the subject*”; ICJ *Botswana/Namibia*, 1999, page 1045: “*customary international law finds expression in Article 31 VCLT*”; Ress, page 18.

¹⁰⁹ ICJ *IMCO*, 1960, page 158: “*usual or common meaning*”; ICJ *Territorial Dispute*, 1994, page 21; ICJ *Oil Platforms*, 1996, page 812.

¹¹⁰ Ress, page 20; ICJ *IMCO*, 1960, page 158: “*The meaning of the word ‘elected’ in the Article cannot be determined in isolation by recourse to its usual or common meaning and attaching that meaning to the word where used in this Article. The word obtains its meaning from the context in which it is used. If the context requires a meaning which connotes a wide choice, it must be construed accordingly, just as it must be given a restrictive meaning if the context in which it is used so requires.*”

¹¹¹ This method is the counterpart of the earlier dominating static method of interpretation. Ress, page 24.

¹¹² ICJ *Namibia*, 1971: *the Courts* “*interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system*

3.1.1 'Threat to the peace'

3.1.1.1 Are single acts of international terrorism and proliferation of weapons of mass destruction encompassed?

In Resolution 1373, the Security Council determined “all acts of international terrorism” a threat to the international peace and security. The notion ‘international terrorism’ is not a clear notion, and Resolution 1373 does not attempt any definition of the term.¹¹³ Lacking such a definition, the determination of whether an act of terrorism is a threat to the peace or not is highly dependent both on the individual situation and on which definition of ‘international terrorism’ one choose to employ. The situation is particularly unclear when it comes to state-nationals attacking state or private property inside of the very same state.¹¹⁴ Arguably, this is not ‘*international* terrorism’, but the label is easily employed the individuals performing the terrorist acts are part of a terrorist network. However, even if no clear definition is provided or agreed upon and the outer limits of the notion are blurring, the notion terrorism¹¹⁵ in its core contains the minimum factor of

prevailing at the time of the interpretation”. This however, does not for the purposes of the present paper force the discussion on implied powers, which is found below in part 4.

¹¹³ For which the Resolution has been heavily criticized. The General Assembly's Sixth Committee is currently considering a draft *Comprehensive Convention on International Terrorism* where a definition of terrorism should be included: <http://www.un.org/ga/57/sixth/index.html>

¹¹⁴ See also Happold, page 595. In his opinion, not all acts of terrorism constitute threats to international peace and security: “*It is difficult to see, for example, how an incendiary device in a furrier’s shop is a threat to the peace*”. Again, different perceptions clearly root in different understandings of the notion ‘terrorism’.

¹¹⁵ Aston 2005, page 114; Wagner page 882; Report of the Ad Hoc Committee on International Terrorism UN-Doc A/9028, which on page 11-12 in 1972 concluded that it was impossible to agree on a definition of the notion ‘terrorism’.

the use of violence against persons.¹¹⁶ This would be decisive for the determination of individual acts of international terrorism as ‘threats to the peace’.¹¹⁷

When it comes to Resolution 1540, the acts described as a ‘threat to international peace and security’ were not the actual use of weapons of mass destruction,¹¹⁸ but the *proliferation* of such. The proliferation of weapons of mass destruction is a mere trading process and does not involve the use of force against persons or objects. Individual acts of proliferation of weapons of mass destruction between the known and accepted atom powers are for example no ‘threat to the peace’.

There is a large step between the possession of weapons of mass destruction and the actual employment these weapons. A single act of proliferation would with less necessity pose a threat to the peace than an act of terrorism. The main fear attached with the proliferation of weapons of mass destruction is, however, the danger of such weapons coming into possession of terrorist entities,¹¹⁹ and that the weapons are subsequently either employed or used for extortion purposes. The great destructive potential of WMD makes the proliferation of such closely interconnected with the use of force. The potentially widespread implications of such weapons in the hands of both terrorists and other non-state entities is the decisive for a determination of the mere proliferation of weapons of mass destruction would isolated pose a ‘threat to the peace’.¹²⁰

¹¹⁶ See for example the proposed definition in Wagner, page 884-887; his result is based on an analysis of the present anti-terrorism-conventions and national laws as well as attempted definitions in the legal theory.

¹¹⁷ Aston 2002, page 276-277; Graefrath page 196; Frowein/Krisch, page 726 margin number 23: “*international terrorism (...) creates severe destabilizing effects on the international order*”; Krisch, page 882.

¹¹⁸ On the general use of nuclear weapons, the Security Council has stated that “*any aggression with the use of nuclear weapons would endanger international peace and security*”: SC-Res. 948 of 1995, preamble.

¹¹⁹ SC-Res. 1540 of 2001, preamble paragraph 8.

¹²⁰ A different conclusion would arguably be the matter for the proliferation of the “*means of delivery*” for weapons of mass destruction, which as well pose a ‘threat to the peace’, see SC-Res. 1540 of 2004, preamble paragraph 1.

3.1.1.2 Preventive contents

Both Resolutions 1373 and 1540 are resolutions of preventive contents as they refer to terrorism and proliferation, which have not yet been committed. Terrorism shall be prevented for the future, as shall the proliferation of weapons of mass destruction to non-state entities.

From a lingual point of view, a ‘threat to the peace’ exists where there is an imminent danger of a breach of the peace or an act of aggression.¹²¹ Logically a threat to the peace would always lie timely before a breach of the peace. The Security Council holds the primary responsibility for the “*maintenance of international peace and security*”. The use of the notion “*maintenance*” as oppose to for example “*re-establish*” and it is clear that the powers of the Security Council are of a certain preventive character. The notion ‘threat to the peace’ might be applicable to specific situations on a preventive basis.¹²²

Both international terrorism and proliferation of WMD to non-state entities are actions, which arguably require planning time ahead. This is an argument pro a right for the Security Council to determine certain acts of international terrorism and proliferation of weapons of mass destruction as ‘threats to the peace’ before this threat has materialised itself.

This indicates that the addressing of at least particular acts of international terrorism or proliferation of weapons of mass destruction before the actions has been taken, would lie within the competencies of the Security Council.

¹²¹ Frowein/Krisch, page 722, margin number 16; Arntz, page 64.

¹²² Frowein/Krisch, page 720, margin number 6 and page 722, margin number 16; Aston 2005, page 90.

3.1.1.3 Preventive contents for phenomena *as such*

The Resolutions 1373 and 1540 goes further than to determine particular situations of international terrorism or proliferation of WMD as threats to the peace: the phenomena are determined ‘threat to the peace’ *as such*. Even if the Security Council might within its competencies under Chapter VII of the Charter determine a single act of terrorism a ‘threat to the peace’ even on a preventive basis, the question on the addressing of such dangers on a general basis is not answered. Such powers for the Security Council would imply a highly more extensive use of its powers than an ordinary preventive use of its powers in an individual situation would imply.

This raises a question of utmost importance for the present thesis: Might the Security Council determine the phenomena international terrorism and proliferation of weapons of mass destruction *as such* as ‘threats to the peace’? An affirmative answer to this would imply that the Security Council might determine a form of behaviour *as such* a threat to the international peace and security for every situation to come rather than to make such a determination individually to every manifestation of a particular behaviour.

From a lingual point of view, the core of the notion ‘threat to the peace’ encompasses *concrete and particular situations*, that is, situations, which if they escalate, may result in a breach of the peace or an act of aggression.¹²³ This finds support in the fact that the measures found in Chapter VII are measures of a more concrete nature.¹²⁴ The heading of Chapter VII¹²⁵ supports an interpretation where the notion ‘threat to the peace’ only

¹²³ Frowein/Krisch, page 772 describe the typical ‘threat to the peace’ as an impending conflict between states, where the danger of a breach of the peace or an act of aggression is imminent.

¹²⁴ This is especially clear in Article 42 on military measures, but as well in the explicitly mentioned measures in Article 41.

¹²⁵ Reading: ‘acts of aggression’.

encompasses specific situations.¹²⁶ In Chapter VI, which is meant to form a preliminary stage to Chapter VII, notions indicating a particular conflict are used.¹²⁷ These factors all support a view that the notion ‘threat to the peace’ is limited to concrete situations. Outside of this core meaning, the notion ‘threat to the peace’ has broad and indistinct boundaries, and an equally broad field of application.¹²⁸

The content of the notion ‘threat to the peace’ has developed over the years,¹²⁹ and it now encompasses a variety of situations, which all have in common that they fundamentally threaten the peace.¹³⁰ As consequence of this development of the understanding of the notion ‘threat to the peace’, the ordinary meaning of the notion ‘threat to the peace’ remains open when it comes to whether it encompasses the general addressing of certain phenomena or not.

3.1.2 A close interconnection

There is of course a close relationship between the determination of a ‘threat to the peace’ and the adoption of measures short of armed force under Chapter VII of the Charter. This close interconnection between the notions was made quite clear by the ICTY in the *Tadic-decision*: “As set out above (...) we are of the view that the Security

¹²⁶ Happold, page 599.

¹²⁷ Article 33 ff.: ‘any dispute’, ‘any situation’, ‘the parties’.

¹²⁸ Zimmermann/Elberling, page 72. ‘Threat to the peace’ is almost the sole alternative of those found in Article 39 that the Security Council uses, see Frowein/Krisch, page 722, margin number 16.

¹²⁹ See paragraph 4.3.3 below.

¹³⁰ As a part of the same development, the Security Council has gone from limiting its understanding of the notion ‘peace’ to the absence of armed violence and hostilities between states (the negative understanding of the notion) to encompassing further factors of importance of the existing of lasting peace, such as the friendly relations between states, democracy and stable economic relations.

*Council was endowed with the power to create this International Tribunal as a measure under Chapter VII in the light of its determination that it exists a threat to the peace.”*¹³¹

This close relationship between the notions might arguably lead to the conclusion that when the Security Council is in the position to determine a phenomenon *as such* a ‘threat to the peace’ it shall as well be in the position to adopt binding decisions to fight these dangers under Article 41 of the Charter.¹³² This line of argumentation would imply that if the Security Council had the competencies to address an abstract danger as a ‘threat to the peace’ it would necessarily have the competencies to adopt binding resolutions of abstract and general content.¹³³

The notions ‘threat to the peace’ and the adoption of simultaneously binding, abstract and general norms under Chapter VII of the Charter might be closely intertwined. However, a positive answer to the question if the abstract phenomena of international terrorism and proliferation of weapons of mass destruction are encompassed by Article 39 of the Charter does not automatically allow for the adoption of such norms – the legal basis not just for addressing- but as well for taking measures must be interpreted.

¹³¹ ICTY, Tadic Appeals Chamber, page 47, paragraph 44.

¹³² Aston 2005, page 103: “*Alle andere würde zu einer systemwidrigen Inkordonanz zwischen der Art der nach Art 39 UN-Charta festgestellten Friedensbedrohung und der Natur der Art. 41 UN-Charta beschlossenen Maßnahmen führen.*”; Zimmermann/Elberling, page 71; Talmon, page 181: “*By their very nature, abstract threats require general measures to be taken*”.

¹³³ The notions will here be attempted interpreted individually. As the interconnection exists, a negative answer on either the addressing of abstract dangers or on the adoption of binding resolutions containing abstract-general norms, will lead to the conclusion that the Security Council lacks the competencies to adopt binding resolutions containing abstract-general norms.

3.1.3 'Measures short of armed force'

The Resolutions 1373 and 1540 contain obligations upon the Member States of simultaneously binding, abstract and general character. The Charter itself does not explicitly open for the Security Council to adopt resolutions containing such norms.

It is clear that the relevant Article of the Charter is Article 41. This negatively limits the measures it allows for to 'measures short of armed force', which implies that the Security Council may not adopt military measures on the legal basis of Article 41.¹³⁴ The discretionary powers of the Security Council regarding which measures are needed to put an end to the situation are thus wide.¹³⁵ Such wide discretionary powers for the Security Council do *not* mean that it may take *any* measures short of armed force.

Article 41 contains a catalogue of measures¹³⁶. However, this list is not exhaustive.¹³⁷ Article 41 may comprise further measures than those it explicitly mentions. Lingual, the notion 'measures short of armed force' is wide enough to comprise as well the adoption

¹³⁴ ICTY *Tadic* Appeals Chamber, page 17 paragraph 35: "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."

¹³⁵ Ibid, paragraph 39.

¹³⁶ Reading: "These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

¹³⁷ Article 41: "may include"; ICTY *Tadic* Appeals Chamber, page 17 paragraph 35; ICTR *Kanyabashi* Jurisdiction, paragraph 27: "While it is true that establishment of judicial bodies is not directly mentioned in Article 41 of the UN Charter as a measure to be considered in the restoration and maintenance of peace, it clearly falls within the ambit of measures to satisfy this goal. The list of actions contained in Article 41 is clearly not exhaustive but indicates some examples of the measures which the Security Council might eventually decide to impose on States in order to remedy a conflict or an imminent threat to international peace and security."

of binding resolutions containing abstract-general norms,¹³⁸ but read in the context of the measures explicitly listed in Article 41, the notion would arguably refer only to measures relating to a particular situation. The measures listed in Article 41 are exclusively concrete measures, which logically may be directed either to a particular state or to a non-particular amount of states in relation to a particular conflict.¹³⁹ To adopt resolutions with abstract-general contents would mean adopting measures qualitatively different from the measures explicitly described in Article 41.

In the drafting of the International Criminal Court (ICC), the International Legal Committee commented upon the report of the Working Group. This had mentioned it as an alternative method to establish the ICC to do this through a Security Council Resolution. The ILC made the remarks that it must be distinguished between the authority to establish a Tribunal as response to a particular situation and to establish a permanent institution with general powers and competence. It concluded that Chapter VII of the Charter envisaged action with respect to a particular situation.¹⁴⁰

It might thus be argued that from a textual interpretation of the notion ‘measures short of armed force’, the measures to disposal for the Security Council under Article 41 are concrete measures with a limited circle of addressees.¹⁴¹ Article 41 for this reason does not open for the adoption of binding resolutions containing abstract-general norms.¹⁴²

¹³⁸ Talmon, page 181; Aston, page 283; Wagner, page 879, 907-909 and 913; Schachter 1988, page 12; Happold, page 594; Frowein/Krisch, page 740. *Contra*: Arangio-Ruiz, page 723.

¹³⁹ This is the case when for example diplomatic relations shall be severed: this affects all the states with diplomatic relations with the state in question, but does not affect all states on a general basis, i.e. does not sever every diplomatic relation between every state.

¹⁴⁰ Report of the International Law Commission on the work of its forty-sixth session, 3 May 1994, UN-Doc A/49/10 of 1994, found in YBILC 1994, page 22: “[*There is a distinction*] between the authority of the Council to establish an *ad hoc* tribunal in response to a particular situation under Chapter VII of the Charter and the authority to establish a permanent institution with general powers and competence.

¹⁴¹ Zimmermann/Elberling, page 72.

¹⁴² Zemanek 1999, page 636-637: “The word ‘measures’ (...) does not suggest that it [the Security

3.2 The systematic approach and the historic- and historic-subsequent practice approaches

A systematic interpretation of the powers of the Security Council implies an interpretation of the UN-Charter as a whole.¹⁴³ Significant parts of a systematic interpretation are comparisons of the different parts of the treaty, distinctions between different parts of the treaty and considerations on the whole treaty structure.¹⁴⁴

The General Assembly has got the primary responsibility for “encouraging the progressive development of international law and its codification”.¹⁴⁵ If one holds the view that the Security Council through adopting norms of simultaneously binding, abstract and general contents is creating ‘true international legislation’ this would be hard to unify with the distribution of competences within the Charter.

Council] may generate rules of general international law by decision (...) The ordinary meaning of the word in the context (...) indicates a specific action intended to achieve a concrete effect and, thus, a temporary, case-related reaction to one of the situations referred to in Article 39; it does not include the abstract prescription of future rules of general conduct for an indefinite period of time.” In favour of limiting the powers of the Security Council to particular situations are: Happold, page 608; Frowein/Krisch, page 708-709; Arangio-Ruiz, page 629; Wood, page 77. More negative to such limitations: Aston 2005, page 95.

¹⁴³ PCIJ, *Competences of the ILO*, 1922, page 23: “In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.”; Ress, page 31-32;

¹⁴⁴ ICJ *Certain Expenses*, 1962, page 162: “Passing from the text of Article 17 to its place in the general structure and scheme of the Charter, the Court will decide whether in that broad context (...)”; *ibid*, page 167: “The Court has considered the general problem of the interpretation of Article 17, paragraph 2, in the light of the general structure of the Charter and of the respective functions assigned by the Charter to the General Assembly and to the Security Council, with a view to determining the meaning of the phrase ‘the expenses of the Organization’.”; Ress, page 32.

¹⁴⁵ UN-Charter, Article 13 number 1 letter a.

Arguably, the norms found in Resolutions 1373 and 1540 will have great influences of the development of international law. The Resolutions were, as stated in the discussions leading up to the adoption, respectively adopted because the ordinary development of treaty law went to slow¹⁴⁶ and in order to fill holes in existing international law.¹⁴⁷ This would imply that the norms found in Resolutions 1373 and 1540 in the reality enter an area, which in the Charter was intended exclusively for the General Assembly.

However, the General Assembly has, despite its important task of *encouraging the progressive development of international law and its codification*¹⁴⁸ got no powers to adopt resolutions containing norms binding on the Member States. It might only make recommendations or negotiate treaties to be adopted through the ordinary procedures of agreement between the state parties. This would arguably make it reasonable to allow the Security Council to make binding resolutions containing norms of abstract and general contents when the need for such norms is present in the world community.¹⁴⁹

The Security Council has been described as the “*policeman*” of the international community.¹⁵⁰ This view is based upon the very wide competences of the Security Council to adopt binding resolutions on the Member States within very short time and a lack of both transparency and representation by the Member States. The role of the Security Council as “world policeman” would from a parallel to powers of a national police force be limited to taking action in particular situations.

Article 2 number 7 of the Charter could explicitly exclude powers for the Security Council to adopt binding resolutions containing norms of abstract-general contents, as this prohibits any interference in the domestic jurisdiction except from “*enforcement*

¹⁴⁶ This was a main argument for adopting Resolution 1373 of 2001.

¹⁴⁷ This was a main argument for adopting Resolution 1540 of 2004.

¹⁴⁸ UN-Charter, Article 13, number 1 letter a.

¹⁴⁹ More on this below in Part 4 on implied powers and the dynamic interpretation of the Charter.

¹⁵⁰ Koskeniemi, page 338-339.

matters under Chapter VII".¹⁵¹ Obviously, abstract-general norms are not "enforcement". However, the notion is not defined in the Charter, and through the practice of the Security Council and the implementation by the Member States, it is now accepted that Article 2 (7) is applicable to any resolution adopted under Chapter VII.

With particular regard to the norms found in Resolution 1540, these are to large degree norms, which will influence the armaments of the Member States and not only non-states entities. Clearly, the Security Council has of course got the power to regulate arms and so on *in particular situations*. This, however, does not necessarily include a competence to take general measures for the limitations of armaments, or possibly to regard armament by States in itself as a threat to the peace.¹⁵² In principle, the Member States decide freely on the regulation of their armaments. In the United Nations Organisation, the General Assembly shall consider the principles governing the disarmament and the regulation of armaments.¹⁵³ The Security Council may address these matters, but then only in form of plans, which it might submit to the Member States.¹⁵⁴

A historic interpretation of the notion 'threat to the peace' and 'measures short of armed force' might be of interest to illuminate both the understanding of the notions possessed by the Charter fathers as well as by the early interpreters of the notions. In the preparatory works of the Charter, it was attempted to define the notion "aggression", which was the most controversial at the time. The notion, however remained undefined, as the *modern techniques of warfare* rendered any definition of 'aggression' impossible.¹⁵⁵ This shows how the founders of the Charter were open for a dynamic interpretation of the Charter.

¹⁵¹ Discussed by Marschik, page 462.

¹⁵² UN-Charter, Article 26; Frowein/Krisch, page 726, margin number 24.

¹⁵³ UN-Charter, Article 11 number 1.

¹⁵⁴ UN-Charter, Article 26.

¹⁵⁵ Yearbook of the United Nations 1946-47, page 26.

In the *Spanish Question*, the Security Council refused to adopt a resolution in which the mere existence of the *Franco-Regime* in Spain was determined a 'threat to the peace'. The Security Council proved sceptic to an expanded interpretation of the Charter and found that even if the Franco regime did cause international friction, it was no 'threat to the peace'.¹⁵⁶ The reasoning behind this was that the Council interpreted its role to be restricted to responding to particular and concrete dangers.¹⁵⁷

The systematic and historic interpretation favours an interpretation of 'threat to the peace', which only encompasses concrete situations¹⁵⁸ and that the Security Council thus not were in the position to adopt binding resolutions containing norms of abstract and general contents.

¹⁵⁶ Yearbook of the United Nations (YUN), 1946-47, page 348.

¹⁵⁷ Ibid., page 345.

¹⁵⁸ See Zimmermann/Elberling, page 73; Aston 2005, page 96, concludes that there is no clear answer; Happold, page 601: "*Neither the General Assembly nor the Security Council can impose general obligations on the member states.*"

3.3 Conclusions on the question on the adoption of abstract-general norms and coherence with the Charter of the United Nations

From the textual point of departure, it is clear that a single act of terrorism and a single act of proliferation of weapons of mass destruction might pose a 'threat to the peace'. From the nature of the notion 'threat to the peace' it is clear that the Security Council might address such situations as well on a preventive basis.

The question becomes more complex when it comes to the determination of these questions on a general basis *as such*. The notion 'threat to the peace' as such would arguably not be a hurdle for such a determination. The context of the notion sponsors a result where only concrete situations might be addressed, but taking the subsequent practice of the Security Council and the Member States into concert, the notion might encompass a larger variety of situations, or even phenomena.

The notion 'measures short of armed force' is textually an open notion, negatively limited not to encompass the use of armed force. The list of measures found in the article itself would be not a complete list of measures, and the Security Council has got a wide margin of appreciation when it comes to determining which measures are necessary to put an end to the situation posing the 'threat to the peace'. The measures available for the Security Council in order to remove the threat to the peace are closely interconnected with the existing 'threat to the peace' and it is clear that the notion 'measures short of armed force' opens for the Security Council to adopt binding resolutions with widespread implications when it responds to particular 'threats to the peace'. Textually, the notion 'measures short of armed force' does not prevent the Security Council from adopting resolutions containing simultaneously abstract, general and binding norms. However, the other measures found in Article 41 are measures suitable to respond to particular situations only, and the contextual result implies a limitation to the competences of the

Security Council. As well the systematic of the Charter leaves it doubtful whether the Security Council has got the competences to adopt simultaneously binding, abstract and general measures under Article 41 of the Charter. This is especially clear when one takes the contrast between the competences and the roles of the Security Council and the General Assembly into concern. As to the measures adopted in Resolution 1540, the systematic interpretation indicates that the Security Council might not regulate the armaments of the Member States, as this task is one of the General Assembly.¹⁵⁹

In sum, it is from a textual, systematic and historic point of view doubtful if the Security Council might within its competencies given it in the Charter of the United Nations determine the phenomena of international terrorism *as such* and proliferation of weapons of mass destruction *as such* as 'threats to the peace'. Thus, is it doubtful if the Security Council might within its competencies adopt simultaneously binding, abstract and general resolutions,¹⁶⁰ and thus is it doubtful if the Security Council within the Charter frames was in the possession of the competencies required to adopt Resolutions 1373 of 2002 and 1540 of 2004.

¹⁵⁹ This opinion is probably shared by Frowein/Krisch, who after the adoption of Resolutions 1173 of 1998 (regarding Nuclear tests performed by India and Pakistan) state that the contents of the resolution "*might just be justified insofar as it responds to dangers arising from the specific circumstances of a case and, therefore, does not equal an attempt to regulate armaments in general*"; Happold, page 606-607; Talmon, page 182: "*the Council cannot impose general disarmament obligations on states, for example, by prohibiting the development, production or possession of a particular type of weaponry.*"

¹⁶⁰ See also Happold, page 599: "*It is highly doubtful whether the Security Council is entitled to act under Chapter VII against a form of behaviour, rather than against a manifestation of that particular form of behaviour*" and further on page 601: "*Neither the General Assembly nor the Security Council can impose general obligations on the member states.*"

4 Dynamic-teleological interpretation of the competencies of the Security Council through the *implied powers* rule

*"Cessante ratio legis, cessat et ipsa lex"*¹⁶¹

In this Chapter it will be discussed whether the United Nations Security Council on the basis of a teleological interpretation and especially through the implied powers rule was in the possession of the adequate competencies to adopt Resolutions 1373 of 2001 and Resolution 1540 of 2004 containing simultaneously binding, abstract and general norms.

In discussing this matter, an important factor is the ‘constitutional’ character of the Charter. There are of course no clear-cut answers in this problematic, but the main views and their implications will be presented. Starting with the understanding of the Charter as a ‘constitution’ in the weaker sense of the notion and discussing the possible implications of this, it will be moved on to discussing the Charter as a ‘constitution’ in the stronger sense of the notion. After giving an interim conclusion to this, the consequences of any implied powers of the Security Council will be discussed. A conclusion will be given on the basis of the collected argumentation. Firstly, the concept of *implied powers* will be presented.

¹⁶¹ “If the reason for the law changes, then the law itself will have to change.” In: Reismann 2004, page 909.

4.1 The implied powers rule

The implied powers rule implies that the competencies and the powers of the Security Council are not exhaustively regulated in the Charter, and that its powers could be extended to areas not expressly found in the Charter.¹⁶² Such powers would be granted to the Security Council as were necessary to maintain the international peace and security.¹⁶³

The implied powers rule was clearly expressed in the International Court of Justice decision in the *Reparations for Injuries* Case in 1949 where the ICJ stated that the Organization – that is the United Nations – under international law must be “*deemed to have those powers, which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.*”¹⁶⁴ As reasoning for this principle, the Court stated that it “*could not be said that the Charter has left the Security Council impotent in the face of an emergency situation*”.¹⁶⁵

After this, there exists no doubt that the Security Council is in possession of some implied powers in exercising its powers under Chapter VII. What might be open for doubt is the exact nature and extent of these implied powers.¹⁶⁶ In other words for the purposes of the present paper: does the implied powers open for the Security Council to adopt resolutions containing norms of simultaneously binding, abstract and general character? Is the possession of such powers necessary for the performance of the Security Councils obligations under the Charter? The answer to this is to a large extent dependent

¹⁶² Arangio-Ruiz 1993, page 1.

¹⁶³ This is the main function of the Security Council under the Charter, UN-Charter Article 24, number 1 as well as it is a basic goal of the United Nations Organization as such, UN-Charter Article 1 number 1.

¹⁶⁴ ICJ *Reparation for Injuries*, 1949, page 182. See also ICJ *Effect of Awards*, 1954, page 56. The Court referred to this as a “*principle of law*”.

¹⁶⁵ Ibid, page 167.

¹⁶⁶ Similar argumentation was given by Judge Fitzmaurice, *ibid*, page 208.

upon which perspective is to behold in relation to the Charter of the United Nations: a ‘constitution’ in the stronger sense of the notion or a ‘constitution’ in the weaker sense of the notion.¹⁶⁷

4.2 The Charter as a ‘constitution’ in the weaker sense of the notion

The Charter of the United Nations is a constituent document of the international Organization of the United Nations, which makes the Charter of the United Nations a ‘constitution’ in the weaker sense of the notion.¹⁶⁸ This is the way the notion ‘constitution’ is utilized in the Vienna Convention on the Law of the Treaties,¹⁶⁹ and the way International Court of Justice has utilized it.¹⁷⁰ This view implies that the Charter is only the ‘constitution’ of the United Nations Organization as such, and not of a community of society.¹⁷¹

An implication of the Charter as a ‘constitution’ in the weaker sense of the notion is that the competencies of the Security Council, like the competencies of the other organs of the United Nations, must be interpreted in a dynamic-evolutionary manner,¹⁷² as the Charter

¹⁶⁷ Arrangio-Ruiz 2000, page 683: The doctrine of implied powers is “*more or less directly interrelated with what we referred to at the outset as the constitutional (federal) theories of the Charter*”.

¹⁶⁸ The counterpoint to this is of course to view the Charter as a constitution for the community of world states from a national- or federal analogy, see part 4.3.

¹⁶⁹ VCLT Art 5: “*Treaties constituting international organizations (...) [t]he present Convention applies to any treaty which is the constituent instrument of an international organization (...).*”

¹⁷⁰ The International Court of Justice qualifies charters of international organizations as “constitutions”. Ress, page 15; ICJ *Reparation for Injuries*, page 180 ff; ICJ *Effects of Awards*, page 57; ICJ *Certain Expenses*, page 167 ff.

¹⁷¹ Crawford, page 9-11; Happold, page 595.

¹⁷² One of the most infamous expressions of this the statement of Judge Alvarez in the Admissions Case: “*The fact should be stressed that an institution, once established, acquires a life of its own, independent of*

clearly is a very special international instrument. This would be in contrast to the traditional understanding of treaty interpretation¹⁷³, after which the treaties shall be interpreted restrictively of care for their capacities to limit the sovereignty of the participating states.¹⁷⁴

The question of importance for the present paper is whether or not this dynamic-evolutionary interpretation opens for the Security Council to adopt Resolutions containing simultaneously binding, abstract and general norms. An important argument here is the present need for a flexible interpretation of the Charter outside of the instruments for amendment itself provides for.¹⁷⁵ The hurdles for any formal amendment of the Charter are so high that a formal change of the Charter at the present time is not likely.¹⁷⁶ In favour of such competencies is existence of a basic need for the United Nations Organization to evolve in pace with any changes in the society surrounding it.¹⁷⁷ If the competencies of the Security Council were not subject to a dynamical

the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life". Alvarez, Individual Opinion, ICJ Admissions, page 68; Schachter, page 118-119: "It must be kept in mind that the U.N. Charter can not be interpreted as a static text, but rather, due to the generality of its language and the broad range of Charter purposes, its interpretation is subject to change over time"; ICJ Namibia, page 31: "Moreover, a legal instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation."; Ress, page 16, margin number 3, and page 23 margin number 19 ff.

¹⁷³ Static-subjective interpretation, after which the interpretation is based on the meaning of the term at the time of conclusion of the treaty. Separate opinion of Judge Spender, ICJ Certain Expenses, on page 186: "A general rule is that words used in a treaty should be read as having the meaning they bore therein when it came into existence."

¹⁷⁴ PCIJ, *European Commission of the Danube*, 1927, page 64.

¹⁷⁵ UN-Charter Article 108 and 109.

¹⁷⁶ See also Wagner, page 908.

¹⁷⁷ Reisman 2004, page 909-910.

interpretation, this could make the Security Council less capable of filling its main obligation under the Charter: to maintain international peace and security.¹⁷⁸

Arguments contra an interpretation of the competencies of the Security Council to interpret its competencies to encompass the adoption of resolutions containing simultaneously binding, abstract and binding norms are both the fundamental principles of the Charter¹⁷⁹ and the basic separation of powers between the organs of the United Nations Organization.¹⁸⁰ The latter argument must be decisive for the conclusion that the Security Council from a dynamic-evolutionary view of the Charter of the United Nations as a 'constitution' in the narrower sense of the notion does not possess the competencies to adopt resolutions containing norms of simultaneously binding, abstract and general norms.

The Charter of the United Nations is a 'constitution' in the weaker sense of the notion. It is, however, clear that it is a very special international instrument. Particular powers are given to particular branches of the organization even if there this is not clear-cut and there is no system of checks and balances.¹⁸¹ This has led some authors to promote the

¹⁷⁸ UN-Charter, Article 24.

¹⁷⁹ Like the equal sovereignty of the Member States, Article 2 letter a.

¹⁸⁰ As illuminated above in part 3.2. Happold page 595: "*This is not to say that the Charter is anything more than the constitution of an organization, but it is to take the view that the Charter assigns particular roles to the various organs or the United Nations and that the powers of those organs are constrained by the roles assigned to them.*"; White 2000, page 293-294, argues that although the Charter does not contain a system of checks and balances, it does include a "weak" form for separation of powers.

¹⁸¹ Happold page 595: "*This is not to say that the Charter is anything more than the constitution of an organization, but it is to take the view that the Charter assigns particular roles to the various organs or the United Nations and that the powers of those organs are constrained by the roles assigned to them.*"; White 2000, page 293-294, argues that although the Charter does not contain a system of checks and balances, it does include a "weak" form for separation of powers.

Charter as a “living tree”, promoting the Charter as a highly vivid instrument of international law.¹⁸²

The “living tree”-theory implies that the Charter shall be interpreted highly dynamically. ‘Constitutions’ – as well in the weaker sense of the notion – are designed to last for an indefinite time. The creators would have little possibility to foresee the changes in the individual- and in the world community. If the hurdles for amendment are too high, the dynamic interpretation poses the opportunity for the constitution to be a living part of the community and not contain mere “empty letters”. This theory would bring the results after an interpretation of the Charter as a constitution in the strong- and weak sense of the notion closer to each other. The weighing of the different arguments pro and contra implied powers to adopt resolution containing norms of simultaneously binding, abstract and general contents as discussed below would thus apply here as well.

¹⁸² Franck 2002, page 4. Similar and interrelated views are promoted under the labels of “more than a constitution in limited sense”, White, page 17; “constitutional-like character” (*Verfassungsähnliche Charakter*), Aston 2005, page 86 and “system of governance”. From the perception of the present writer, it seems that the Charter as a “living tree” is not dependent on a status of the Charter as a ‘constitution’ in the stronger sense of the notion. However, the arguments are to a large degree the same, so that it seems to be an alternative placed in the middle: constitution in the weak sense and but with far-reaching implications.

4.3 The Charter of the United Nations as a ‘constitution’ in the stronger sense of the notion and the implications of this

4.3.1 A constitution in the stronger sense?

Clearly, all the Member States of the United Nations are sovereign states.¹⁸³ When discussing if the Charter of the United Nations is a ‘constitution’ *in the stronger sense of the notion*,¹⁸⁴ a positive answer to this would imply that the Member States have through its creation distributed some of their sovereignty to the international structure of the United Nations Organization.

The United Nations Organization is neither a ‘super state’ nor a world government.¹⁸⁵ However, it is clear that the Charter is of extraordinary nature and that it holds a particular position in comparison with other international constituent treaties. The broad purposes of the Organization combined with its principles and its virtually universal membership¹⁸⁶ gives indications hereof. The norms contained in it are of normative character.¹⁸⁷ It might on the basis of these norms be discussed if the Charter in fact is a constitution of the international community. In the present paragraph, elements favouring and disfavouring a constitutional character of the Charter will be identified, described and attempted weighed against each other.¹⁸⁸

¹⁸³ This is a basic principle of the United Nations Organization, UN-Charter Article 2 number 1.

¹⁸⁴ The notion is as well used by Crawford, page 11.

¹⁸⁵ De Wet 2004, page 93; ICJ *Certain Expenses* page 157; ICJ *Reparations for injuries*, page 179. However, it might be discussed if the Security Council through competencies to adopt resolutions containing binding, abstract and general norms would lead to such a “super-state” status of the United Nations; see Happold, page 604.

¹⁸⁶ The UN has 192 Member States, <http://www.un.org/Overview/growth.htm#2000>

¹⁸⁷ De Wet page 95.

¹⁸⁸ The factors regarded of importance for determining the constitutional character of the Charter vary with

The main function of the Security Council is to maintain international peace and security.¹⁸⁹ This maintenance-role might be compared with the role of the police¹⁹⁰ in a national state. The Security Council is given broad powers to take effective, but preliminary,¹⁹¹ measures in acute situations, a role normally kept by a national police force. Furthermore, the police function of the Security Council lies implicit in the division of powers between it and the General Assembly.¹⁹² However, the Security Council has – unlike the national police force – got no obligation to respond to a ‘threat to the peace’¹⁹³ and functions like a political organ.¹⁹⁴

the different authors on the subject: De Wet 2004, page 94: a normative character of the constitution, supremacy, inclusiveness, dynamic nature and separation of powers; Franck 2003, page 102: Pervasive perpetuity, indelibility, primacy and institutional autochthony. Fassbender Col. 1998: Presents “*features of the ideal constitution*” recognizable in the Charter: a “*constitutional moment*”, a system of governance, a definition of membership, a hierarchy of norms, “*eternity*”/amendment, “*charter*”, constitutional history and universality.

¹⁸⁹ UN-Charter Article 24 number 1 and Article 1 number 1.

¹⁹⁰ See Koskenniemi 1995, page 337 ff; Frowein/Krisch page 705-706; Arangio-Ruiz page 723-724 limits the powers of the Council to “*peace-enforcing*” functions; Wood, page 78-79.

¹⁹¹ Frowein/Krisch page 705 margin number 13.

¹⁹² UN-Charter Article 11 and 13 contra Article 24.

¹⁹³ De Wet 2004, page 110.

¹⁹⁴ ICJ *Congo/Uganda* page 1111: The SC has got functions of a political nature.

Rudiments of separation of powers are found in the Charter of the United Nations.¹⁹⁵ Such a separation of powers would arguably be essential for a 'constitution' in the strong sense of the notion to exist,¹⁹⁶ and would be a basic prerequisite for any system of checks and balances. The Security Council would in this system as discussed above be the "police",¹⁹⁷ however acting on political will and without obligation to act. The General Assembly would be the parallel to the national legislative body, endowed to tax and allocate money¹⁹⁸ however, with no powers to adopt binding legislation. The International Court of Justice¹⁹⁹ would be the parallel to the national Supreme Court, however with limited competencies²⁰⁰ and little possibilities to review the decisions of the other organs.²⁰¹

¹⁹⁵ ICJ Lockerbie, diss. op. Judge Weeramantry, page 165: "[a]s with the great branches of government within a domestic jurisdiction such as the executive and the judiciary, they perform their mission for the common benefit of the greater system of which they are part. In the United Nations system, the sphere of each of these bodies is laid down in the Charter, as within a domestic jurisdiction it may be laid down in a constitution." However, this is no true separation of powers from a national analogy; Fassbender Col. 1998, page 576. Crawford, page 11: "the absence of any notion of separation of powers". ICTY, in ILM 1996 paragraph 43: "It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to ... the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut." Furthermore: "It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the law of states."

¹⁹⁶ However, not all national constitutional systems have constitutions in the strong sense of the notion, for example parliamentary systems. In these systems, there still exists some sort of division of checks and balances. See for example: Article 16 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789, as quoted in Crawford page 12: "A society in which the separation of powers [is] not clearly established, has no constitution." See Fassbender Col. 1998, pages 575-576.

¹⁹⁷ See also Koskenniemi, page 337 ff. In his text the Security Council is the 'police', being responsible for the world order, and the General Assembly the 'temple', being responsible for matters of justice.

¹⁹⁸ UN-Charter Article 17.

¹⁹⁹ UN-Charter Chapter XIV.

²⁰⁰ The ICJ has no compulsory jurisdiction over international disputes, ICJ Statutes Article 36 (3). Its jurisdiction is limited to inter-state conflicts, ICJ Statutes Article 34.

²⁰¹ ICJ Statutes Article 34. The Court may for example not control the contents or form of Security Council

In Article 103 of the UN-Charter it is stated that the obligations of the Member States under the Charter shall prevail over their obligations under “any other international agreement” in the case of conflict.²⁰² Arguably, this makes the norms found in the Charter the top level of an international hierarchy of norms.²⁰³ In a national state, the constitution would normally have supremacy over ordinary statute law.²⁰⁴ This is a strong argument favouring the constitutional character of the Charter.

It might be argued that the Charter of the United Nations through its Secretariat²⁰⁵ establishes an organization independent from the will of the Member States, which again would promote the Charter as ‘constitution’ in the strong sense of the notion.²⁰⁶ On the other side, the status of the UN Secretariat is not particularly strong compared to administrative instruments of other international organizations of a certain size.

In sum, the present writer finds it difficult to describe the Charter of the United Nations as a constitution for the international community in the strong sense of the notion. There of course exist rudiments of what might be described as a separation of powers, but these are not far-going enough to establish the Charter of the United Nations as a ‘constitution’

resolutions unless they are necessary to reach a conclusion in contentious disputes between Member States. Furthermore, the organs of the United Nations are the judge of their own competencies: ICJ *Certain Expenses*, page 168; Lamb, page 363; Sohn, page 203; Rosand, page 546.

²⁰² In SC-Res. 1540 of 2004, operational paragraph 5, the Security Council particularly states that it shall not conflict with or alter the rights and obligations of State Parties to the existing treaty framework on area. It is, however, not clear that the Security Council in this way may surpass the Charter text.

²⁰³ Fassbender Col 1998, page 577 ff; ICJ *Lockerbie*, ICJ-Rep. 1992, pages 15 (paragraphs 39-41) and 126-127 (paragraphs 42-44); SC-Resolutions 731 of 1992 and 748 of 1992.

²⁰⁴ Franck 2003, page 98: uses the notion *primacy*, which implies a domination of the proposed constitution among other legal instruments available to the community it serves.

²⁰⁵ UN-Charter, Article 97-101.

²⁰⁶ Franck page 100.

in the stronger sense of the notion.²⁰⁷ The hard to classify powers of the Security Council enhances this fact,²⁰⁸ especially as the other organs of the Organization possess minimal possibilities to control the Security Council. However, arguments both pro and contra the United Nations Charter are convincing and any interim conclusion to the question is open.

If one does view the Charter of the United Nations as a ‘constitution’ in the strong sense, this would imply greater powers endowed on the Security Council through the implied powers rule. The potential of this were potentially widespread. The question on whether or not competencies to adopt resolutions of binding, abstract and general contents are endowed on the Security Council might only be determined through holding the need for such competencies up against the implications of such.

²⁰⁷ Fassbender Col. 1998, page 576. Crawford, page 11: *"the absence of any notion of separation of powers"*. ICTY, *Tadic* Trials Chamber, paragraph 43: *"It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to ... the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut."* Furthermore: *"It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the law of states."*; Arangio-Ruiz 1997, page 9: *"the Charter is a mere inter-state compact"*. De Wet, page 112 argues in the opposite direction; Simma, page 1117: *"the Charter has become the constitution of the international community"*; Franck 2003, page 99: The Charter *"markedly simulates the requisites of a constitutive instrument"* and on page 102: the Charter *"more proximately relate to a constitution than to an ordinary contractual normative arrangement"*.

²⁰⁸ This relates to the *"quasi-judicative"* and *"quasi-legislative"* powers of the Security Council.

4.3.2 The need for the Security Council to adopt resolutions containing simultaneously binding, abstract and general norms to fulfil its obligations

The Security Council has an important role to fulfil in the international community. Facing global, cross-border ‘threats to the peace’, the international community is arguably in need of a flexible organ capable of taking action.²⁰⁹ Arguably, as the proliferation of weapons of mass destruction and international terrorism could be described as ‘global threats’, which can only be fought with ‘global norms’:²¹⁰ in other words abstract ‘threats’, which could only be fought with binding, abstract and general rules.

If the implied powers rule would not allow for the Security Council to take action firstly, the hurdles²¹¹ built in the Charter were too high to make it likely that the Charter will be formally changed²¹² and secondly, the processes of multinational negotiating and ratifying would have taken too long to efficiently tackle the threats.²¹³ If not given greater competencies, the Security Council might arguably find itself helpless facing the challenges of new threats.

Arguably, competencies for the Security Council to adopt resolutions of simultaneously binding, abstract and general rules would be a benefit for the world community, giving it

²⁰⁹ See the positive view of Szasz, page 905, arguing that a “legislative” function of the Security Council will open for centrally creating international law and for filling existing gaps in this.

²¹⁰ Rosand, page 544.

²¹¹ UN-Charter Article 108, which necessitates firstly an adoption in the General Assembly with a two thirds majority and thereafter that this amendment is ratified by two thirds of the Member States, including all the permanent members of the Security Council.

²¹² Wagner, page 908.

²¹³ Rosand, page 543-544; See also Szasz, page 905.

the possibility to centrally create norms on the international level and to fill existing gaps in existing treaty framework.²¹⁴

4.3.3 Potential implications of any *implied* powers to adopt resolutions containing norms of simultaneously binding, abstract and general contents

Especially since the end of the cold war, the Security Council has extended its powers, both regarding the situations it might address, and regarding the measures it might decide on under Chapter VII. This is particularly clear regarding the determinations of what makes a ‘threat to the peace’: from the very strict understanding expressed in the Spanish Question²¹⁵ to an understanding not only involving inter-state conflicts but furthermore cases regarding inner- and regional conflicts,²¹⁶ humanitarian crisis,²¹⁷ the lack of democracy²¹⁸ and financial crisis.²¹⁹

²¹⁴ Szasz, page 905.

²¹⁵ See above, part 3.2.

²¹⁶ Somalia: SC-Res. 733 and 794, 1992;

²¹⁷ SC-Res. 688 of 1991: “*Gravely concerned by the repression of the Iraqi civilian population (...), which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region*” and further the Security Council was “[d]eeply disturbed by the magnitude of the human suffering involved”²¹⁷; Österdahl, page 46 promotes the importance of the humanitarian for the adoption of the Resolution 688 of 1991. In the cases of Somalia and Rwanda, the Security Council made it clear that the human tragedy caused by the conflicts were ‘threats to the peace’: SC-Res. 794 of 1992: “*Determining that the magnitude of the human tragedy caused by the conflict in Somalia (...), constitutes a threat to international peace and security*”; SC-Res. 929 of 1994: “*Determining that the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region*”. In the case of Eastern Zaire the far-reaching violations of human rights presented a ‘threat to the peace’: SC-Res. 1078 of 1996.

²¹⁸ The Security Council has opened for viewing the lack of democracy or coups against democratic chosen governments as threats to the peace. In SC-Res. 940 of 1994 and SC-Res. 1529 and 1542 of 2004, the

A clear expression of this change in perception is might be observed in the statement of the president of the Security Council made in 1992: “*The 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 international peace and security.*”²²⁰

As illuminated above in part 2.3.3, the Security Council has on occasions adopted resolutions of abstract and general content, however, without adopting norms binding on the Member States. In some resolutions it has, however, gone one step further and has determined certain phenomena potential ‘threats to the peace’.²²¹ The phenomena posing a potential ‘threat to the peace’ *as such* are These are for example the deliberate targeting of civilian populations²²², including children²²³, violation of international humanitarian

Security Council determined the situation on Haiti a threat to the peace. However, it made it clear that the competencies of the Security Council is dependent on the circumstances in the individual conflict: SC-Res. 940, 1994. “*Recognizes the unique character of the present situation in Haiti and its deteriorating, complex and extraordinary nature, requiring an exceptional response*”.

²¹⁹ In the Case of Albania, the financial situation, leading to instability und violence was characterized a ‘threat to the peace’: SC-Res. 1101 and 1114 of 1997.

²²⁰ Heads of State and Government Summit, Security Council meeting number 3046, Statement by the President, in YUN, 1992, page 34. The range of this comment is hotly discussed in the judicial literature; see Aston 2005, page 275; Frowein/Krisch, page 720, margin number 6; Österdahl, page 19. Koskenniemi, page 326 asks “*Was it [the Security Council] in fact making a charte blanche declaration on the limitlessness of its powers?*” Contextually, the Council stated further: “*The United Nations membership working as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.*” (ibid, page 34). This might imply a limitation of the range of the statement.

²²¹ Though without acting under Chapter VII.

²²² SC-Res. 1296 of 2000, operational paragraph 5.

²²³ SC-Res. 1314 of 2001, operational paragraph 9: “*the deliberate targeting of civilian populations (...) including children, and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to children, in situations of armed conflict may constitute a threat to international peace and security*”.

and human rights law²²⁴ the illicit trade in small arms and light weapons²²⁵ and the pandemic of HIV and AIDS.²²⁶ This might arguably express a tendency – or at least a will – of the Council to broaden its competencies.

The existence of any competencies to adopt resolutions containing norms of simultaneously binding, abstract and general contents has potentially great implications. The Council has pointed at the close connection between international terrorism and trans national organized crime, illicit drugs, money-laundering, illegal arms-trafficking and illegal movement of nuclear, chemical, biological or other potential deadly materials,²²⁷ all phenomena it would thinkable desirable to address on an abstract basis to fight.

In the literature it has been suggested that the Council adopt resolutions relating to violations of the friendly relations between states, disarmament and arms control.²²⁸ It could be thinkable to develop the provisions of resolution 1540 further, for example by defining the possessing of biological or chemical weapons a ‘threat the peace’ and as such and thereafter prohibit them, not only for terrorist entities and non-state actors but as well for states.²²⁹ Furthermore, any nuclear explosion would arguably constitute a ‘threat to the peace’.²³⁰ Thinkable were as well be for the Council to respond to threats of cross-boundary pollution or distribution of limited resources.

²²⁴ Ibid.

²²⁵ SC-Res. 1209 of 1998, operational paragraph 1: the excessive accumulation and circulation of small arms and light weapons in Africa threaten national, regional and international security.

²²⁶ SC-Res. 1308 of 2000, preamble paragraph 11: if it remains unchecked, the pandemic of HIV and AIDS might pose a threat to international peace and security.

²²⁷ SC-Res 1373 of 2001, operational paragraph 4: similar in SC-Res. 1456 of 2003, preamble: Organized crime, illicit drugs and drug trafficking, money-laundering and illicit arms trafficking. It was in both resolutions stressed that terrorists must be prevented from using these other criminal activities for their terrorist purposes.

²²⁸ Szasz 2002, page 904.

²²⁹ See also Aston, page 112; Tomuschat RdC 1993, page 241.

²³⁰ See also Szasz 2002, page 904.

Such scenarios would clearly be mere speculations. However, already before the adoption of resolutions 1373 and 1540 and before the adoption of resolution 1172, it was speculated if the Security Council might declare that certain types of weapons per se constitute a threat to the peace and that it thereby might forbid or limit them.²³¹ It was argued that the Security Council might venture into developing a subject-matter-specific understanding of article 39 and determine, for instance, that certain types of armaments constitute per se a threat to international peace and security.²³² This has of course proved right. The Security Council has in some of its resolutions addressing abstract phenomena stated its intention to “*consider imposing targeted and graduated measures*”.²³³

Certain parallels might arguably be drawn from the development on the area of international terrorism and proliferation of weapons of mass destruction: The Security Councils response to international terrorism might be described in three stages:²³⁴ firstly, the single acts of terrorism are condemned, and resolutions are made towards concrete states.²³⁵ Secondly, the international terrorism condemned on a general basis.²³⁶ Thirdly,

²³¹ Ibid, page 901; Szasz 1995, page 62.

²³² Thomuschat RdC 1993, page 344 ff: “*The Security Council could venture to develop a subject-matter-specific understanding of Article 39, determining, for instance, that certain types of armaments - like the production and stockpiling of biological weapons - constitute per se a threat to international peace and security (...) the Security Council may act not only as an executive agency that enforces the provisions of the Charter in individual cases, it also has the power to issue 'secondary legislation' with a view to preventing concrete, actual threats from arising. The main fields of application of this power can be arms regulation and disarmament as well as protection of the environment.*” (Prof. Tomuschat was obviously ahead of his time) ; Müller, page 54.

²³³ SC-Res. 1539 of 2004, operational paragraph 5 letter c; SC-Res. 1612 of 2005, operational paragraph 9.

²³⁴ The separating lines between these stages are of course blurring, general statements are for example made in resolutions responding to concrete situations.

²³⁵ Lockerbie/Libya: SC-Res. 731 of 21 January 1992; SC-Res. 748 of 31 March 1992; SC-Res. 883 of 11 November 1993: “*Convinced also that the suppression of acts of international terrorism (...) is essential for the maintenance of international peace and security*”; See also SC-Res. 1189 of 13 August 1998.

²³⁶ SC-Res. 1269 of 19 October 1999, operational paragraph 1: “*Condemning all acts of terrorism,*

binding resolutions for the phenomena international terrorism, applicable on all manifestations of the phenomena.²³⁷ On the area of proliferation of weapons of mass destruction, the phenomenon has been addressed on general basis from an early stage²³⁸ before Resolution 1540 was adopted. This step-by-step process could imply that the steps would be shorter for the Security Council to adopt binding, abstract and general Resolutions if the phenomenon is firstly addressed on a non-binding basis. Such non-binding abstract and general resolutions are made on several areas²³⁹, and in some of these the Security Council went as far as to state that the phenomena “might” pose a threat to the international peace and security.²⁴⁰

irrespective of motive, wherever and by whomever committed”; and in the preamble paragraph 8: “*the suppression of acts of international terrorism, including those in which States are involved, is an essential contribution to the maintenance of international peace and security*”; Security Council Presidential statement after meeting at level heads of state and government S/2350 of 31 January 1992, page 3; SC-Res 1269 of 1999: “*Emphasizing the necessity to intensify the fight against terrorism at the national level and to strengthen (...) effective international cooperation in this field*” and furthermore “[r]eaffirming that the suppression of acts of international terrorism, including those in which States are involved, is an essential contribution to the maintenance of international peace and security”. From these statements it is only a small step to declare “*all acts of international terrorism*” as a threat to international peace and security; Krisch, page 882.

²³⁷ Or more precisely: mainly the financing leading up to the international terrorism. SC-Res. 1373 of 2001.

²³⁸ Presidential Statement of 31 January 1992 (S/2350), page 4: “[t]he proliferation of all weapons of mass destruction constitutes a threat to international peace and security”. Repeated: S/PRST/1996/17, paragraph 4 of the statement; S/PRST/1998/12 paragraph 4. The step to the general statement in SC-Res 1172 of 1998, preamble paragraph 2 was perhaps smaller.

²³⁹ See part 2.3.3 above.

²⁴⁰ These are: The deliberate targeting of civilian populations: SC-Res. 1296 of 2000, operational paragraph 5; the deliberate targeting of civilians including children: SC-Res. 1314 of 2000, operational paragraph 9; the proliferation of small arms and light weapons in Africa: SC-Res. 1209 of 1998, operational paragraph 1; the pandemic of HIV and AIDS if remained unchecked: SC-Res. 1308 of 2000, preamble paragraph 1; widespread violations of international humanitarian and human rights law in situations of armed conflict; 1296 of 2000, operational paragraph 5.s

4.3.4 Conclusions on the Charter as a ‘constitution’ in the strong sense and the implications of this

Even from the perspective of the United Nations Charter as a ‘constitution’ in the stronger sense of the notion, it should be kept in mind that if the Member States wanted to give the Security Council competencies to adopt resolutions containing simultaneously binding, abstract and general norms, these powers should after the system of the Charter be endowed on the Council through a formal amendment of the Charter. Application of the implied powers rule should arguably be reserved to only highly exceptional cases where the performance of the most essential tasks of the organization is at stake.²⁴¹

On the other side, it might be argued that not such a high degree of necessity is required, as the Security Council is, like any organ of the United Nations in the first instance judge of its own legality.²⁴² This finds support in the more functionalist view expressed in the *Certain Expenses* Advisory Opinion.²⁴³ Arguably, the threats of international terrorism and proliferation of weapons of mass destruction are threatening the international peace and security on a global level, which necessitates responses of global applicability, like norms of simultaneously abstract, general and binding contents.

The Charter is subject to limited government as inherent in the notion ‘constitution’.²⁴⁴ This requires any constitutional interpretation to be practised with caution.²⁴⁵ When the Security Council interprets its competencies, this must be done strictly within the legal sub-system, that is: within the frames of the United Nations Charter.²⁴⁶

²⁴¹ Fassbender Col. 1993, page 596.

²⁴² Rosand, page 546; Lamb 1999, page 363; Sohn 1996, page 203.

²⁴³ ICJ *Certain Expenses*, page 167 as quoted above.

²⁴⁴ Fassbender Col. 1993, page 596.

²⁴⁵ Fassbender Col. 1993, page 596.

²⁴⁶ Marshik, page 475.

The principle of sovereign equality²⁴⁷ of the Member States is a basic principle of the United Nations, which is binding on the Security Council in the performance of its duties.²⁴⁸ This principle would arguably be hard to unite with powers for the Security Council to adopt resolutions containing norms of simultaneously binding, abstract and general contents.²⁴⁹ In the same direction pulls the argument of basal separation of powers between the General Assembly and the Security Council, which would prevent the latter adopting simultaneously abstract, general and binding norms. It was stated by the ICTY that the Security Council “*is thus subjected to certain constitutional limitations, however broad its powers under the constitution might be*”²⁵⁰ and further, that the powers of the Security Council “*cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, nor to mention other specific limitations or those which may derive from the internal division of power within the Organization*”.²⁵¹

In sum, the best reasons favour the solution that the implied powers rule does not open for the Security Council to adopt resolutions containing norms of simultaneously binding, abstract and general contents. This is particularly clear taking the potentially widespread implications of implied powers to adopt resolutions of simultaneously binding, abstract and general contents into concern. However, the conclusion must be regarded as an open one, with strong arguments sponsoring the both alternatives.

²⁴⁷ UN-Charter Article 2 number 1.

²⁴⁸ UN-Charter Article 24 number 2; Tomuschat, page 346.

²⁴⁹ The principle has of course got two sides: *Sovereign* and *equal*. Tomuschat, page 346 argues that if the Security Council were to adopt a resolution where the regulations prohibited certain activities or to use certain substances, this would be conceivable only as a legal device if the provisions were applicable to all states without distinction. The Members of the Security Council could not demand preferable treatment.

²⁵⁰ ICTY *Tadic Appeals Chamber*, paragraph 28. The Court built its argumentation on the Charter as a constitution in the weaker sense of the notion, but the result must be the same.

²⁵¹ ICTY *Tadic*, Appeals chamber, paragraph 28.

4.4 Conclusion on dynamic-teleological interpretation of the competencies of the Security Council through the implied powers rule

As seen above, the intensity of the flexibility of the interpretation of the Charter will to a large degree be dependent on whether or not one views the Charter as a 'constitution' in the strong sense of the notion. There are of course. If one views the Charter of the United Nations as a 'constitution' of the world community *in the stronger sense of the notion*, this would imply wider purposes and therefore open for wider powers implied to it. On the other hand, if one views the Charter as a 'constitution' of the world community *in the weaker sense of the notion*, the range of powers implied to the Security Council would be narrower.

The conclusion on the question on the Charter as a 'constitution' in the strong sense remains open. If one were to come to the conclusion that the Charter is a 'constitution' in the strong sense, this would under no circumstances open for the Security Council to take *any* measure of *any* character at will. Weighed up against the major implications such competencies the Council would have in performing such duties a restrictive interpretation would be advisable as well here.

5 Subsequent practice and implementation

5.1 Introduction to the subsequent practice approach

The subsequent practice of the treaty parties is – as any mean of dynamic interpretation of the Charter – of importance because it is unlikely that the Charter of the United Nations will be formally revised or amended in the nearest future²⁵² and because new threats create new needs for the fields of practice of the United Nations to expand. Another aspect of giving legal relevance to the subsequent practice of the Organization and its members is that this reduces the possibility of *ultra vires* action of the United Nations.²⁵³

The Vienna Convention of the law of Treaties establishes as a general rule of interpretation that “[t]here shall be taken into account (...) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”²⁵⁴. Although all the Member States of the United Nations have not yet ratified the VCLT, and even though the convention is only directly applicable on treaties concluded subsequent to the VCLT entry into force in 1980, the rules of interpretation found in the VCLT are part of international customary law.²⁵⁵

The International Court of Justice already in the *Reparation for Injuries* Advisory Opinion in 1949 made it clear that the subsequent practice might be of importance for the interpretation of the provisions in the Charter.²⁵⁶ The practice of the United Nations

²⁵² See part 4.3.3 above.

²⁵³ Ress page 28, margin number 27.

²⁵⁴ VCLT, Article 31 number 3 letter b.

²⁵⁵ See note 108 above.

²⁵⁶ ICJ *Reparation for Injuries*, 1949, page 180: “the rights and duties of an entity such as the Organization

organs and the practice of the Member States are important elements in specifying and developing the Charter provisions.²⁵⁷ The subsequent practice of both the treaty parties and of the organs of the Organization is a necessary and autonomous element of interpretation in a dynamic-objective interpretation of the Charter,²⁵⁸ establishing a dynamic consensus based upon the organizational purpose.²⁵⁹

The different sources to knowledge of subsequent practice are different for the Security Council and for the Member States. Of main relevance for the practice of the Security Council are clearly its adopted resolutions and the practice of the CTC and the 1540 Committee. The main sources of relevance for the subsequent practice of the Member States are for the purposes of the present paper officially given statements and reports to the CTC and the 1540 Committee.

Of relevance would of course be both practice relating to the interpretation of the notion ‘threat to the peace’ and the encompassing of abstract phenomena as well as the practice relating to the adoption of simultaneously binding, abstract and general contents.²⁶⁰

must depend on its purposes and functions as specified or implied in its constituent documents and developed in practice”.

²⁵⁷ Ress, page 17, margin number 5.

²⁵⁸ Ibid, page 27, margin number. 27.

²⁵⁹ Ibid.

²⁶⁰ However, the material regarding the formal is relatively limited, as the potential lying in the notion is either unrecognised or ignored.

5.2 Practice of the Security Council

The Council itself obviously considered the adoption of both the Resolutions 1373 and 1540 *intra vires*, an observation particularly clear when the statements made by the permanent members of the Security Council before and at its adoption.²⁶¹

As to the field of application of its competencies, the Security Council has through its resolutions subsequent to Resolution 1373 and 1540 made it clear that it repeatedly considers the phenomena of international terrorism and of proliferation of weapons of mass destruction a ‘threat to the peace’. Such statements were given on two occasions prior to the adoption of the Resolutions 1373 and 1540.²⁶²

Furthermore, the Security Council has, as described above in part 4.3.3 on several occasions addressed certain phenomena as ‘threats to the peace’ or potential ‘threats to the peace’.²⁶³ Such resolutions and statements show that the Security Council continuously understands itself as competent to address and potentially respond to abstract phenomena.²⁶⁴

²⁶¹ UN-Doc. S/PV.4950, Statements of the United Kingdom and Russia. UN-Doc. S/PV.4956, Statement of France.

²⁶² SC-Res. 1172 of 1998 (Nuclear tests India and Pakistan); SC-Res. 1368 of 2001 (international terrorism).

²⁶³ Such statements are as well found in several presidential statements.

²⁶⁴ On the close interconnection between the addressing of certain phenomena as ‘threats to the peace’ and the adoption of resolutions of simultaneously binding, abstract and general content, see above, part 2.2.1.

5.2.1 Particularly on the Counter Terrorism Committee

In reviewing the practices of the Security Council, it must be identified with its helping organs²⁶⁵ in order to describe the Council's determination on the question. Thus, the practice of the Counter Terrorism Committee gives guidelines to the subsequent practice of the Security Council. The Counter Terrorism Committee is an organ that strengthens the executive capacity of the Security Council, for which reasons its practices are particularly relevant for interpreting the Security Council's view on different questions. As a subordinate organ, the CTC reports to the Security Council and answers to this.

The main obligation of the Counter Terrorism Committee is to monitor the implementation of Resolution 1373.²⁶⁶ In the practice, however, it has gone over these duties and offers assistance to the Member States on the implementation, gives comments on these reports. It functions as a link between different international counter terrorism organs and has established contact with a wide range of international organizations. The Committee provides the Member States with technical assistance²⁶⁷ and has started to develop standards of best practice.²⁶⁸ The Counter Terrorism Committee has become the hub of a global, long-term effort to combat terrorism²⁶⁹ through building capacity and sharing information and is far more active than any committee previously set up by the Security Council.²⁷⁰

²⁶⁵ The CTC and the 1540 Committee are subsidiary organs of the Security Council, UN-Charter Art. 29.

²⁶⁶ SC-Res. 1373 of 2001, operational paragraph 6.

²⁶⁷ The CTC performs its work “with the assistance of the appropriate expertise”, SC-Res.1373 of 2001, operational paragraph 6; see internet under <http://un.org/sc/ctc>

²⁶⁸ See Krisch, page 885; see internet under <http://un.org/sc/ctc>

²⁶⁹ Rosand 2003, page 338.

²⁷⁰ Krisch, page 885; S/2004/124: “the CTC has evolved to assume a more proactive role.”

The strategic and political decisions of the CTC are still taken by a plenary consisting of the members of the Security Council.²⁷¹ In 2003 the CTC consisted of 10 experts, of which eight were concerned with reviewing the reports of the Member States.²⁷² That is, eight persons to review the received reports, which reached more than 300 in 2003. In comparison there are 20 experts employed in the new Information and Administrative Office.

In 2004, the Counter Terrorism Committee went through a process of “revitalization”²⁷³. Included in this process is the establishment of the Counter Terrorism Executive Directorate (CTED),²⁷⁴ which is separated in the Assessment and Technical Assistance Office (ATAO)²⁷⁵ and the Information and Administrative Office (IAO)²⁷⁶. The CTED has got extended competencies compared to those of the CTC, for example may the CTED visit the different Member States to control on the implementation of Resolution 1373²⁷⁷ and shall visit selected countries “*to enhance the full and effective implementation of the measures*“.²⁷⁸

It might be argued that the Counter Terrorism Committee is now in the position of an international administrative organ.²⁷⁹ The Security Council gives the organ a great responsibility and a great trust from the Council. The process of revitalization and the establishment of the CTED show the Security Councils determination on the area.

²⁷¹ S/2004/124, page 4.

²⁷² Rosand 2005, page 335.

²⁷³ S/2004/124.

²⁷⁴ SC-Resolution 1535 of 26 March 2004.

²⁷⁵ S/2004/124, page 4.

²⁷⁶ Ibid.

²⁷⁷ SC-Resolution 1535 of 26 March 2004.

²⁷⁸ Ibid, operational paragraph 11 and 14.

²⁷⁹ Wagner, page 903: “*international-verwaltungsrechtlichen Verordnungsgeber*”.

In Resolution 1566 of 8 October 2004, the Security Council reaffirmed that every act of international terrorism posed a threat to international peace and security, and in the operational paragraph recalled a definition of terrorism.²⁸⁰ This further promotes the Security Council's determination on the area. The lack of a definition of terrorism has been a source of much critique.

5.2.2 Weight of the practice of the Security Council

The Resolutions 1373 and 1540 both are subsequent practice in the terms of the VCLT,²⁸¹ and implies that the Security Council itself interprets its competencies to encompass as well the adoption of simultaneously binding, abstract and general norms. The subsequent practice of the Security Council is of importance for the interpretation of the Charter provisions both as a manifestation of the current consensus amongst its members as well as it might serve as a starting point for a discussion on the consistency with the Charter.²⁸² It might be argued that the far most important legal source to interpretation of the Charter of the United Nations is the practice of the Organs of the Organization itself.²⁸³ The Security Council influences the development of international

²⁸⁰ SC-Resolution 1566 of 2004, operational paragraph 3: “*Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism*”.

²⁸¹ VCLT Article 31 number 3 letter b: practice, which “*establishes the agreement of the parties regarding its interpretation*”.

²⁸² Ress, page 28, margin number 28. UNICO XIII, page 709, the organs of the UN will interpret the parts of the Charter needed for its functions: “*This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers*”.

²⁸³ Fassbender, page 598 ff.

law by its resolutions under Chapter VII. On questions regarding international peace and security – the core areas of the competences of the Security Council – the uniform practice of the permanent Security Council members comes close to being relevant practice in the meaning of the VCLT.²⁸⁴ In the ICJ Namibia-case, the particular weight of the practice of the permanent Members of the Security Council was promoted.²⁸⁵

The Security Council is of course not a representative organ, with its decisions supported immediately only by 15 Member States. However, it is clear that the subsequent practice of the Security Council could be of great importance for the interpretation of the Charter. The best-known example for subsequent practice evolving into a generally accepted agreement on the interpretation of the Charter provisions is the interpretation of Article 27 number 3 of the Charter. In its practice, the Security Council has seen it adequately for the Permanent Member of the Security Council to be present when votes are taken and accepted that votes might be withheld without taking this as a use of the right of veto. This procedure has been consistent since 1965 and has been generally accepted by the Member States.²⁸⁶

The Security Council is in the first instance the judge of its own legality.²⁸⁷ This makes its practice an important element for the interpretation of its competences under the United Nations Charter. The practice of the Security Council itself is of particular importance as a part of an evolutionary interpretation of the Charter as the constituent document of the United Nations Organization.²⁸⁸

²⁸⁴ Ress, Interpretation, page 15, margin number 1; VCLT. Article 31 number 3 letter b.

²⁸⁵ ICJ *Namibia* page 153, separate opinion of Judge Dillard: “*In the absence of such a precise prescription the subsequent conduct of the parties is clearly a legitimate method of giving meaning to the Article in accordance with the expectations of the parties, including, in particular, the permanent members.*”

²⁸⁶ ICJ *Namibia*, 1971, page 22: this practice “*evidences a general practice of the Organization*”.

²⁸⁷ ICJ *Certain Expenses* 1962, page 168.

²⁸⁸ ICJ *Namibia* 1971, page 22.

It is argued that the cumulative actions of the Security Council might reflect the *opinio juris* in the international community of states²⁸⁹ and that resolutions adopted by the Security Council can become a meaning that goes over the cumulated practice of the states represented in the Security Council.²⁹⁰ The value of this, however, is limited:²⁹¹ The Security Council is as organ established to respond to particular, acute situations. Its procedures, subjecting the Council to time constraints and pressure, are not made to warrant the needs of the world community or to create norms of general applicability.

On the other side, it might be argued that the purposes of the United Nations is such an important element for the interpretation that the will of the parties is derogated to an almost subsidiary means of interpretation,²⁹² an argument, which promotes the autonomous interpretation by the organs of the Organization.

The Security Council bases its resolutions on a majority vote.²⁹³ The practice of an organ based on the majority principle may arguably only be regarded as unanimous member State practice when only an insignificant number of (Member) States objects to the adoption.²⁹⁴

Clearly, the practice of the Security Council does not represent the collective will of the Member States, but mere the Organ itself and the Member States represented in it.²⁹⁵ A resolution by the Security Council is dependent some explicit acceptance in order to imply changes in the powers of the Security Council.²⁹⁶ This makes the weight of the

²⁸⁹ Gowlland-Debbas, page 316.

²⁹⁰ Karl, page 87 f. and 90 ff.

²⁹¹ Nolte, page 324.

²⁹² Ress, Interpretation, page 15, margin number 1.

²⁹³ Even with the right of veto.

²⁹⁴ Ress, page 30, margin number 32.

²⁹⁵ Zimmermann / Elberling, page 74.

²⁹⁶ Nolte, page 325 points to that even an unanimous resolution of the Council must receive more explicit

argument of subsequent practice of the Security Council dependent on the subsequent practice of the Member States.

It has been argued that the weight of the Security Council Resolutions is mere that similar to the Friendly Relations Declaration of the General Assembly "*provided that their subject-matter is not restricted to particular situations*".²⁹⁷ If this were a correct observation, this would imply that the resolutions containing simultaneously binding, abstract and general norms because of their general contents.

acceptance "as law" than a unanimous resolution of the General Assembly.

²⁹⁷ Marc Perrin de Brinchambaut, as quoted in Nolte page 325.

5.3 Subsequent practice of- and implementation by the Member States

5.3.1 Introduction

The adoption of resolutions containing simultaneously binding, abstract and general norms is arguably after the discussion above *ultra vires*.²⁹⁸ The Member States might though through its subsequent practice have healed this.

When the Security Council submits an innovative interpretation of its own powers by declaring situations ‘threats to the peace’, the community of states will accept or decline this innovative interpretation of the Charter.²⁹⁹ In this way, the dynamic of the Charter is fully exploited only through collaboration between the Security Council and the Member States, making the practice of the Security Council and the implementation by the Member States function closely interconnected.

The subsequent practice of the Member States might be expressed both through formal statements made in connection with the adoptions of the Resolutions and in later discussions, through co-operation with the Counter Terrorism Committee and the Committee established with Resolution 1540 as well as through domestic implementation of the Resolutions 1373 and 1540 and through ratification of the international treaties on the area.

As to the latter point, there are 13 main international instruments on the area of counter terrorism, which the Security Council has encouraged the Member States to ratify. From

²⁹⁸ Dependent on to which opinion one holds to the matters discussed above, of course.

²⁹⁹ See Nolte, page 325.

being subject to a minimal number of ratifications at the time of adoption of Resolution 1373, these instruments were in March 2006 ratified in between 116³⁰⁰ and 183³⁰¹ Member States.³⁰²

5.3.2 Particularly on reporting to the Counter Terrorism Committee

Resolution 1373 of 2001 was adopted rapidly after the incidents in the United States of 11 September the same year, and was not subject to any formal debate with members outside of the Security Council before it was adopted.³⁰³ For this reason, reports to the CTC become an even more important source of knowledge.

The implementation of the Resolution 1373 has progressed well. The Secretary General of the United Nations has stated: “*The work of the Counter-Terrorism Committee, and the cooperation it has received from the Member States have been unprecedented and exemplary.*”³⁰⁴ By the end of May 2003, all the Member States had submitted a first report on their implementation of the Resolution.³⁰⁵ By August 2004, more than 500 reports had been submitted in four rounds of reporting.³⁰⁶ The majority of states have submitted more reports, responding to letters received from the Chairman of the Security

³⁰⁰ Convention on the Physical Protection of Nuclear Material.

³⁰¹ Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

³⁰² These international instruments and number of states, which have ratified, are available in the internet under <http://www.un.org/sc/ctc/law.shtml>

³⁰³ In fact, even the non-permanent Members of the Security Council had only a limited access to the resolution before it was adopted.

³⁰⁴ United Nations Secretary General Kofi Annan, as quoted on <http://www.un.org/Docs/sc/committees/1373/cted.html>

³⁰⁵ The reports from the Member States are available at http://www.un.org/Docs/sc/committees/1373/submitted_reports.html

³⁰⁶ On the work of the CTC, see Rosand 2003 page 333 ff.

Council.³⁰⁷ However, the intensity of the reporting has not been at the same level in all the states,³⁰⁸ and the implementation of Resolution 1373 has been a source of concern for the Security Council. This was expressed in Resolution 1456 of 20 January 2003, as the Council stressed the obligation on States to report to the CTC according to the timetable set by the CTC and furthermore called on the states to respond to the Committees requests for information.³⁰⁹

In April 2003, it had been presented 351 reports from 188 states, and only three states had not yet provided first reports.³¹⁰ However, 41 States had not provided the requested second reports and eight states had failed to deliver third reports.³¹¹ In October 2003, all Member States had filed reports.³¹² However, 26 were late in submitting their second report and 31 late in submitting their third report. In May 2004, 32 member states were late in submitting their second report, 29 late in submitting their third report and 10 late on submitting their fourth report.³¹³ In December 2004, 31 Member States were late on submitting their second report, 34 late on submitting their third report and 10 late on submitting their fourth report.³¹⁴

³⁰⁷ In fact, some Member States have raised the question of 'reporting fatigue', so Report from the Chairman of the CTC to the President of the Security Council of 30 May 2006, <http://www.un.org/sc/ctc/30max.shtml>

³⁰⁸ Stretching from one report (ex. Burkina Faso, Equatorial Guinea, Eritrea, Gambia, Guinea Bissau, Kiribati, Liberia, Micronesia, Niue Sierra Leone, Somalia, Togo, Tuvalu) to seven and more (Belarus, Djibouti, El Salvador, Jamaica). The majority of the Member States have given four till five reports.

³⁰⁹ SC-Res. 1456 of 2003, operational paragraph 4.

³¹⁰ S/2003/404.

³¹¹ Ibid, page 3-4.

³¹² S/2003/1056.

³¹³ S/2004/361. 5 had requested an extension of the deadline on their third report and 4 had requested an extension of the deadline on their fourth report.

³¹⁴ S/2004/982. One Member State had requested an extension of the deadline on the second report, three had requested an extended deadline on the third report and three had requested an extension of the deadline on the fourth report.

The Counter Terrorism Committee has for capacity reasons separated the prerequisites to states reports in three stages.³¹⁵ In the first stage, stage A, the Committee shall monitor in how far the Member States have the adequate legislation to cover all the aspects of Resolution 1373. Furthermore, they shall become part to all the 12 international counter terrorism conventions and protocols.³¹⁶

The stages of the work of the Counter Terrorism Committee are not coherent with the number of reports presented by the individual Member State. That is to say: the first report indeed directs itself to the stage A, but so does as well the second and third reports. As the Committee has received the first set of reports, it composes a list of questions in a letter sent back to the Member State. The State's answers to these questions then compose the second reports, in which the Committed monitors that all states regard the requirements of stage A.³¹⁷ The reviews of the states practices will probably continue until the factors in stage A are fulfilled before moving on to reviewing the further stages.³¹⁸

In the stage B, the Counter Terrorism Committee shall focus on in how far the Member States have an effective coordinated executive organization for implementing Resolution 1373, police and intelligence structures as well as immigration- and border controls.³¹⁹ The stage C is the stage in which the Committee shall examine the implementation of Resolution 1373 in the States, implying that the Member States shall possess the legislative and executive machinery to fill their obligations on the justice and on bilateral,

³¹⁵ Rosand 2003, page 335.

³¹⁶ Ibid; Stromseth 2003, page 43

³¹⁷ Rosand 2003, page 336.

³¹⁸ Ibid.

³¹⁹ SC-Res. 1373 of 2001, operational paragraph 2 letters b, f and g; Stromseth 2003 page 44.

regional and international cooperation. Furthermore, the states shall cooperate judicially and share information.³²⁰ So far, few or none state have reached Stage C in their reports.

5.3.3 Particularly on the practice regarding Resolution 1540

In contrast to the adoption of Resolution 1373, the Security Council invited Member States to take part in public hearings or ‘conversations’ before it adopted Resolution 1540 in 2004.³²¹ In these ‘conversations’, a line of Member States expressed doubt in ‘legislative competences’ of the Security Council.³²² The view that the Security Council was not satisfactory representative to adopt a resolution with such widespread implications was expressed,³²³ as well as the view that the Resolution would undermine the balance between the Security Council and the General Assembly.³²⁴ It was pointed to the widespread implications of the Resolution for the national legislature for the instance of non-compliance,³²⁵ and was warned against an accumulation of functions and powers in the Security Council.³²⁶ Pakistan – a non-permanent member of the Council at the moment – though expressed that the “*Security Council cannot assume the stewardship of global non-proliferation and disarmament issues.*”³²⁷

³²⁰ Ibid.

³²¹ Public debate of 22 April 2004, UN-Doc S/PV.4950. See Press Release of 28. April 2004: SC/8070.

³²² SC/8070 of 28 April 2004: Statements by Egypt, India, Indonesia, Iran, Mexico, Namibia, Nepal, Pakistan and South Africa.

³²³ Ibid, Statement of the Indonesian representative.

³²⁴ Ibid, Statement of the Indian representative.

³²⁵ Ibid, Statements of the South-African and Pakistan representatives.

³²⁶ Ibid, UN-Doc. S/PV.4950, Statement of the Nepalese representative.

³²⁷ UN-Doc. S/PV.4956, page 3. Surprisingly, Pakistan still voted in favour of the adoption of Resolution 1540.

Some states demanded that the Security Council should limit its 'legislative competences' to extraordinary situations,³²⁸ and promoted the dependence on international consensus.³²⁹ Concerns were expressed that the Resolution 1540 would become a precedent.³³⁰ The view of the Resolution as a mere interim solution was expressed,³³¹ as well as the need for the Security Council to act cautious not to undermine the stability of the international legal framework.³³²

However, a great amount of States expressed more positive views to the adoption of the Resolution.³³³ It was stated that it would be "*entirely appropriate [for the SC to adopt Resolution 1540], consistent with its mandate to maintain international peace and security.*"³³⁴ It was in particular focused on the urgent need to adopt such regulations and on how the normal procedures of adopting international treaties would be too slow too efficiently respond to the treat of proliferation of weapons of mass destruction,³³⁵ promoting the Security Councils "*leadership in addressing a new challenge*".³³⁶

³²⁸ SC/ 8070 of 28 April 2004, Statements of Mexico, Switzerland and South Korea. Switzerland stated that those obligations foreseen in the draft resolution "*should be established through multilateral treaties, in whose elaboration all States can participate. It is acceptable for the Security Council to assume such a legislative role only in exceptional circumstances and in response to an urgent need.*"

³²⁹ UN-Doc. S/PV.4950 , Statements of Kuwait, Indonesia and Cuba.

³³⁰ Ibid, Statement of Mexico.

³³¹ UN-Doc. S/PC.4950, Statement of Kuwait. "*We agree that a gap exists within the international treaty regime (...). This draft resolution could be an interim conclusion until that gap is addressed fully at a later stage.*"

³³² Ibid, Statement of Japan and Korea.

³³³ Ibid, see for example statements of Albania, Australia, New Zealand, Singapore, Sweden, Tajikistan.

³³⁴ Ibid, Statement of Australia.

³³⁵ SC/ 8070 of 28 April 2004, Statements of the representatives of Australia, Canada, Chile, France, Ireland, Israel, Jordan, Romania, Russia, Singapore and USA.

³³⁶ UN-doc S/PV.4950, page 19, Statement of Canada.

It was argued that when Resolution 1373 could be adopted within the frames of Chapter VII, this as well had to be the case for a resolution with the goal of preventing proliferation of weapons of mass destruction to terrorist entities.³³⁷ Some states focused on the importance of adopting the resolution under Chapter VII in order to show the determination of the Security Council in the matter.³³⁸ Subsequent to the adoption of Resolution 1540, the critical voices were however more or less gone; only India gave a formal statement, in which it repeated the previously expressed reservations to the adoption of the resolution.

In July 2005, more than a year after the adoption of Resolution 1540, it was clear that 74 states – almost 40 percent of the Member States – still had not reported on their implementation of the Resolution.³³⁹ The contents of this report should mere be on the steps the states have taken or intend to take to implement the resolution.³⁴⁰

The Member States shall report on their implementation of the resolution 1540 to a Monitoring Committee established through the Resolution.³⁴¹ The existence of this is however limited to a period of two years.³⁴² As in Resolution 1373, the Member States were called upon to report to this committee on their implementation of the Resolution no later than six months form the adoption of the resolution.³⁴³

³³⁷ SC/ 8070 of 28 April 2004, Statements of Chile, France, Great Britain, New Zealand, Spain and USA.

³³⁸ Ibid, Statements of France, New Zealand, Spain and USA.

³³⁹ Briefing by the Chairman of the Security Council Committee established pursuant to resolution 1540 of 2004 from 20 July 2005.

³⁴⁰ SC-Res. 1540 of 2004, operational paragraph 4.

³⁴¹ Ibid.

³⁴² SC-Res. 1540 of 2004, operational paragraph 4.

³⁴³ Ibid.

As per 1. August 2006, 132 Member States and the European Union has submitted reports to the 1540 Committee.³⁴⁴ This of course implies that there are still – two years after the adoption of Resolution 1540, still 60 Member States who have yet to report to the committee.³⁴⁵ Furthermore, the intensity of the reporting is not very high.³⁴⁶

5.3.4 Weight of the practice of- and the implementation by the Member States

The extent of the implementation of Resolutions 1373 and 1540 in the Member States is of great importance for the development of the competences of the Security Council. Unless the Resolutions actually influence actual behaviour they remain no more than verbal admonitions and their presumed obligatory character merely nominal.³⁴⁷ In order to produce changes in the competences of the Council under the Charter, additional elements of state practice are required.³⁴⁸ Thus, in order for the Security Council to expand its competences to encompass adoption of resolutions containing norms of simultaneously binding, abstract and general contents, it would be required that the resolutions are implemented in the Member States.³⁴⁹

³⁴⁴ <http://disarmament2.un.org/Committee1540/report.html>

³⁴⁵ The UN has 192 Member States, <http://www.un.org/Overview/growth.htm#2000>

³⁴⁶ The 132 Member States have all submitted one main report and on request between one and three supplementary reports.

³⁴⁷ Schachter 1963, page 198. But furthermore he states: "(...) *it can be assumed that States would not focus on legal prescriptions (...) unless they had an expectation that normative decisions had an ascertainable impact on conduct outside of the organ itself.*"

³⁴⁸ Frowein/Krisch, page 709, using the notion "new law".

³⁴⁹ See also Nolte page 325: "Given the limited number of its members even a unanimous resolution of the Council must receive more explicit acceptance as law than a unanimous resolution of the General Assembly."; Ress, page 17, margin number 5: "if this subsequent development meets the different needs and intentions of nearly all member States, in particular also those of the member States concerned, and

The legal weight of the implementation in the Member States might though arguably be dubious. In the cases for the International Court of Justice where practice of organs of the United Nations Organization or of its Member States has been emphasised, the ICJ has with one exception promoted that the result gained from the practice as well would have been achieved by other means of interpretation.³⁵⁰

In how far the reporting to the committees shows the real picture of the national situation might sometimes be doubtful.³⁵¹ Furthermore, the fulfilment of their obligations to report to the CTC and the 1540 Committee does not necessarily represent a consensus in the Member States. There are two sides to this. *Firstly*, resolutions adopted under Chapter VII are binding on the Member States, a fact, which makes the weight of the implementation of the Resolutions somewhat dubious. Arguably, compliance with binding resolutions is sub-standard to the compliance with non-binding resolutions.³⁵² When the resolutions are binding, implementation of these does not necessarily represent a consensus among the Member States, but could as well represent the mere obligation to implement the resolution.³⁵³ The lack of efficient review of Security Council Resolutions might lead the Member States to fear enforcement of as well *ultra vires* resolutions as

can thus be considered to reflect the global balance of political interests."

³⁵⁰ Ress, page 30, margin number 33. This exception is the Namibia- advisory opinion, It was emphasised that "*the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice*". ICJ Namibia, 1971, page 22.

³⁵¹ Politic is as well an important part of the reporting, something the first report supplied by the Iraqi government (S/2001/1291) shows: "*Iraq is the foremost victim of terrorism ... terrorists that receive patronage, training, financing and armament within a framework of State terrorism ... One such State is the United States of America, which openly spends tens of millions of dollars on troops of mercenaries to carry out terrorist operations against Iraq pursuant to what is referred to as the 'Iraq Liberation Act'*".

³⁵² Ress, page 28, margin number 29. "*If the organ's competence to interpret is binding, the practice in application does not necessarily reflect a consensus among member States.*"

³⁵³ See Zimmermann/Elberling, page 74: "*Jedoch muß die Tatsache, daß ein Staat einen solchen Bericht erstattet nicht notwendig bedeuten, daß er damit auch die Rechtsgrundlage für eine entsprechende Verpflichtung anerkennt.*" Similar: Klein, page 104.

ordinary resolutions. The actual obedience will for these reasons give no completely true picture of the Member States opinion on the legality of the Security Council Resolutions.

Secondly, both resolutions 1373 and 1540 fill important gaps in international legislation. The majority – if not all – of the Member States have a great interest in a stop of proliferation of weapons of mass destruction and a stop to international terrorism. Implementation of the Resolutions might very well be found in the own interest of the state to put an end to the phenomena and does not necessarily prove an acceptance of a competence for the Security Council to adopt resolutions of simultaneously binding, abstract and general contents.³⁵⁴

Both the binding character of the resolutions and the interests of the states to fight the phenomena limit the weight of the implementation of the Resolutions, at least regarding the weight of the Resolutions as predicates for resolutions to come. Implementation of the provisions of Resolutions 1373 and 1540 does not with necessity imply an acceptance for the legal basis for adopting the Resolutions, in other words, does not necessarily imply acceptance for any general competence for the Security Council to adopt resolutions of simultaneously binding, abstract and general contents.

As to the ratification of resolutions on the counter-terrorism area, the Security Council only called upon the Member States to become parties to these. If the Member States follow non-mandatory resolutions by the Security Council this might be a more trustworthy sign of compliance than any compliance with binding parts of the resolutions.³⁵⁵ On the other side, the compliance with these resolutions will not give us information to the acceptance of the Security Councils competencies to adopt resolutions containing norms of simultaneously binding, abstract and general contents as this compliance refers to norms of a non-binding character.

³⁵⁴ See also Zimmermann/Elberling, page 74.

³⁵⁵ As argued above.

In the process of adopting Resolution 1540, most western states were positive to the adoption of the Resolution, whereas the members of the Non-Aligned Movement (NAM) were more critical of the role the adoption of this resolution would give the Council.³⁵⁶ It seems though that there was a general scepticism to “legislative powers” of the Security Council,³⁵⁷ which again would imply scepticism to a general admissibility to adopt resolutions containing norms of simultaneously binding, abstract and general contents.

The comments made in the discussions before the adoption of Resolution 1540 are arguably not definite reactions to the competencies of the Security Council. Arguably, the comments were made with the intention of making views of the States known to the Security Council before the adoption of the Resolution perhaps in hope that this would influence the contents of the adopted resolution.³⁵⁸ The statements were arguably not intended as formal declarations on acceptance or refusal of the resolution.³⁵⁹

Statements made before and after the adoption of the Resolution 1540 might give a more valid indication on the acceptance in the Member States.³⁶⁰ From this might arguably the conclusion be drawn that the Member States accepted the resolution and its implications.³⁶¹

³⁵⁶ See Marschik, page 478.

³⁵⁷ So also the statement of Pakistan in UN-Doc. S/PV.4956, at page 3: “*Pakistan shares the general view expressed in the Council’s open debate that the Security Council cannot legislate for the world.*”

³⁵⁸ Marschik, page 480-41 states: “*As is the practice in the UN, States used the opportunity of a public debate to convey a political message in strong terms, especially if they hoped that a clear message would influence the final deliberations on the resolution.*”

³⁵⁹ Ibid, page 481.

³⁶⁰ Ibid.

³⁶¹ Ibid: “*It could be argued, that all States – with the sole exception of India – did, in the end, accept the resolution and that the wider Membership has thereby accepted the Council’s legislative role for exceptional circumstances.*”

As to the statements made in the phase preliminary to Resolution 1540, where some states stated that the powers of the Security Council should be limited to only exceptional situations,³⁶² this expresses a wish not to be bound under international law on decisions the Member States might formally not influence. Binding character of the resolutions, adopted in a process the Member States might not influence, is though the basis character of Resolutions adopted under Chapter VII. These comments must be of limited weight.

It might be argued that the practice of the Member States when it comes to the reporting to the CTC and implementing of Resolution 1373 proves a “clear and continued acceptance” of the regime established under Resolution 1373.³⁶³ However, the most important practice of the Member States is that relating to the implementation of Resolution 1540. This is not experiencing the same progress as the implementation of Resolution 1373, which might be an argument counter acceptance.

5.4 Conclusions on subsequent practice and implementation

In order for the Security Council to develop its competencies within the Charter of the United Nations through subsequent practice, both *recurrence* of acts of similar character and *acceptance* by the Member States of the United Nations.³⁶⁴ Resolutions 1373 and 1540 are both resolutions containing norms of simultaneously binding, abstract and general character and Resolution 1540 for this reason represent a recurrence of Resolution 1373 for the matters of interest in the present paper.³⁶⁵

³⁶² Press release SC/8070 from 22. 04. 2004, statements by Namibia, Nigeria, Kuwait, South Korea and Switzerland.

³⁶³ Marschik, page 475.

³⁶⁴ Ibid, page 480.

³⁶⁵ Ibid, going somewhat further: “*SC-Res. 1373 was thus not a unique aberration, an ultra vires act remedied by acquiesce, but the beginning of a continuing practice.*”

The organs of the United Nations are in the first instance the judges of their own jurisdiction. However, such a determination will only be binding if this determination is followed by the Member States in general.³⁶⁶ This makes the practice of- and implementation in the Member States of great importance.³⁶⁷ This was promoted as well in the preparatory works of the Charter, in which the sub-committee of the Committee on Legal Questions at the San Francisco Conference stated: “*It is to be understood (...) that if an interpretation made by any organ of the Organization (...) is not generally acceptable it will be without binding force*”.³⁶⁸ The other way around this would arguably mean that an interpretation of an organ of the Organization, which is generally acceptable would be binding.³⁶⁹

The implementation in the Member States is for this reason of determining character. When the Security Council interprets its own powers, as it has done with the notion ‘threat to the peace’ and with regard to the measures it might take under Article 41, this interpretation is only binding if and when it is supported by state practice in general.³⁷⁰ Without subsequent state practice, the interpretation of the powers of the organ by this itself is not binding on the Member States.³⁷¹

As to the submitting of reports to the Counter Terrorism Committee, the reporting might be described as initially successful, with submitting of reports from all states, including those one might not initially expect compliance from.³⁷² On the other hand, the mere

³⁶⁶ See Ress, page 29: “(...) even possible to construe the practice of an organ in which not all member States are represented as a general interpretational consensus of all member States, if at least the ‘concerned’ powers abide permanently and consistently by such practice, and if there are no objections.”

³⁶⁷ Frowein/Krisch, page 710, margin number 25.

³⁶⁸ UNICO XIII, page 832.

³⁶⁹ Sohn, page 174.

³⁷⁰ Frowein/Krisch, page 710 margin number 25.

³⁷¹ Sohn, page 203-204.

³⁷² See Rosand, page 337. As examples he mentions *Iraq* and *the Democratic People’s Republic of Korea*.

filing of reports does not say anything on the real situation in the States. Furthermore, the most states are still – five years after the adoption of resolution 1373 – in their reports focused on the stages A and B.

Arguably, Resolutions 1373 and 1540 serve as precedence for subsequent adoption of resolutions of simultaneously binding, abstract and general contents.³⁷³ This would imply as well that Resolution 1540 will not be the last resolution containing simultaneously binding, abstract and general norms the Council will adopt³⁷⁴ as well as a modification of the norms of the Charter of the United Nations.³⁷⁵

It has been stated that Resolution 1540 is the *"first major step towards having the Security Council legislate for the rest of the United Nations' membership"*,³⁷⁶ and that the Security Council would be *"needed more and more to do that kind of legislative work"*.³⁷⁷ Arguably, Resolution 1373 was an opening gate for at least further adoption of resolutions of simultaneously binding, abstract and general character by the Security Council.³⁷⁸ However, the Security Council is dependent on the support in the Member States to develop further its competences. This process might be described as a process of slow erosion, where one interpretation after another chip away the barrier on the way and slowly wear it away.³⁷⁹

³⁷³ Szasz, page 905; Aston, page 118 argues that they will be of precedent character for the decision-making process of the United Nations.

³⁷⁴ Talmon, page 175.

³⁷⁵ Optimistically, Krisch, page 885, concludes that that the implementation of Resolution 1373 has *"changed the world order"*.

³⁷⁶ www.un.org/News/briefings/docs/2004/pleugerpc.DOC.htm.

³⁷⁷ Ibid.

³⁷⁸ Szasz, page 905: *"The members of the SC were most likely unaware, when they hastily adopted Resolution 1373, of the pioneering nature of that decision. Now that this door has been opened, however, it seems likely to constitute a precedent for further legislative activities."*

³⁷⁹ Nolte, page 228; Stromseth, page 45: *"Despite political differences and current difficulties, the last decade suggests that the Security Council will continue to find ways to innovate in response to threats to*

A final answer to the question would still be to come, revealed through the following subsequent practice by the Security Council and most important through the implementation and acceptance of this in the Member States. Their role for these to play in the future will be great when it comes to limiting and leading the practice and the powers of the Security Council in the wanted direction.³⁸⁰

peace and security in the dangerous years ahead."

³⁸⁰ See Nolte, page 325: "So far, the Council's assertion of its expanded powers has met with little determined resistance and much official approval. There are signs, however, that this trend may not continue. If this is the case, the community of states is not reduced to the role of the sorcerer's apprentice who lost control of what he had brought to life."

6 Conclusions

6.1 Summary

Resolutions 1373 of 2001 and 1540 of 2004 are Security Council Resolutions, which clearly separate themselves from previously adopted Security Council Resolutions through their simultaneously binding, abstract and general contents. Previously adopted Security Council Resolutions with widespread implications, like those establishing the International Criminal Tribunals for the former Yugoslavia or Rwanda, or those establishing intrusive embargos on particular states or entities are only of a binding and general character. Resolutions of both general and abstract character have been adopted in the past, however only on a non-binding basis.

Taken the innovative character of the Resolutions, the question arises whether or not these resolutions are within the competencies endowed on the Security Council under the Charter. The question is whether or not the adoption of binding resolutions containing simultaneously binding, abstract and general measures are encompassed by Article 41 of the United Nations Charter, opening for measures short of armed force. A necessary prerequisite for this is a determination of a ‘threat to the peace’ under Article 39 of the Charter, and the question must be asked if the abstract dangers of international terrorism and proliferation of weapons of mass destruction might be encompassed by this notion.

From the lingual point of view, the notion ‘threat to the peace’ is arguably open when it comes to whether or not the Security Council might address abstract dangers as ‘threats to the peace’. The measures found in the Article itself are of fairly concrete nature, leading to an assumption that ‘threats to the peace’ must be of a somewhat concrete nature. However, the contents of the notion have developed over the years, to encompassing situations, which fundamentally threaten the peace. The notion ‘threat to

the peace' remains open when it comes to whether or not it encompasses abstract phenomena.

The adoption of resolutions containing simultaneously abstract, general and binding norms is not mentioned as a 'measure short of armed force' under Article 41 of the Charter. This list of measures found in Article 41 is though not an exhaustive one. The measures listed in the article are, however, all of a concrete character, suitable for responding to concrete situations. Resolutions of simultaneously binding, abstract and general character are of a different character than these measures, and Article 41 does not open for the adoption of such. This conclusion is supported by a systematic interpretation of the Charter emphasizing the distribution of competencies between the organs of the Organization as well as by the preparatory works of the Charter. An interim conclusion is therefore that the Security Council acted *ultra vires* as it adopted Resolutions 1373 and 1540.

However, the concept of implied powers could possibly expand the powers of the Security Council under the Charter to encompass the adoption of resolutions of simultaneously binding, abstract and general contents. There are different approaches to the subject, which are closely interconnected with the view one has on the Charter of the United Nations as a 'constitution' in the stronger sense of the notion. Arguably, the competencies of the Security Council would be wider in the instance that the Charter was a 'constitution' in the stronger sense of the notion. In this matter, no clear conclusion might be given. There are strong arguments in both directions, and the Charter of the United Nations clearly contains elements similar to those found in a national constitution, for example rudiments of a separation of powers. An interesting theory, which the present writer understands as a solution in between is the "living tree" theory, which implies a particularly vivid interpretation of the Charter.

If one sponsors the conclusion that the Charter of the United Nations is not a 'constitution' in the stronger sense of the notion, this would still imply a certain dynamic-evolutionary interpretation of the Charter, that is: some powers would still be implied on

the Security Council without direct basis in the Charter text. These implied powers would though not be far-reaching enough to imply as well the adoption of resolutions containing simultaneously binding, abstract and general norms, as this would imply giving the Council materially far wider competencies than originally implied on it in the Charter.

If one sponsors the conclusion that the Charter of the United Nations is in fact a 'constitution' in the stronger sense of the notion, this would mean that the Security Council would have a larger degree of powers implied on it. This would possibly open for the adoption of resolutions of simultaneously binding, abstract and general contents. However, the consequences of such competencies are crucial for to which conclusion one arrives at here.

The Security Council has over the years widened the field of what it determines a 'threat to the peace' or a potential such, which again broadens its possibilities to adopt measures under Chapter VII. The implications of competencies to adopt resolutions of simultaneously binding, abstract and general contents would be widespread and would seriously challenge the sovereignty of the Member States as well as it would disturb what existing distribution of competencies between the organs of the United Nations. This would be the main argumentation against implied powers for the Security Council to adopt Resolutions of simultaneously binding, abstract and general contents.

The conclusion on the matter is of course open, depending on mainly which need one sees for such competencies by the Security Council as well as to which extent one sees the potential extension of the circle of phenomena as likely. The present writer holds the view that the Security Council is not in possession of the competencies to adopt resolutions containing simultaneously binding, abstract and general norms even after the implied powers rule and an understanding of the Charter as a 'constitution' in the stronger sense of the notion.

As the previous conclusions remain under debate, the subsequent practice and implementation must be discussed. It is clear, that even if the adoption of the Resolutions 1373 and 1540 was *ultra vires* at the time of adoption, this could have healed through subsequent acceptance of the Resolutions and the legal basis for these. The Security Council has clearly and continuously regarded itself competent to adopt the Resolution 1373 and 1540 as well as to address other phenomena as at least potential 'threats to the peace'. Its persistence is particularly clear through the work of the Counter Terrorism Committee and that of the 1540 Committee. The subsequent practice of the Security Council is, however, substandard to that of the Member States.

The Member States have arguably implemented the Resolution 1373 diligently. Large amounts of reports have been given, as well as the number of members to the different international instruments on the area of counter terrorism has increased drastically. This does, however, only give indications on the actual implementation in the Member States, as this would have to be found through an analysis of the internal legislation in the individual states.

As to the implementation of the Resolution 1540, the Member States initially proved sceptical to both to the resolution and to the powers of the Security Council to do so. After the adoption of the Resolution, however, the Member States have reported to the 1540 Committee and has raised few critical voices.

For the present writer, it remains difficult both to draw the conclusion that the Security Council was in the initial position to adopt Resolutions 1373 and 1540 from both clear and implied powers as well as to draw the conclusion that that the *ultra vires* character of the Resolutions have healed through subsequent practice and implementation. The conclusions, though, must be said to be open. It will in the time to come be a great emphasis on the implementation by the Member States of Security Council Resolutions to come.

6.2 Law making contra law breaking

The implications of the adoption of the Resolutions 1373 and 1540 will be discussed for two different angles: Firstly from the view that the adoption of the resolutions was *ultra vires*, secondly from the view that the adoption of the resolutions was *intra vires* or *ultra vires* and subsequently healed.

Through the consideration of subsequent practice, the interpretation of the treaty and the alteration of the treaty are in the practice mixed, even if the notions might be clearly distinguished from each other in the theory.³⁸¹ This makes an interpretation of the Charter based on subsequent practice of the Security Council and the General Assembly as well as the implementation in the Member States somewhat interesting. Arguably, law breaking is an essential part of law making.³⁸²

6.2.1 The Resolutions were *ultra vires*

If the Resolutions 1373 and 1540 were adopted *ultra vires* and were not healed by acceptance in the Member States, the question on what the consequences of such *ultra vires* acts by the Security Council were arises.

There is of course no direct legislature on the international area endowed with powers to directly review acts of the Security Council. The Security Council is, at in the first stage, the judge of its own legality.

³⁸¹ Ress, page 28, margin number 27.

³⁸² Higgins, RdQ, 1991; Probably promoted as well by Rosand 2005 “*The manifestations of the difference, however, serve to highlight the innovative rather than the ultra vires nature of this activity.*”

However, if the organs of the Security Council differ on the interpretation of their competences, an advisory opinion might be requested from the International Court of Justice.³⁸³ This could be of great importance when it comes to limiting the powers of the Security Council.³⁸⁴ The possibility for review of the powers at least in advisory opinion leads to a certain, but very limited control with the powers of the Council.³⁸⁵ On the other side, the International Court of Justice does not have the competencies to declare Resolutions of the Security Council “null and void”.³⁸⁶ Arguably, the rights of the Member States maintained in the Charter might in the present system be maintained only by persuasion or disobedience.³⁸⁷

6.2.2 The Resolutions were *intra vires* or subsequently healed

If the Resolutions 1373 and 1540 were adopted *intra vires* from the implied powers view or were adopted *ultra vires* and were subsequently healed by acceptance in the Member States, this could have implications for the competencies of the Security Council in the future.

If the Resolutions 1373 and 1540 are in fact adopted *intra vires* of the competencies the Security Council has got under the Charter of the United Nations, this would imply the Security Council has got the competencies to adopt resolutions of simultaneously

³⁸³ Sohn page 173;

³⁸⁴ ICJ *Admissions*, page 26, dissenting opinion of Judge Azevedo: “*Should these conflicts remain unsolved, chaos would result in this organization, which is so complex that it has no water-tight compartments*”.

³⁸⁵ The present paper does not open for a in-depth discussion on this. For discussions on the matter, see: Alvarez 1996; Alvarez 2003; Arkande; Bowett; Conforti 1969; Delbrück 2003; Fassbender 2000; Gill; Gowlland-Debbas; Herbst; Higgins; Martenczuk 1996; Osieke; Rubin; Schweigmann; such discussions.

³⁸⁶ Rosand, page 546.

³⁸⁷ Crawford, page 12.

abstract, binding and general resolutions, powers, which are of potentially widespread impact.³⁸⁸

On the other hand, if the Resolutions 1373 and 1540 were in fact adopted *ultra vires* of the competencies of the Security Council, and if this *ultra vires* character of the resolutions has in fact healed after subsequent practice in the Member States as determined through their implementation of the Resolutions, this would mean that the Member States has got a particularly important role to play in the development of international law in the time to come. The practice of the Security Council will only be an expression of a binding interpretation of the Charter if it is in fact supported by the Member States.³⁸⁹

It must of course be separated between the importance of the implementation of Resolution 1373 and the importance of the implementation of Resolution 1540. The former would be a prejudice for the latter. As the second instance of a resolution containing norms of abstract, general and binding norms, the Resolution 1540 could establish general powers to adopt resolutions containing binding, abstract and general norms if this is accepted by means of implementation in the Member States. In other words, if the Security Council has got general powers to adopt resolutions containing simultaneously binding, abstract and general norms is dependent on the Member States acceptance of Resolution 1540.³⁹⁰

What is demanded from the subsequent practice of the Member States in order to create new rules binding for the future is difficult to say. Arguably, it must for the importance of subsequent practice be differentiated between accepting single instances of *ultra vires*

³⁸⁸ As discussed above in part 4.2.3. on the potential implications of any implied powers to adopt resolutions containing norms of simultaneously binding, abstract and general contents.

³⁸⁹ Frowein/Krisch, page 710, margin number. 25; Lorinser, page 42-46; Schachter 1995, page 11; Sohn, page 203-204.

³⁹⁰ So probably as well Marschik, page 475 and 476.

acts and creation of customary international law or reformation of the Charter.³⁹¹ However, in order to understand this, the motivation of the Member States must be taken into concern.³⁹² The selfish interests in fighting the all-encompassing threats of international terrorism and of proliferation of weapons of mass destruction to non-state entities is an argument in direction that the Member States have accepted the *ultra vires* acts by the Security Council only for the individual cases, and that no general competencies to adopt resolutions containing simultaneously binding, abstract and general norms was intended confined on the Security Council.³⁹³

6.2.3 Limitations to the potential powers of the Security Council

It is clear that there in fact exist some limitations on the powers of the Security Council. This is clearly expressed in the Charter of the United Nations stating “*the specific powers granted to the Security Council*”. This was clearly promoted by the International Criminal Tribunal for the former Yugoslavia in the Tadic Case: “*The Charter thus speaks the language of specific powers, not of absolute fiat.*”³⁹⁴ The powers of the Security Council are constrained both by the Charter itself³⁹⁵ and by *ius cogens* norms.³⁹⁶

³⁹¹ See also Arangio-Ruiz 2000, page 691: “*It would be one thing for the States to condone (...) given instances of ultra vires actions and altogether another thing for them (...) to produce by custom (...) reform of the Charter and/or general international law*”.

³⁹² Arangio-Ruiz 2000, page 690 focuses on the acceptance and not motivation: “*With regard to subsequent practice, there is no doubt that any ultra vires actions of an international body can eventually be made good, so to speak by the lack of adequate opposition, or by acquiescence, if not acceptance*”.

³⁹³ It might, however, be argued differently, with emphasis on the practice and not on the motivation: “*The practice in respect to SC-Res. 1373 must be considered as evidence of acceptance not only for the resolution in question but also of the competence to enact such wide, binding rules, at least in the field of terrorism.*” Marschik, page 480.

³⁹⁴ ICTY Tadic, *Decision on the defence motion for interlocutory appeal on jurisdiction*, paragraph 28. Furthermore, it states: “[i]n any case, neither the text nor the spirit of the Charter conceives of the Security Council as a *legibus solutus* (unbound by law).”

Constraints of the Council deriving from the Charter itself are in the first degree that it must be kept within the limits of the purposes and principles of the Charter,³⁹⁷ but principles of justice and international law are not binding on the Security Council when it is acting under Chapter VII of the Charter.³⁹⁸

The principle of proportionality is binding on the Security Council.³⁹⁹ This implies that there must be a reasonable connection between the phenomenon in question and the contents of the adopted resolutions.⁴⁰⁰ Such a principle would be in conformity with the object and the purposes of Article 39. The Security Council would violate the Charter provisions and act *ultra vires* if the impact of its resolutions on the Member States were manifestly out of proportion to the objective pursued.⁴⁰¹ However, like the Council determines its competencies, it has got a wide margin of appreciation in determining the proportionality of its own action.⁴⁰² Arguably, the more the Council the Council extends its functions under the Charter, the stronger the principle of proportionality should be

³⁹⁵ UN-Charter, Art. 25: only decisions by the Council *in accordance with the present Charter* are binding; UN-Charter Art. 24 (2): The Council "*shall act in accordance with the Purposes and Principles of the UN.*" Frowein/Krisch, page 710, margin number 25: *Any discretionary powers of the Security Council must be derived from the Charter and may not be presumed.* Talmon, page 182. Alvarez 2003, page 124: in particular must the Council act in accordance with the purposes and principles of the Charter.

³⁹⁶ Gowlland-Debbas 2004, page 65.

³⁹⁷ Tadic Jurisdiction, paragraph 29. The Court states that the determination under Article 39 is a "more of a political concept" and continues "the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

³⁹⁸ Article 1 number 1 of the Charter. Frowein/Krisch page 710, margin number 26.

³⁹⁹ Rosand 2005, page 547.

⁴⁰⁰ Talmon, page 181: "*... a reasonable connection between the phenomenon in question and the use of force is required in all cases.*"

⁴⁰¹ Rosand, page 547.

⁴⁰² Talmon, page 185; Frowein/Krisch, page 711, margin number 30.

regarded as a general limitation to the actions of the organs of the United Nations organization.⁴⁰³

6.3 De lege ferenda

Any powers of the Security Council to adopt Resolutions of simultaneously binding, abstract and general contents will clearly be of potentially great impact on the Member States, as illuminated above in Part 4.3.3. There are procedural deficits in the Security Council making such widespread competencies highly questionable. Resolutions are adopted non-democratic and non-transparent, and would be indefensible for any other reason than to provide the possibility to take effective measures in pressing or acute situations.⁴⁰⁴ The legitimacy of the Security Council is weak⁴⁰⁵ and it is suffering from democracy deficit. Such objections might of course be made to all decisions by the Security Council, but in the case of resolutions of simultaneously binding, abstract and general contents, the consequences of this are even clearer.

On the other side, it might be argued that the Security Council is one of the few effective organs in public international law that really functions relatively efficient. For example, it is argued, the Security Council might respond rapidly to human rights crisis.⁴⁰⁶ Furthermore, the Council has through its actions immensely contributed to the

⁴⁰³ Kirgis, page 517.

⁴⁰⁴ See also Koskenniemi 1995 page 338: *“That the five Great Powers have permanent membership and the right of veto in the Council and that the Council has the authority to bind members would be indefensible under any conception of institutional justice worthy of that name.”*

⁴⁰⁵ Mere 15 Members, five non-selected, from which in the best case all 15 support a resolution, in the worst case only nine. Thereto the veto-problematic must be taken into concern.

⁴⁰⁶ Alvarez, War on Terrorism, 2003, page 123.

progressive development of international human rights.⁴⁰⁷ This might call for certain cautiousness in criticizing new developments by the Security Council.

That the Security Council might contribute to further developments on the international human and humanitarian rights area through fully using the potential lying in the adoption of resolutions of simultaneously binding, abstract and general norms. It has through its mere addressing of different questions helped renew the interest in different vulnerable groups, such as women and children, civilians, refugees and the victims of the HIV/AIDS pandemic.

Furthermore, the United Nations Organization has been described as the single most influential source of international legitimacy today.⁴⁰⁸ An effective counteraction to terrorism and other threats to the peace would arguably require a collective approach based on a platform of legitimacy that only the UN may provide.⁴⁰⁹

Furthermore, a too broad scope of activities under Chapter VII, marginalizing the issues addressed by the Council on high politics and making the Council even more an instrument for the western powers could lead to threaten the Security Council loose or weaken its authority.⁴¹⁰ This would be damaging for the continuance of the work of the organ. It might be argued that the powers of the Council are only justifiable on the basis of its specific and limited purpose, that is, on the basis of its police function,⁴¹¹ and that the Council may only maintain its authority as long as it acts within only within the frames of this.⁴¹²

⁴⁰⁷ Ibid.

⁴⁰⁸ Krisch, page 899.

⁴⁰⁹ Türk, page 54.

⁴¹⁰ Krisch, page 880.

⁴¹¹ Koskenniemi 1995, page 339.

⁴¹² Caron, page 552 ff.

With regards to procedures of the Council, representation and transparency, powers to adopt resolutions containing simultaneously binding, abstract and general norms are powers the Security Council are neither intended to possess nor from a *de lege ferenda* point of view suited to have.

However, this concentration of powers in the Security Council has got its clear negative sides. In the Security Council, executive powers as well as the powers to adopt binding, abstract and general resolutions would be accumulated, with itself as the sole judge of the legality of its own actions.⁴¹³ *"The Security Council is constituted by executive representatives, operating in most cases without the apparatus of accountability to which most executives are subject under their own national systems. And yet it is, internationally, the megaphone of executives."*⁴¹⁴

⁴¹³ Similar: Crawford, page 12-13.

⁴¹⁴ Ibid, page 11.

7 Bibliography

7.1 Books and Articles

Akram/Shah

M. Akram and S. H. Shah, “*The Legislative Powers of the United Nations Security Council*”, in McDonald and Johnston (eds.), *Towards World Constitutionalism – Issues in Legal Ordering of the World Community*, Leiden/Boston, 2005, page 431.

Allain

J. Allain, “*The Legacy of Lockerbie: Judicial review of Security Council Actions or the First Manifestation of ‘Terrorism’ as a Threat to International Peace?*”, *Indian Journal of International Law*, 2004, page 74.

Alvarez 1996

J. E. Alvarez, “*Judging the Security Council*”, *American Journal of International Law*, 1996, page 1.

Alvarez, War on Terrorism, 2003

J. E. Alvarez, “*The Security Council’s War on Terrorism: Problems and Policy Options*”, in *Review of the Security Council by Member States*, de Wet and Nollkaemper (eds.), Amsterdam, 2003, page 119.

Alvarez AJIL 2003

J. E. Alvarez, “*Hegemonic International Law Revisited*”, *American Journal of International Law*, 2003, page 873.

Arangio-Ruiz 1997

G. Arangio-Ruiz, “*The ‘Federal Analogy’ and UN Charter Interpretation: A Critical Issue*”, *European Journal of international law*, 1997, page 1.

Arangio-Ruiz 2000

G. Arangio-Ruiz, “*On the Security Council’s ‘Law Making’*”, *Rivista di Diritto Internazionale*, 2000, page 609.

Arkande

D. Arkande, “*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?*”, *International and Comparative Law Quarterly*, 1997, page 320.

Aston 2002

J. D. Aston, “*Die Bekämpfung abstrakter Gefahren für den Weltfrieden durch legislative Maßnahmen des Sicherheitsrats – Resolution 1373 (2001) im Kontext*”, *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht*, 2002, page 257.

Aston 2005

J. D. Aston, “*Sekundärgesetzgebung internationaler Organisationen zwischen mitgliedstaatlicher Souveränität and Gemeinschaftsdisziplin*”, *Schriften zum Völkerrecht*, Band 158, Dunker & Humblot Verlag, Berlin, 2005.

Aust

A. Aust, “*Counter-Terrorism – A new Approach. The International Convention for the Suppression of the Financing of Terrorism*”, in *Max Planck Yearbook of International Law*, 2001, page 285.

Bailey

S. D. Bailey, “*The UN Security Council and Terrorism*”, in *International Relations II*, 1992/93, page 533.

Bowett

D. W. Bowett, “*Judicial and Political Functions of the Security Council and the International Court of Justice*”, in Fox (ed.) *The Changing Constitution of the United Nations*, London, 1997, page 73.

Caron

D. D. Caron, “*The Legitimacy of the Collective Authority of the Security Council*”, *American Journal of International Law*, 1993, page 552.

Cassese 2001

A. Cassese, “*Terrorism Is Also Disrupting Some Crucial Legal Categories Of International Law*”, 12 *EJIL* 2001, page 993.

Cassese 2003

A. Cassese, “*International Criminal Law*”, 2003.

Claude

I. L. Claude, “*Swords into Plowshares: The Problems and Progress of International Organization*”, 3rd ed., 1964.

Conforti 1969

B. Conforti, “*The Legal Effect of Non-Compliance with Rules of Procedure in the UN General Assembly and the Security Council*”, 63 *American Journal of International Law*, 1969, page 479.

Conforti 2000

B. Conforti, *“The Law and Practice of the United Nations”*, 2nd edition, The Hague/London/Boston, 2000.

Crawford

J. Crawford, *“The Charter of the United Nations as a constitution”*, H. Fox (ed.), *“The Changing Constitution of the United Nations”*, 1997, page 9.

Delbrück 2002

J. Delbrück, *“Article 25”*, in B. Simma (ed.), *The Charter of the United Nations*, 2nd ed., 2002.

Delbrück 2004

J. Delbrück, *“Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State”*, *Indiana Journal of Global Legal Studies*, 2004, page 31.

Delbrück 2003

J. Delbrück, *“Right v. Might – Great Power Leadership in the Organized International Community of States and the Rule of Law”*, in J. A. Frowein et al. (eds.), *Negotiating for Peace, Liber Amicorum Tono Eitel*, Berlin etc., 2003, page 23.

De Wet 2004

Erika de Wet, *„The Chapter VII Powers of the United Nations Security Council”*, Oxford 2004.

Dicke

K. Dicke, *“Weltgesetzgeber Sicherheitsrat”*, Vereinte Nationen, 2001, page 163.

Dicke/Rengeling

D. C. Dicke / C. W. Rengeling, *“Die Sicherung des Weltfriedens durch die Vereinten Nationen”*, 1975.

Dinstein

Y. Dinstein, *“War, aggression and Self-Defense”*, 3rd edition, 2001.

Dulles

J. F. Dulles, *“War or Peace”*, 1950.

Dupuy

P.-M. Dupuy, *“The Constitutional Dimension of the Charter of the United Nations Revisited”*, in Max Planck Yearbook of International Law I, 1997, page 1.

Farer

T. J. Farer, *“Beyond the Charter Frame: Unilateralism or Condominium?”*, American Journal of International Law, 2002, page 359.

Fassbender Col. 1998

B. Fassbender, *“The United Nations Charter as Constitution of the International Community”*, Columbia Journal of Transnational Law 1998, page 531.

Fassbender, Reform 1998

B. Fassbender, *“UN Security Council Reform and the Right of Veto. A Constitutional Perspective”*, 1998.

Fassbender, Friedens-Warte, 1998

B. Fassbender, *“Reforming the United Nations”*, Die Friedens-Warte, 1998, page 427.

Fassbender 2000

B. Fassbender, “Review Essay: *Quis Judicabit: The Security Council, Its Powers, and Its Legal Control*”, *European Journal of International Law*, 2000, page 227.

Fassbender 2005

B. Fassbender, “*The Meaning of International Constitutional Law*”, in McDonald and Johnston (eds.), *Towards World Constitutionalism – Issues in legal Ordering of the World Community*”, Leiden/Boston, 2005, page 837.

Fenwick

C. G. Fenwick, “*When is there a threat to the peace? – Rhodesia*”, *American Journal of International Law*, 1967, page 753.

Finke/Wandscher

J. Finke und K. Wandscher, “*Terrorismusbekämpfung jenseits militärischer Gewalt. Ansätze der Vereinten Nationen zur Verhütung und Beseitigung des internationalen Terrorismus*”, Vereinten Nationen, 2001, page 168.

Fraas

Michael Fraas, “*Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof: Die Rechtmässigkeitsprüfung von Beschlüssen des Sicherheitsrats der Vereinten Nationen in Rahmen des VII. Kapitels der Charta durch den Internationalen Gerichtshof*”, Frankfurt am Main, 1998.

Franck 1992

T. M. Franck, “*The ‘Powers of Appreciation’: Who is the Ultimate Guardian of UN Legality?*”, *American Journal of International Law*, 1992, page 520.

Franck 1995

T. M. Franck, “*Fairness in International Law and Institutions*”, 1995.

Franck 2002

T. M. Franck, “*Recourse to Force – State action Against Threats and Armed Attacks*”, 2002.

Franck 2003

T. M. Franck, “*Is the U.N. Charter a Constitution?*”, in J. A. Frowein et al. (eds.), *Negotiating for Peace, Liber Amicorum Tono Eitel*, Berlin etc., 2003, page 95.

Franck/Nolte

T. M. Franck and G. Nolte, “*The Good Offices Function of the UN Secretary-General*”, in Roberts/Kingsbury (eds.): *United Nations, Divided World: The UN’s Roles in International Relations*, 1993, page 143.

Frowein in Simma 1994

J. A. Frowein, “*Article 39*”, in B. Simma (ed.), *Charter of the United Nations. A Commentary*, Oxford, 1994, page 618.

Frowein 2003

J. A. Frowein, “*Issues of Legitimacy around the United Nations Security Council*”, in *Negotiating for Peace, Liber Amicorum Tono Eitel*, J. A. Frowein et al. (eds.), Berlin etc., 2003, page 121.

Frowein/Krisch

J.A. Frowein / N. Krisch, *Chapter VII: Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*”, in B. Simma (ed.), *The Charter of the United Nations. A Commentary*, page 701.

Gading

H. Gading, “*Der Schutz grundlegender Menschenrechte durch militärisch Maßnahmen des Sicherheitsrats – das Ende staatlicher Souveränität?*”, Berlin, 1996.

Gill

T. D. Gill, “*Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*”, *Netherlands Yearbook of International Law*, 1995, page 33-138.

Gowlland-Debbas 1994

V. Gowlland-Debbas, “*Security Council Enforcement Action and Issues of State Responsibility*”, *International and Comparative Law Quarterly*, 1994, page 55.

Gowlland-Debbas 2003

V. Gowlland-Debbas, “*The Domestic Implementation of UN Sanctions*”, in de Wet and Nollkaemper (eds.), *Review of the Security Council by Member States*, Amsterdam, 2003.

Graefrath 1993

Bernd Graefrath, “*Leave to the Court What Belongs to the Court: The Libyan Case*”, *European Journal of International Law*, 1993, page 184.

Graefrath 1998

B. Graefrath, “*International Crimes and Collective Security*”, in Wellens (ed.) *International Law: Theory and Practice. Essays in Honor of Eric Suy*, the Hague, 1998, page 237.

Gray

C. Gray, “*International Law and the Use of Force*”, 2000.

Guillaume

G. Guillaume, “*Terrorism and International Law*”, Grotius Lecture at the British Institute of International and Comparative Law, 2003.

[available at <http://uniset.ca/terr/art/537.pdf>]

Harper

K. Harper, “*Does the United Nations Security Council Have the Competence to act as a Court and Legislature?*”, *New York University Journal of International Law and Politic*, 1994, page 103.

Happold 2003

M. Happold, “*Security Council Resolution 1373 and the Constitution of the United Nations*”, *Leiden Journal of International Law*, 2003, page 593.

Herbst

J. Herbst, “*Rechtskontrolle des UN-Sicherheitsrats*”, Frankfurt a. M., 1999.

Herdegen 1994

M. Herdegen, “*The ‘Constitutionalization’ of the UN Security System*”, *Vanderbilt Journal of Transnational Law*, 1994, page 135.

Herdegen 1995

M. Herdegen, “*Der Sicherheitsrat und die autoritative Konkretisierung des VII. Kapitels der UN-Charta*”, in Beyerlin, Bothe, Hofmann, Petersmann (Eds.), *Recht zwischen Bewahrung und Umbruch, Festschrift für Rudolf Bernhardt*, Berlin et al., 1995, page 103.

Herdegen 1998

M. Herdegen, “*Die Befugnisse des UN-Sicherheitsrates. Aufgeklärter Absolutismus im Völkerrecht?*”, *Schriftenreihe Juristische Studiengesellschaft*, Karlsruhe, 1998.

Higgins

R. Higgins, “*International Law and the Avoidance, Containment and Resolution of Disputes*”, *Recueil des Cours*⁴¹⁵ V, 1991, page 1.

Hoffmann

Stanley Hoffmann, “*Thoughts on the UN at Fifty*”, in *EJIL* 1995, page 317.

Karl 1983

W. Karl, “*Vertrag und spätere Praxis in Völkerrecht*“, 1983.

Karl 1987

W. Karl, “*Die spätere Praxis im Rahmen eines dynamischen Vertragsbegriffs*”, in Roland Bieber /Georg Ress (Eds.), *Die Dynamik des Europäischen Gemeinschaftsrechts*, Baden-Baden 1987, page 81.

Kelsen 1948

H. Kelsen, “*Collective Security and Collective Self-Defence under the Charter of the United Nations*”, *American Journal of International Law* 1948, page 783.

Kelsen 1950

H. Kelsen, “*The Law of the United Nations. A Critical Analysis of Fundamental Problems*”, London, 1951.

Kim

S. S. Kim, “*In Search for Global Constitutionalism*”, in Falk et al. (eds.), *The Constitutional Foundations of World Peace*, 1993, page 55.

⁴¹⁵ Collected Courses of the Hague Academy of International Law.

Kirgis

F. L. Kirgis Jr., “*The Security Councils First Fifty Years*”, *American Journal of International Law*, 1995, page 506.

Klein 1987

Eckhart Klein, “*Vertragsauslegung und ‘spätere Praxis’ internationaler Organisationen*”, in Bieber and Ress (eds.), *Die Dynamik des Europäischen Gemeinschaftsrechts*, 1987, page 101.

Kooijmanns

Kooijmanns, “*The Enlargement of the Concept ‘Threat to the Peace’*”, in Dupuy (ed.), *The Development of the Role of the Security Council, Workshop of the Hague Academy of International Law*, 1993, page 117.

Koskenniemi 1995

M. Koskenniemi, “*The police in the Temple – Order, Justice and the UN: A dialectical View*”, in *European Journal of International Law*, 1995, page 325:

Koskenniemi 2005

M. Koskenniemi, “*International Legislation Today: Limits and Possibilities*”, *Wisconsin International Law Journal*, 2005, page 61.

Krisch

N. Krisch, “*The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council*”, in Walter, Vöneky, Röben and Schorkopf (eds.), *Terrorism as a Challenge for international Law: Security versus Liberty?*, Heidelberg 2004.

Lailach

M. Lailach, *“Die Wahrung des Weltfriedens und der internationalen Sicherheit als Aufgabe des Sicherheitsrates der Vereinten Nationen”*, Berlin, 1998.

Lamb

S. Lamb, *“Legal Limits to United Nations Security Council Powers”*, in *The Reality of International Law: Essays in Honor of Ian Brownlie*, Goodwin-Gill / Talmon (eds.), 1999, page 361.

Lauterpacht

H. Lauterpacht, *“The function of Law in the International Community”*, 1933.

Lorinser

B. Lorinser, *“Bindende Resolutionen des Sicherheitsrates”*, Baden-Baden, 1996.

Marschik

A. Marschik, *“Legislative Powers of the Security Council”*, in McDonald and Johnston (eds.), *Towards World Constitutionalism – Issues in Legal Ordering of the World Community*, Leiden/Boston, 2005, page 457.

Martenczuk 1996

B. Martenczuk, *“Rechtsbildung und Rechtskontrolle des Weltsicherheitsrats. Die Überprüfung nichtmilitärischer Zwangsmaßnahmen durch den internationalen Gerichtshof”*, Berlin, 1996.

Martenczuk 1999

B. Martenczuk, *“The Security Council, the International Court and Judicial Review: What Lessons From Lockerbie?”*, *European Journal of International Law*, 1999, page 538.

Merrills

J. G. Merrills, "*Anatomy of International Law*", 1976.

Morgenthau

H. Morgenthau, "*Politics among Nations*", 1948.

Müller

H. Müller, "*Das nukleare Nichtverbreitungsregime im Wandel*", Europa-Archiv, 1992, page 51.

Murphy

Murphy, "*The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*", Columbia Journal of Transnational Law, 1994, page 201.

Nolte

G. Nolte, "*The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections*", in Byers (ed.), *The Role of International Politics*, 2000, page 316.

Österdahl

I. Österdahl, "*Threat to the peace. The interpretation by the Security Council of Article 39 of the UN Charter*", Uppsala, 1998.

Oosthuizen

G. A. Oosthuizen, "*Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law*", 12 Leiden Journal of International Law, 1999, page 521.

Osieke

E. Osieke, "*The legal validity of ultra vires decisions of international organizations*", *American Journal of International Law*, 1983, page 239.

Pleuger

G. Pleuger, "*Konflikte werden nicht á la carte serviert. Deutschlands neue Amtszeit im Sicherheitsrat der Vereinten Nationen*", *Vereinte Nationen* 2002, page 209.

Rama-Montaldo

M. Rama-Montaldo, "*Contribution of the General Assembly to the Constitutional Development and Interpretation of the UN Charter*", in McDonald and Johnston (eds.), *Towards World Constitutionalism – Issues in legal Ordering of the World Community*", Leiden/Boston, 2005, page 493.

Randelzhofer

B. Randelzhofer, "*Der normative Gehalt des Friedensbegriffs im Völkerrecht der Gegenwart – Möglichkeiten und Grenzen seiner Operationalisierung*", in Delbrück (ed.), *Völkerrecht und Kriegsverhütung*, Berlin 1979, page 13.

Reisman 1981

W.M. Reisman, "*International Lawmaking: A process of Communication? The Harold D. Lasswell Memorial Lecture*", *American Society of International Law Proceedings*, 1981, page 101.

Reisman 1993

W. M. Reisman "*The Constitutional Crisis in the United Nations*", *American Journal of International Law*, 1993, page 83.

Ress

Ress, "Interpretation", in B. Simma (ed.), *The Charter of the United Nations*, 2nd edition, 2002, page 13.

Rosand 2003

E. Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism", *American Journal of International Law*, 2003, page 333.

Rosand 2005

E. Rosand, "The Security Council as a 'Global Legislator': Ultra vires or ultra innovative?", *Fordham International Law Journal* 2005, page 542.

Rostow

N. Rostow, "Before and After: The Changed UN Response to Terrorism Since September 11th", *Cornell International Law Journal*, 2002, page 475.

Rubin

A. P. Rubin, "Legal Response to Terror: An International Criminal Court?", *Harvard International Law Journal*, 2002, page 65.

Sarooshi

D. Sarooshi, "The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII powers", Oxford, 1999.

Schachter 1964

O. Schachter, "The Quasi-Judicial Rôle of the Security Council and the General Assembly", *American Journal of International Law*, 1964, page 960.

Schachter 1963

O. Schachter, "*The Relation of Law, Politics and Action in the United Nations*",
Recueil des Cours, II, 1963, page 165.

Schachter 1991

O. Schachter, "*International Law in Theory and Practice*", 1991.

Schachter 1995

O. Schachter, "*The UN Legal Order: an Overview*", in O.Schlachter and
C.D.Joyner (eds.), *United Nations Legal Order I*, 1995, page 1.

Schrijvers

N. Schrijvers, "*Responding to International Terrorism: Moving the Frontiers of
international Law for 'Enduring Freedom'?*", *Netherlands International Law
Review*, 2001, page 271.

Schweigman

D. Schweigman, "*The Authority of the Security Council under Chapter VII of the
Charter: Legal Limits and the Role of the International Court of Justice*".

Simma 1994

B. Simma, "*From Bilateralism to community Interest in International Law*",
Recueil des Cours VI, 1994, page 217.

Skubiszewski EPIL

K. Skubiszewski, "*International legislation*", in R. Bernhardt (ed.), *Encyclopedia
of Public International Law*, Volume II, page 1255.

Skubiszewski 1989

K. Skubiszewski, "*Implied Powers of International Organizations*", in Dinstein
(ed.), *International Law at a Time of Perplexity*, 1989, page 855.

Stein

A. Stein, *„Der Sicherheitsrat der Vereinten Nationen und die Rule of Law: Auslegung und Rechtsfortbildung des Begriffs der Friedensbedrohung bei humanitären Interventionen auf der Grundlage des Kapitels VII der Vereinten Nationen“*, Baden-Baden, 1999.

Stromseth 2003

J. E. Stromseth, *“An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390. The Security Council’s Counter Terrorism Role: Continuity and Innovation”*, American Society of International Law Proceedings, 2003, page 41.

Sohn

L. B. Sohn, *„The UN System as Authorative Interpreter of Its Law“*, in O.Schlachter and C.D.Joyner (eds.), *United Nations Legal Order I*, 1995, page 169.

Szasz 1995

P. C. Szasz, *„General Law-Making Processes“*, in *1 United Nations Legal Order*, O.Schlachter and C.D.Joyner (eds.), 1995, page 35.

Szasz 2002

P. C. Szasz, *“The Security Council Starts Legislating”*, American Journal of International Law, 2002, page 901.

Talmon

S. Talmon, *“Note and comment: The Security Council as a World Legislature”*, American Journal of International Law, 2005, page 175

Tomuschat 1993

C. Tomuschat, *“Obligations Arising for States Without or Against Their Will”*, Recueil des Cours, IV, 1993, page 195.

Tomuschat 1995 - 1

C. Tomuschat, “*Die internationale Gemeinschaft*”, in Archiv des Völkerrechts, 1995, page 1.

Tomuschat 1995 - 2

C. Tomuschat, “*International Law*”, in Tomuschat (ed.), *The UN at ate fifty – a legal perspective*, 1995.

Tomuschat 2001

C. Tomuschat, “*Der 11. September 2001 und seine rechtlichen Konsequenzen*”, Europäische Grundrechte-Zeitschrift, 2001, page 535.

Türk

D. Türk, “*Law and Policy: Security Council’s Ability to Innovate*”, American Society of International Law Proceedings, 2003, page 51.

Yemin

E. Yemin, “*Legislative Powers in the United Nations and Specialized Agencies*”, Leyden, Sijthoff, 1969.

Zemanek 1994

K. Zemanek, “*Was kann die Vergleichung staatlichen öffentlichen Rechts für das Recht der internationalen Organisationen leisten?*”, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 1994, page 453-471.

Zemanek 1997

K. Zemanek, “*General Course on Public International Law*”, Recueil des Cours, 1997, page 13.

Zemanek 1999

K. Zemanek, “*Is the Security Council Judge of Its own Legality?*”, in E. Yapko/T.Boumedra (eds.), *Lieber Amicorum Mohammed Bedjaoui*, der Haag etc., 1999, page 629.

Zimmermann

A. Zimmermann, “‘*Acting under Chapter VII (...)*’” – *Resolution 1422 and Possible Limits of the Powers of the Security Council*”, in *Negotiating for Peace, Liber Amicorum Tono Eitel*, J. A. Frowein et al. (eds.), Berlin etc., 2003, page 253.

Zimmermann / Elberling

A. Zimmermann and B. Elberling, “*Grenzen der Legislativbefugnisse des Sicherheitsrats. Resolution 1540 und abstrakte Bedrohungen des Weltfriedens*”, Vereinte Nationen, 2004, page 71.

Verdross

A. Verdross, “*Die Verfassung der Völkerrechtsgemeinschaft*”, 1926.

Verdross/Simma

A. Verdross and B. Simma, „*Universelles Völkerrecht: Theorie und Praxis*“, 3.ed. 1984.

Wagner

M. Wagner, “*Die wirtschaftlichen Maßnahmen des Sicherheitsrates nach dem 11. September 2001 im völkerrechtlichen Kontext – Von Wirtschaftssanktionen zur Wirtschaftsgesetzgebung?*“, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2003, page 879.

White 1997

N. D. White “*Keeping the Peace: The United Nations and the Maintenance of International Peace and Security*”, 2nd edition, 1997.

White 2002

N. D. White, “*The United Nations System – Toward International Justice*”, London, 2002.

Williams

I. Williams, “*Abbringen, Verweigerung, Zusammenarbeit. Der Ausschuß des Sicherheitsrats zur Bekämpfung des Terrorismus*”, Vereinte Nationen 2002, page 213.

Wood

M. C. Wood, “*The Interpretation of Security Council Resolutions*”, Max Planck Yearbook of United Nations Law, 1998, page 73.

7.2 Cases

7.2.1 Decisions by the International Court of Justice⁴¹⁶

ICJ Admissions

Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, ICJ Reports 1947-48, page 55.

ICJ Aegan Sea Continental Shelf

Aegan Sea Continental Shelf Case, ICJ Reports 1976, page 3.

ICJ Certain Expenses

Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, ICJ Reports 1962, page 151.

ICJ Competence of the GA

Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of 3 March 1950.

ICJ Corfu Channel

Corfu Channel Case, ICJ Reports 1947-48, page 4.

ICJ Congo/Uganda

Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Uganda), ILM 2000 page 1100.

⁴¹⁶ Decisions by the International Court of Justice are available in the internet under <http://www.icj-cij.org/icjwww/idecisions.htm>

ICJ *Effect of awards*

Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of 13 July 1954, ICJ Reports 1954, page 47.

ICJ *Lockerbie*

Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident in Lockerbie, Request for the Indication of Provisional Matters, ICJ-Reports 1992, page ...

ICJ *Lockerbie* Preliminary Objections

Questions of Interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie, Preliminary Objections, ICJ Reports 1999, page 9.

ICJ *Namibia*

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, ICJ Reports 1971, page 16. 8

ICJ *Nicaragua* Judgment

Military and paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 26. June 1986.

ICJ *Nicaragua* Jurisdiction and Admissibility

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, ICJ Reports 1984, page 432.

ICJ Reparation for injuries

Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, 11 April 1949, ICJ Reports 1949, page 174.

ICJ Reservations to the genocide convention

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory opinion, 28 May 1951, ICJ Reports 1951, page 15.

ICJ South West Africa

South West Africa, Second Phase, Judgment, ICJ Reports 1966, page 6.

7.2.2 Decisions by the Permanent Court of International Justice

PCIJ Danube

Permanent Court of International Justice (PCIJ), *European Commission of the Danube*, 1927, in PCIJ, Series B, No. 14, page 64.

PCIJ Competences of the ILO

Permanent Court of International Justice, *Competences of the ILO*, 1922, Series B, number 2.

7.2.3 Decisions by the International Criminal Tribunal for the former Yugoslavia⁴¹⁷

ICTY Tadic Trials Chamber

Prosecutor v Tadic, Decision on the Defense Motion on Jurisdiction, Case No IT-94-1, 10. August 1995, Trials Chamber.

ICTY Tadic Appeals Chamber

Prosecutor v Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No IT 94-1-AR72, 10. Oktober 1995, Appeals Chamber.

ICTY Tadic, decision on the defence motion for interlocutory appeal on jurisdiction

ICTY Prosecutor v. Dusko Tadic, Decision on the defence motion for interlocutory appeal on jurisdiction, 2. October 1995.

7.2.3.1 Decisions by the International Criminal Tribunal for Rwanda⁴¹⁸

ICTR Kanyabashi Jurisdiction

The Prosecutor v. Joseph Kanyabashi, decision on the defense motion on jurisdiction. 18 June 1997.

⁴¹⁷ Decisions by the International Criminal Tribunal for the former Yugoslavia are available in the internet under <http://www.un.org/icty/cases-e/index-e.htm>

⁴¹⁸ Decisions by the International Criminal Tribunal for Rwanda are available in the internet under (temporary site) <http://69.94.11.53/default.htm> or (permanent site to come) <http://www.ict.rw>

7.3 Attachments

Security Council Resolution 1373 of 28. September 2001.

Security Council Resolution 1540 of 28 April 2004.