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# *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*

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## **Abstract**

*This article aims to assess the effectiveness of the Security Council's anti-terror measures against the background of the Member States' practices of implementation. This survey is based primarily on the national reports submitted by states, pursuant to the relevant SC resolutions. Other issues, such as the legitimacy of the SC's actions and the encroachment of anti-terror measures on fundamental human rights, are also broached in so far as they may have an impact on the effectiveness of the implementation process. Finally, the article attempts to evaluate, primarily from the perspective of legal interpretation, how to reconcile the predominant security concerns underlying anti-terror measures with the cohesion of the international legal system.*

## **1 In Search of a Paradigm**

The harsh criticism that the sanctions against Iraq provoked due to their detrimental impact on the Iraqi civil population led the international community to question the efficacy of measures which, while directed at sanctioning governments, ended up, almost inevitably, affecting the life of civilians.<sup>1</sup> This is why many hailed the adoption by the Security Council (SC) of travel and financial restrictions against UNITA in 1997 and 1998 as the inauguration of a new course of action.<sup>2</sup> Indeed, the travel and

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<sup>1</sup> On the effects of the Iraqi sanctions regime see the Symposium on: 'The Impact on International Law of a Decade of Sanctions against Iraq', with contributions by different authors, published at 13 *EJIL* (2002) 1.

<sup>2</sup> See SC Res. 1127 (1997) and SC Res. 1173 and 1176 (1998).

financial restrictions imposed on the members of UNITA marked the first application of so-called ‘smart sanctions’.<sup>3</sup> This shift of strategy on the part of the SC relied on a widely emerging consensus among states on the need to adopt a ‘more prompt and effective response to present and future threats to international peace and security . . . designed so as to maximize the chance of inducing the target to comply with Security Council resolutions, while minimizing the negative effects of the sanctions on the civilian population . . .’.<sup>4</sup>

Despite its innovative character and the occasional controversies surrounding the identification of legitimate targets, the Sanctions Committee established to implement the sanctions against UNITA managed somewhat to convey the impression that targeted sanctions could effectively work in bringing about compliance with SC resolutions without affecting the civil population. Having gained confidence from this experience, the SC adopted the same strategy to impose financial sanctions against the Taliban, Usama Bin Laden and individuals affiliated with him.<sup>5</sup> While Resolutions 1267 and 1333<sup>6</sup> were relatively narrow in scope and the blacklist attached to them was at least quantitatively comparable to previous ones, Resolution 1390 presented different features.<sup>7</sup> It was the first resolution of an open-ended nature with no apparent link to any specific territory.<sup>8</sup> The Sanctions Committee, established under the three resolutions, later supplemented by other ancillary organs, is in charge of listing and de-listing individuals and entities as well as of reviewing the implementation reports submitted by states. Meanwhile, following the 9/11 attacks against the United States, the SC also passed Resolution 1373,<sup>9</sup> which imposed on states a number of obligations of a general character, mostly concerning the prevention and punishment of the financing of terrorist activities in addition to other obligations aiming at the prevention and repression of terrorist acts.<sup>10</sup> Although no blacklist is

<sup>3</sup> As is well known, smart sanctions have been the object of study in the context of a joint diplomatic and scholarly effort to assess their efficacy and design their implementation. See: T. Biersteker, *Targeted Financial Sanctions: a Manual for the Design and Implementation. Contributions from the Interlaken Process* (2001); M. Brzoska, *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the Bonn–Berlin Process* (2001); P. Wallenstein, C. Staibano, and M. Eriksson, *Making Targeted Sanctions Effective Guidelines for the Implementation of UN Policy Options* (2003).

<sup>4</sup> Report of the Secretary-General on the Work of the Organization, A/55/1, at 13, para. 100.

<sup>5</sup> Relevant measures included the freezing of assets, a ban on travel and a weapons embargo aimed at targeted individuals and groups.

<sup>6</sup> SC Res. 1267 (1999); SC Res. 1333 (2000).

<sup>7</sup> SC Res. 1390 (2002).

<sup>8</sup> See Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights’, 72 *Nordic J Int’l L* (2003) 159, at 164.

<sup>9</sup> SC Res. 1373 (2001).

<sup>10</sup> It may be worth recalling the obligations imposed by the SC on UN Member States by way of Res. 1373: ‘The Security Council . . . Acting under Chapter VII of the Charter of the United Nations. 1. Decides that all States shall: (a) Prevent and suppress the financing of terrorist acts; (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and

annexed to the resolution, a Counter Terrorism Committee (CTC) was created with a view to monitoring the implementation of the resolution by Member States.<sup>11</sup> The fact that Resolution 1373 lays down legal obligations of a general character has caused many to characterize it as a form of 'legislation' on the part of the SC.<sup>12</sup> Incidentally, this has not remained an episodic instance, as the SC later enacted Resolution 1540, concerning the proliferation of weapons of mass destruction, which presents similar features.<sup>13</sup>

All these resolutions have been adopted under Chapter VII of the Charter and they all have a binding character in as much as their *dispositif* unequivocally so purports. It goes without saying that the implementation of the measures enacted by the SC relies entirely on the Member States. Since most of the obligations envisaged require domestic implementation, their efficacy will greatly depend on the extent to which

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entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities; (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons; 2. Decides also that all States shall: (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists; (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens; (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts; (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings; (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents'.

<sup>11</sup> For a full account of the subsequent SC resolutions which bear on the functioning of the sanctions regime originally established under Res. 1267, 1333, 1390, and 1373, see *infra* para. 2. D.

<sup>12</sup> In fact, the resolution seems to fit the definition given by Yemin: 'legislative acts have three essential characteristics: they are unilateral in form, they create or modify some element of a legal norm, and the legal norm in question is general in nature, that is, directed to indeterminate addressees and capable of repeated application in time': E. Yemin, *Legislative Powers in the United Nations and Specialized Agencies* (1969), at 6.

<sup>13</sup> Among other things, Res. 1540 (2004) imposes on States an obligation to refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, transport, transfer, or use nuclear, chemical, or biological weapons and their means of delivery. States are under an obligation to adopt and enforce effective laws to implement the above obligation and to establish domestic controls to prevent the proliferation of weapons of mass destruction. The resolution established a committee to monitor its implementation.

states incorporate them properly into their domestic legal orders and subsequently enforce them by means of their internal law enforcement machinery.

To provide an overall assessment of the effective implementation of the UN SC's anti-terrorism measures is a daunting task. Not only are lawyers traditionally little inclined to use quantitative methodology analysis to carry out their research,<sup>14</sup> they also lack adequate parameters to objectively judge the efficacy of states' implementing measures as well as their consistency with other obligations incumbent on them. Furthermore, to provide an evaluation of the implementation measures of relevant SC resolutions almost inevitably also entails an assessment of the latter.

Short of any epistemological ambition, some criteria have been selected for an assessment of SC resolutions and states' implementing measures. In Section 2 the legitimacy of the SC's action is examined. Although the conceptual contours of legitimacy as a legal category are often difficult to grasp, its importance ought not to be underestimated. Indeed, the question of legitimacy was highlighted by the High Level Panel on Threats, Challenges and Change as a key issue for the effectiveness of the global collective security system.<sup>15</sup> In particular, the perception that relevant decisions adopted for the maintenance of international peace and security are taken on the basis of legal principles and established practices is likely to enhance their effectiveness.<sup>16</sup> Section 3 is concerned with an evaluation of the implementation process by states. Since the state reports submitted under the relevant SC resolutions is the main source of information, a reading of them has proved invaluable in assessing the efforts made by states to implement their obligations. Oftentimes one must read between the lines and assess the relevance, or lack thereof, of what states say or respond to the CTC or the Sanctions Committee. The constant adjustment of the SC's procedures to the challenges of implementation will also be evaluated. In Section 4

<sup>14</sup> Apparently, the CTC also does not possess formal objective criteria for evaluating implementation by Member States. In the literature reference is made to an anonymous CTC legal expert who in Oct. 2003 developed in an unpublished paper some criteria to measure State compliance and categorize the level of States' performance. These criteria include: (i) The existence of legislative authority for freezing terrorist finances and co-operating with international law enforcement efforts; (ii) the administrative capacity to enforce various counter-terrorism mandates; (iii) the presence of a policy and regulatory framework for prioritizing counter-terrorism across a range of government institutions and programmes; (iv) participation in international counterterrorism conventions and institutions: see D. Cortright, G.A. Lopez, A. Miller, and L. Gerber, *An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism* (2004) (published in the framework of the Counter-terrorism research project, a joint research programme of the Fourth Freedom Forum and the Joan B. Croc Institute for International Peace Studies at the University of Notre Dame), at 7–8.

<sup>15</sup> 'A More Secure World: Our Shared Responsibility', Report of the High-level Panel on Threats, Challenges and Change, New York, 2004 (UN Doc. A/59/565), para. 204: '[t]he effectiveness of the global collective security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy—their being made on solid evidentiary grounds, and for the right reasons, morally as well as legally.'

<sup>16</sup> See Hurd, 'Legitimacy, Power, and the Symbolic Life of the Security Council', 8 *Global Governance* (2002) 35, quoting B. Russett and J.S. Sutterlin, 'The U.N. in a New World Order', 70 *Foreign Affairs* (1991) 69 and the seminal work of Claude Jr., 'Collective Legitimation as a Political Function of the United Nations', 20 *Int'l Org* (1966) 367.

the measures of implementation taken by states will be analysed against the background of some human rights obligations which may be affected by such measures. Finally, some considerations of a systemic nature of the potential and limits of the SC's action under Chapter VII will be advanced in Section 5, with a view to providing an assessment, primarily from the perspective of legal interpretation, on how to reconcile the predominant security concerns underlying anti-terror measures with the cohesion of the international legal system in its current stage of development.

This complex exercise may well result in a highly subjective evaluation of the current state of implementation of SC anti-terror resolutions. However, even a tentative assessment may be useful at a time when the modalities of the SC's exercise of normative powers in this area are increasingly called into question.<sup>17</sup>

## 2 The Legitimacy of the Action: The SC as World Law-maker

### A *The Broad Mandate under Chapter VII*

To state that the SC enjoys a wide measure of discretion under Chapter VII may be tantamount to stating the obvious. This holds true for both the determination of the existence of one of the situations that could trigger its powers as well as for the choice to resort to the measures contemplated under the Chapter. Attempts to constrain the SC within the boundaries of a legalistic construction of the UN Charter have led 'to claims of illegality which simply do not square with reality'.<sup>18</sup> At the same time, the proposition that the SC is *legibus solutus* finds little support in international legal scholarship for reasons that border on the obvious. To admit that the SC legitimately operates outside the law would amount to denying the relevance of the law to the governance of world affairs.

The discussion about the limits attached to the SC's action and its proper role under Chapter VII is a well-known one and need not be recounted here.<sup>19</sup> The idea that 'the predominance of the political over the legal approach' marked the drafting of the Charter<sup>20</sup> can hardly be contested, particularly when it comes to the pre-eminent

<sup>17</sup> See the Study commissioned by the UN Office of Legal Affairs on "Targeted Sanctions and Due Process", by Prof. Bardo Fassbender of Humboldt University (20 Mar. 2006). In the context of the Council of Europe see 'The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions', Report prepared by Professor Iain Cameron (6 Feb. 2006).

<sup>18</sup> Wood, 'Comment on Erika de Wet's Contribution "The Security Council as a Law Maker: The Adoption of (Quasi)-Judicial Decisions"', in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making* (2005), at 227, 228.

<sup>19</sup> See, among others, D. Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (2001); Lamb, 'Legal Limits to United Nations Security Council Powers', in G. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999), at 361; Nolte, 'The Limits of the Security Council's Powers and Its Functions in the International Legal System: Some Reflections', in M. Byers (ed.), *The Role of Law in International Politics* (2000), at 315.

<sup>20</sup> H. Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* (2001), at 735.

position that the SC was to occupy in the maintenance of international peace. Accurate historical reconstructions of the preparatory works show how the SC as a political organ was merely meant to act as dispute settler under Chapter VI and as peace enforcer under Chapter VII.<sup>21</sup> To some, this is evidence that the activism showed by the SC in the 1990s, with a panoply of quasi-judicial activities accomplished in the name of peace maintenance or restoration, are hardly consistent with its mandate under the Charter. In other words, there would be an ‘insurmountable functional limit’, namely peace enforcement, which the SC must not trespass.<sup>22</sup> However, to identify what is ‘genuinely instrumental to the enforcement of peace and security’ in order to mark the boundaries of the legitimacy of the SC’s action risks begging the question in so far as the SC itself has a largely unfettered discretion to determine whether this is the case.

More recently, attention on the limits to the SC’s exercise of its powers under Chapter VII has focused on the alleged encroachment on fundamental human rights brought about by sanctions. If during the 1990s attention was drawn to the detrimental effects on human rights entailed by general embargoes sanctioned by the SC,<sup>23</sup> anti-terrorism resolutions and smart sanctions have also come to the fore as potential threats to the fundamental human rights of targeted individuals and groups. Once again, international legal scholarship has stressed the purposes and principles of the Charter, which would limit the SC under Article 24(2), to maintain that ‘the inter-action of the principle of good faith with articles 1(1) and 1(3) of the Charter . . . would estop the organs of the United Nations from behaviour that violated . . . the core elements of the human rights norms underpinning article 1(3).’<sup>24</sup> In particular, the SC would, by the operation of the above reasoning, be bound to respect the Universal Declaration of Human Rights as well as the two 1966 Covenants, which would be implementing instruments of the obligations laid down in Articles 55 and 56 of the UN Charter. Alternatively, the theory that the UN as an international organization is bound to respect international law<sup>25</sup> has also been used to support the view that the SC, as one of its organs, is also under an obligation to ensure respect for general rules of international law.<sup>26</sup> At the very least, the proposition that the SC

<sup>21</sup> *Ibid.*, at 372, 724–731.

<sup>22</sup> Arangio-Ruiz, ‘On the Security Council’s “Law-Making”’, 3 *Rivista di diritto internazionale* (2000) 609, at 710.

<sup>23</sup> See, among others, Statement dated 29 Dec. 1997 by the Inter-Agency Standing Committee to the Security Council on the Humanitarian Impact of Sanctions, S/1998/147; Note by the President of the Security Council: Work of the Security Council, S/1999/92; Sub-Commission on the Promotion and Protection of Human Rights: The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights, Working Paper Prepared by Mr. Marc Bossuyt, E/CN.4/Sub.2/2000/33; Committee on Economic, Social and Cultural Rights: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, General Comment No. 8 (1997), E/C.12/1997/8, CESCR. For a general assessment, see T. Weiss *et al.*, *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions* (1997).

<sup>24</sup> De Wet, ‘The Security Council as a Law Maker: The Adoption of (Quasi)-Judicial Decisions’, in Wolfrum and Röben (eds.), *supra* note 18, at 183, 193.

<sup>25</sup> See in this respect *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* [1980] ICJ Rep 73, at 89–90.

<sup>26</sup> See Reinisch, ‘Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions’, 95 *AJIL* (2001) 851, at 858–859.

should be subject to peremptory norms of international law (*jus cogens*) seems to be widely shared.<sup>27</sup> The argument is one of logic. If states may not derogate from peremptory norms, the latter must be also opposable to international organizations. To hold the contrary would allow states, at least in theory, to use international organizations to avoid compliance with peremptory norms.<sup>28</sup> Recently, this approach has been confirmed by the Court of First Instance of the EC, which, in the cases of *Yassin Abdullah Kadi* and *Ahmed Ali Yusuf and Al Barakaat International Foundation*, has held that the SC ‘must observe the fundamental peremptory provisions of *jus cogens*’.<sup>29</sup>

The basic truth, however, remains that the SC was created as a peace-enforcing-body in charge of guaranteeing international peace and security after the horror and devastation brought about by World War II. No one could have reasonably anticipated at the time of drafting of the UN Charter that the subsequent practice of the organ would evolve to encompass a general law-making – and previously quasi-judicial – activity to face threats to the international legal order, the nature of which has changed remarkably since the mid 1940s. The extent to which these changes can be accommodated as a matter of treaty interpretation remains controversial. The doctrines of ‘implied powers’ and ‘subsequent practice’ have been invoked to provide legal justification to the evolving practice of the SC, with fervent opponents voicing their concerns about any attempt to reconsider the original role of the SC, namely the political peace-enforcer.<sup>30</sup> As Judge Fitzmaurice put it in his dissenting opinion attached to the ICJ’s Advisory Opinion on Namibia: ‘It was to keep the peace and not to change the world order that the Security Council was set up.’<sup>31</sup>

Be that as it may, it is hard to deny that the ‘textual constraints’ are tenuous, if not altogether non-existent,<sup>32</sup> and that, rather than highly sophisticated scholarly constructions, the ultimate test of the legitimacy of the SC’s action remains the level of acceptance of its practice by the UN Member States. This should not be seen as an abdication to power politics, but, rather, as a pragmatic legal approach to one of the subjects in which the hiatus between theory and practice is most relevant. Given its broad mandate under Chapter VII, a textually convincing argument, as opposed to a

<sup>27</sup> ‘Là . . . s’arrête le balancier : le Conseil de Sécurité a l’obligation absolue de respecter le *jus cogens* . . .’ : Pellet, ‘Rapport introductif. Peut-on et doit-on contrôler les actions du Conseil de Sécurité?’, SFDI, Colloque de Rennes, *Le chapitre VII de la Charte des Nations Unies* (1995), at 221, 237.

<sup>28</sup> ‘. . . [I]t can hardly be maintained that States can avoid compliance with peremptory norms by creating an organization’: Report of the International Law Commission on the Work of its Thirty-Fourth Session, A/37/10, II *Yearbook of the International Law Commission* (1982), Part Two, at 56.

<sup>29</sup> Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI, 21 Sept. 2005, at para. 281; Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI, 21 Sept. 2005, at para. 230.

<sup>30</sup> Arangio-Ruiz, *supra* note 22, at 693.

<sup>31</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Dissenting Opinion of Judge Sir Gerald Fitzmaurice, [1971] ICJ Rep 291, at 294, para. 115.

<sup>32</sup> Koskenniemi, ‘The Police in the Temple. Order, Justice and the UN: A Dialectical View’, 6 *EJIL* (1995) 325, at 328.

policy one, that the SC is prevented from sailing the uncharted waters of international law-making is yet to be produced.

## B *The Need for General Law*

Despite the controversy over the limits attached to its powers under Chapter VII, practical considerations exist that may easily explain why the SC has taken upon itself the task of legislating and imposing sanctions against individuals on a worldwide basis. Traditional law-making mechanisms at the international level are ill-suited to produce general law in a short time span. Therefore, when a prompt normative response is required, the system does not readily possess adequate instruments to react. Multilateral treaty making presupposes a long and cumbersome process of negotiation, let alone the time necessary to ensure national ratification. Furthermore, a treaty's capacity to deploy effects on a large scale depends on the number of parties that have consented to it. In an international community of nearly 200 states it is not easy to secure the consent of each and every state. Paradoxically, the higher the participation in a given multilateral treaty regime, the more likely are the chances that the text results in fairly ineffective provisions, which are the product of mutual concessions and package-deal negotiations. Even lengthier is the law-making process which leads to the development of customary rules. Even though, in principle, this is the only process whereby rules of general application come into being in international law, its features are such as to render its operation impracticable in cases when prompt and specific regulation is needed. As is known, generality of practice and *opinio juris* are required to establish the existence of a customary rule, thus making the passage of time an important, albeit not decisive, element for the formation of custom. Furthermore, the somewhat indeterminate and amorphous character of the customary international law-making process is hardly suited to producing the precise normative standards necessary to provide effective regulation in some areas.<sup>33</sup> Given the level of specificity demanded of the rules aimed at combating terrorism – it suffices to think of the criminalization of a certain conduct or the freezing of the assets of specific individuals and entities – it is difficult to see how any such rule could be the result of customary law-making. As has been aptly noted by some commentators, the proliferation of multilateral fora and their normative output may play an important role in shaping new avenues for the creation of general law at the international level.<sup>34</sup> However, such multilateralism and the heterogeneous character of its law and policy-making mechanisms have yet to be consolidated in a true legislative process of general acceptance and uncontested legitimacy.<sup>35</sup>

<sup>33</sup> 'A body of detailed rules is not to be looked for in customary international law . . .': *Case concerning delimitation of the maritime boundary in the Gulf of Maine area (Canada/United States of America)*, [1984] ICJ Rep 246, at 299, para. 111.

<sup>34</sup> Charney, 'Universal International Law', 87 *AJIL* (1993) 529, at 551.

<sup>35</sup> Bianchi, 'Enforcing International Law Norms against Terrorism: Achievements and Prospects', in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (2004), at 491, 516–517.

In fact, the SC's exercise of powers under Chapter VII is the only available means of promptly producing general law. Little matters if these powers were originally conceived for the sole purpose of allowing the Council to patrol the world and act as a watchdog for the international community, occasionally resorting to sanctions in specific situations by targeting certain states. Compelling reasons exist to justify their use at a time when a normative response of general application is required in order to effectively counter a threat perceived as being of a global character by the international community.

The irony of this is that the SC is, in all likelihood, the least suitable international body that could credibly discharge a legislative function.<sup>36</sup> States are represented unevenly, with the five permanent members exercising a predominant role, its procedure is all but transparent and its competence not strictly delimited. Furthermore, the Council may be characterized by 'the absence of what might be called a legal culture'.<sup>37</sup> Be that as it may, its powers have come in handy in confronting a situation largely perceived as requiring a timely normative response. Considerations of expediency seem to have prevailed until now over any legalistic preoccupation on the proper role of the SC within the UN and, more generally, in world affairs.

### ***C The Contingencies of the Terrorist Threat and Its Implications for Future Action***

As is well known, the SC remarkably expanded, by way of interpretation, the scope of the notion of 'threat to the peace' during the 1990s. Despite some inconsistencies and ambiguities, the concept of threat, originally confined to situations involving the threat of use of military action, has been extended to cover such heterogeneous grounds for intervention as the safe delivery of humanitarian aid and the prevention of massive refugee flows in relation to geographically circumscribed crises.<sup>38</sup> Even the inter-state connotation that originally appeared inherent in the very concept of 'threat to the peace' has slowly disappeared to allow the SC to characterize in this manner situations of a merely internal nature. This broad interpretation seems consistent with the wide measure of discretion that the Charter gives to the Council under Article 39 and has rarely been contested by states. Even for the *Lockerbie* case, perhaps the boldest characterization of all by the SC of a situation amounting to a threat to the peace, it did not encounter major difficulties.<sup>39</sup> The ICJ, some dissonant

<sup>36</sup> As M. Koskenniemi pointed out, 'it is not possible to conceive the Security Council as a legitimate global law-maker': Koskenniemi, 'International Legislation Today: Limits and Possibilities', 23 *Wisconsin Int'l LJ* (2005) 61, at 74.

<sup>37</sup> See Koskenniemi, *supra* note 32, at 3. According to Koskenniemi, these elements 'hardly justify enthusiasm about its [the Security Council's] increased role in world affairs'.

<sup>38</sup> Somalia (SC Res. 733 (1992)) and Haiti (SC Res. 841 (1993)) are the outstanding examples.

<sup>39</sup> See SC Res. 748 (1992) adopting sanctions against Libya for its non-compliance with SC Res. 731 (1992). Res. 748 was adopted by 10 votes to none, with 5 abstentions (Cape Verde, China, India, Morocco and Zimbabwe).

voices notwithstanding,<sup>40</sup> has on its part never dared to challenge the SC's exercise of its discretionary power under Article 39.

Of particular relevance for our purposes is the practice, inaugurated by the SC in the aftermath of the 9/11 attacks, to characterize any act of international terrorism as a threat to international peace and security. Since then, the SC has reiterated this qualification with regard to every single terrorist attack that has occurred worldwide.<sup>41</sup> This marks a dramatic change as previously the SC used to characterize as a threat to the peace the attitude of particular countries *vis-à-vis* terrorist groups or activities.<sup>42</sup> This consolidated trend of past decisions clearly attests that international terrorism has made its way into the category of threats to the peace.

The fact that the SC considers the acts of groups of individuals to amount to a threat to the peace is no novelty.<sup>43</sup> The peculiarity lies, rather, in the fact that the threat in question is neither situation-specific nor time-limited. International terrorism remains fairly indeterminate, given the controversy surrounding its definition or, at least, the scope of application of current definitions, particularly at times of armed conflict.<sup>44</sup> Should one take it that only those terrorist acts that are condemned and qualified as such by the SC on an *ad hoc* basis amount to a threat to peace? Or should one start from the definition given by the SC itself in Resolution 1566<sup>45</sup> and hold that all acts amenable within that definition are threats to the peace, regardless of any specific condemnation of individual attacks? Furthermore, international terrorism in its recent manifestations is largely perceived as a threat of indefinite duration. It is not

<sup>40</sup> See the dissenting opinion of Judge Gros in the advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *supra* note 31: 'that is another attempt to modify the principles of the Charter as regards the powers vested by States in the organs they instituted. To assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government': *ibid.*, at 340, para. 34. See also the dissenting opinion of Judge Sir Gerald Fitzmaurice in the same case: 'limitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally intended': *ibid.*, at 294, para. 116.

<sup>41</sup> See SC Res. 1438 (2002) concerning the bomb attacks in Bali on 12 Oct. 2002; SC Res. 1440 (2002) concerning the taking of hostages in Moscow on 23 Oct. 2002; SC Res. 1530 (2004) concerning the bomb attacks in Madrid on 11 Mar. 2004; SC Res. 1611 (2005) concerning the terrorist attacks in London on 7 July 2005.

<sup>42</sup> See SC Res. 731 (1992), SC Res. 1054 (1996), SC Res. 1267 (1999).

<sup>43</sup> See SC Res. 733 (1992), SC Res. 794 (1992), SC Res. 788 (1992), SC Res. 1132 (1997).

<sup>44</sup> See Report of the Ad Hoc Committee established by General Assembly Res. 51/210 of 17 Dec. 1996, A/60/37, at 23–28.

<sup>45</sup> In this resolution the SC '[r]ecalls 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, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature': SC Res. 1566 (2004), para. 3.

clear if and when international terrorism will be eradicated. Hence, the SC's exercise of normative powers under Chapter VII, traditionally geared to managing time-limited threats with a view to keeping and/or re-establishing international peace and security,<sup>46</sup> risks turning itself into a rehearsal for world governance.

#### D A State of Emergency Exception?

The above remarks pave the way towards another fairly intriguing question. Given the rather exceptional circumstances that have led the SC to broadly interpret its powers under Chapter VII, the argument can be set forth that the SC itself is acting in some sort of state of emergency. From this analogy, the unprecedented character of the terrorist threat would cause states to coalesce on the need to resort to exceptional measures. This situation would be no different than that which occurs in domestic legal orders when they face a threat to the life of the nation.<sup>47</sup> In such exceptional circumstances, special powers may be entrusted to the executive branch of government to counter the threat, having recourse, if necessary, to emergency measures.

The state of emergency analogy is appealing for many reasons. First, it seems to represent quite accurately the prevailing perception that international terrorism is a particularly serious and compelling threat to international peace and security. Second, the state of emergency paradigm may be quite useful at a time when it is increasingly difficult to justify the exercise of certain powers by the SC and an exception is needed to account for its departure from established rules and practices. It is interesting to note that resort to a state of emergency exception has recently been advocated in international legal scholarship to accommodate the changing demands of the international legal regime for the use of force within the framework of the UN collective security system.<sup>48</sup> Since the SC was originally conceived as an international 'police force' to patrol the world and to make sure that in case of a threat to the peace appropriate measures are taken to restore the order, the idea that in exceptional situations it may have recourse to 'special measures', even if not expressly contemplated in the Charter, is a tempting one.

At closer scrutiny, however, the state of emergency analogy hardly holds water. In the first place, Chapter VII powers are themselves an exception. Regardless of the functional link theories between Chapter VI and Chapter VII elaborated in international legal scholarship to explain the relationship between the dispute settlement and sanctioning powers of the SC,<sup>49</sup> it is self-evident that the measures envisaged in Chapter VII are 'emergency' measures that can be resorted to when international peace and security has been violated or is under threat. To allow the SC to enlarge its powers for specific types of threats would be tantamount to creating an exception to

<sup>46</sup> See SC Res. 1448 (2002) whereby the sanctions against UNITA were terminated.

<sup>47</sup> The language is borrowed from derogation clauses in human rights treaties: see Art. 4 ICCPR, Art. 15 ECHR, and Art. 27 IACHR.

<sup>48</sup> See Benvenisti, 'The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies', 15 *EJIL* (2004) 677, at 697–699.

<sup>49</sup> See on this theory Arangio-Ruiz, *supra* note 22, at 655–682.

an already existing exception. Besides the difficulty of conceiving a proper legal basis for such an expansion of powers expressly conferred to the SC by the Charter,<sup>50</sup> the policy implications of such a choice would be dire.

Furthermore, a fundamental feature of state of emergency powers is the temporary character of the special measures that are adopted to face the exceptional situation. With the goal being to restore as soon as possible a state of normalcy, these measures can only be justified if they are strictly required by the exigencies of the situation. These requirements cannot be met by the SC's anti-terror-measures. They have been adopted for an indefinite time. Their implementation in domestic legal systems means that they cannot be easily removed, once the threat has been properly countered, if this is ever the case. As we shall see in greater detail below,<sup>51</sup> no judicial review is readily available to assess whether the adopted measures are strictly necessary to counter the threat, leaving the SC free to determine the legitimacy of its own action. Finally, however broadly one may interpret the SC's powers under Chapter VII, a fundamental difference remains between conceiving the SC as peace enforcer through the use of police powers in specific situations or, rather, as general law maker, adjudicator and enforcer in respect of a situation which represents a fairly indeterminate threat of indefinite duration.<sup>52</sup>

## 2 The Efficacy of the Measures: The Challenge of Implementation and Institutional Responses Thereto

The enormous quantity of reports submitted by states under both regimes, Resolution 1267, as subsequently amended, and Resolution 1373, is the primary source of information for an assessment of the effectiveness of implementing measures taken by states.<sup>53</sup> A systematic and exhaustive analysis of such raw materials is outside the scope of this article. A comprehensive reading of the reports, however, and the common difficulties encountered by states in their implementation efforts allow for some generalizations to be made. An attempt to provide an overall view of the current state of implementation of the SC's anti-terror measures may well fall short of accuracy. However, it may have the advantage of drawing attention to those grey areas which conceal the real challenges of implementation. If the basic pillars and distinctive traits of domestic legal systems vary a great deal from one to another, the hurdles to be overcome in order to effectively implement international standards are, generally speaking, not too dissimilar. Knowledge of the varying techniques of incorporation

<sup>50</sup> For a discussion of the different theories (such as constitutionalism, implied powers, modification by way of custom, and so on) that have been used by legal scholars to justify the expansion of the SC's powers see *ibid.*, at 682–692.

<sup>51</sup> See *infra* at sect. 5.A.

<sup>52</sup> Arangio-Ruiz, *supra* note 22, at 700.

<sup>53</sup> The Counter-Terrorism Committee has received more than 600 reports from Member States since its establishment: see *Report of the Counter-Terrorism Committee to the Security Council for its Consideration as Part of Its Comprehensive Review of the Counter-Terrorism Committee Executive Directorate, S/2005/800*, at para. 30. More than 140 reports have been submitted under SC Res. 1267 (1999).

and legal interpretation come in handy in deciphering the often cryptic reports submitted by national authorities, the primary purpose of which seems to be to demonstrate at all costs their good standing in the international fight against terrorism. This accounts for the overall lack of criticism of the measures imposed by the SC and for the sometimes clumsy efforts made to make the state of domestic implementation appear to be a much smoother and unproblematic reality than it actually is.

### *A Incorporation and Its Limits*

Incorporation of the relevant SC anti-terror measures does not occur in a vacuum. Domestic legal systems not only have their constitutional or statutory rules for incorporation, but also their own criminal law and procedure as well as administrative law and practices, which may be inspired by different legal traditions. Mechanisms to implement relevant international measures may not exist and need to be created or, if they do exist, they may require adjustment to the particular requirements of the standards to be implemented. Nonetheless, the state at the time of implementation will have to consider whether or not additional measures are needed.

Quite obviously, in assessing what measures of implementation are required for UN anti-terror measures, states need to look at their domestic legal system in its entirety and evaluate which particular measures are needed to honour their international obligations. As regards, for instance, the requirements of criminalizing the financing of terrorism, most states seem to have needed new legislation.<sup>54</sup> The making of the 'financing of international terrorism' a distinct criminal offence requires the enactment of an *ad hoc* statute or a modification of the domestic code of criminal law. Some states have already provided for such amendments, while others have introduced bills into their Parliaments.<sup>55</sup> The good will shown by states in abiding by the UN measures leaves the question of the harmonization of the definition of the relevant offence an unanswered question. In other words, while most states have indicated their willingness to implement the criminalization of the financing of terrorism, what would amount to such an offence under domestic law varies a great deal from one country to another. This point is of general interest as it shows that incorporation is rarely fully consistent with the requirements of Resolution 1373.1(a). Given that the provision in question bears on the definition of the crime, the lack of uniform legislative solutions at the domestic level may prejudice the overall effectiveness of the international

<sup>54</sup> See, among others, the Report of Bolivia on the Implementation of Security Council Resolution 1455 (2003), S/AC.37/2005/(1455)/3, at 2; Report of Colombia on the Implementation of Resolutions 1267 (1999), 1333 (2000), and 1390 (2002), S/AC.37/2003/(1455)/39, at 4; Report Submitted by the Republic of Costa Rica Pursuant to Security Council Resolution 1455 (2003), S/AC.37/2004/(1455)/33, at 4; Report of the Czech Republic in Fulfilment of United Nations Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/59, at 6.

<sup>55</sup> See the Costa Rica Report, *supra* note 54, at 4; The Socialist Republic of Vietnam Report Submitted to the Committee Established under Resolution 1267 (1999) of the United Nations Security Council Pursuant to Paragraphs 6 and 12 of Resolution 1455 (2003) of the Security Council, S/AC.37/2003/(1455)/77, at para. 9.3.

regime.<sup>56</sup> Moreover, some states have decided not to bring any modifications to their domestic legal system as the existent anti-money-laundering legislation would also cover terrorism financing.<sup>57</sup> As rightly noted by the CTC, this argument fails to take into account the difference existing between the two phenomena and, in particular, the well-known fact that terrorism financing can also be secured by lawful means.<sup>58</sup>

The wide array of incorporation tools and the limits arising out of such a diversity of incorporation mechanisms is aptly illustrated by the way in which countries have incorporated the Consolidated List. While only a handful of states provide for the automatic incorporation of the list, which becomes automatically part of the domestic legal order,<sup>59</sup> most states require incorporation either by statute or governmental decree.<sup>60</sup> States implementing measures of a general character generally find their proper legal basis in the enabling legislation used to incorporate the UN Charter or international sanctions regimes and in regulations adopted thereunder.<sup>61</sup> Interestingly, some states have not incorporated the Consolidated List at all, either on the ground that the list is merely meant to provide national authorities with factual information on the basis of which legal action can be taken,<sup>62</sup> or on the ground that the general laws of the country concerned 'provide appropriate measures against general subject matters without mentioning specific entities or individuals [sic!].'<sup>63</sup>

Incorporation may be limited also by constitutional provisions. Apart from the concerns expressed by some countries concerning the consistency of some anti-terror measures with constitutional provisions bearing on fundamental freedoms,<sup>64</sup> a fairly recurrent limit can be traced to the prohibition of extradition of a state's own citizens.<sup>65</sup> This may be a bar to the full implementation of the SC's anti-terror measures in so far as it may prevent the smooth functioning of international judicial

<sup>56</sup> See, for instance, Art. 260 *quinquies* of the Swiss criminal code, which creates a 'political exception' to the criminalization of the financing of terrorism: '[a]n act shall not constitute financing of terrorism if it is intended to establish or re-establish a democratic regime or the rule of law or to enable the exercise or safeguarding of human rights'. See the CTC's objections and the Swiss government's response thereto in UN Doc. S/2005/161.

<sup>57</sup> Second Report of Belgium on the Implementation of Security Council Resolution 1373 (2001), S/2003/526, at 6.

<sup>58</sup> Report by the Chair of the Counter-Terrorism Committee on the Problems Encountered in the Implementation of Security Council Resolution 1373 (2001), S/2004/70, at 5.

<sup>59</sup> The most illustrative examples are the Republic of Angola (Report of the Republic of Angola Pursuant to Paragraph 6 of Security Council Resolution 1455 (2003) S/AC.37/2003/(1455)/3, at 4) and the Republic of Belarus (Report of the Republic of Belarus on the Implementation of Security Council Resolution 1455 (2003) S/AC.37/2003/(1455)/25, at 2).

<sup>60</sup> The latter category includes such states as Argentina, Brazil, Cyprus, Liechtenstein, and Russia.

<sup>61</sup> Such states include Australia, partly Canada (dual system), Finland, Iceland, New Zealand, Slovakia, Portugal Switzerland, and Singapore.

<sup>62</sup> Report of the Republic of Guinea Submitted Pursuant to Paragraph 6 of Resolution 1455 (2003), S/AC.37/2003/(1455)/78, at 2.

<sup>63</sup> The Vietnam Report, *supra* note 55, at para 2.1

<sup>64</sup> Supplementary Report Submitted by Algeria to the Counter-Terrorism Committee Pursuant to Security Council Resolution 1373 (2001), S/2003/723, at 4.

<sup>65</sup> Report of Angola on Legislation and Measures for Preventing and Combating Terrorism, Prepared Pursuant to Security Council Resolution 1373 (2001), S/2003/402, at 11.

cooperation schemes in criminal law matters. A conflict may arise, even in the absence of an express constitutional provision, if a statute provides the legal basis for the refusal to extradite a state's own nationals. In any such case, the problem will need be tackled either by statutory amendment or by interpretation. Similar considerations would apply to the requirement that a state be able to punish and bring to justice terrorists irrespective of the place where the crime was committed.<sup>66</sup> The inadequacy of most national legislations to allow for the exercise of jurisdiction over extraterritorial acts of terrorism would be an additional reason for states to ratify and incorporate anti-terror treaties, thus creating a web of jurisdictional obligations and judicial assistance, which could be used either directly or indirectly, by means of interpretation, to make up for the lack of specific provisions in national criminal systems.<sup>67</sup>

### **B Enforcement as a Multifaceted Activity**

Formal incorporation into the domestic legal order of relevant obligations under international law is an essential prerequisite, but not an actual guarantee, that anti-terror measures are effectively enforced. Indeed, enforcement is a fairly complex activity, which ranges from formal incorporation of the relevant international law instrument to the monitoring of its practical application by courts and law enforcement officials. A good example of how enforcement must be carried out by means other than the formal incorporation of international legal standards is the complaint by the Chair of the CTC that states often limit themselves to ratifying anti-terror conventions and then fail to adopt the measures to properly enforce them.<sup>68</sup> Particularly in the field of criminal law and jurisdiction, states should, as a consequence of their participation in treaty regimes, amend their legislations in accordance with the requirements of the treaty. This may entail substantial changes in their systems of criminal law and procedure, which national authorities too often neglect to implement. Regrettably, an overall consideration of national reports shows that states are more concerned with highlighting the adoption of formal measures of incorporation and adjustment of the extant legislation than with the actual practice of enforcement. Other than the impressive figures provided for substantiating their contribution to assets freezing,<sup>69</sup> information about other practical aspects of enforcement proper are usually scant.

<sup>66</sup> See SC Res. 1373, at para. 2(c) and (e).

<sup>67</sup> See the concerns expressed by the CTC: Report by the Chair of the Counter-Terrorism Committee, *supra* note 58, at 6.

<sup>68</sup> *Ibid.*, at 6–7.

<sup>69</sup> See the Report of Switzerland Submitted Pursuant to Security Council Resolution 1455 (2003) S/AC.37/2003/(1455)/44, at 7 (34 million SFr); Report of Canada Pursuant to Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/20, at 12 (CAN\$340, 000); Report of Germany Required Pursuant to Paragraphs 6 and 12 of Resolution 1455 (2003) S/AC.37/2003/(1455)/10, at 10 (€4,935.75); Report of the United Kingdom Pursuant to Paragraphs 6 and 12 of Resolution 1455 (2003), S/AC.37/2003/(1455)/19, para. 12. (£334,428.14); Report of the Government of the United States Called for under Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/26, at 9 (US\$36.3 million).

Along similar lines, one may point to the difficulties that some states have had in the implementation of the assets freeze mandated by the SC.<sup>70</sup> In these countries the freezing of assets is subject to judicial determination of the commission of a crime. The mandatory intervention of the judiciary in the freezing procedures is of particular concern to the UN monitoring organs, which have stressed the risk of giving national judges a ‘veto power’ for the implementation of mandatory measures under Chapter VII of the Charter.<sup>71</sup> Yet other countries have no proper legal basis on which to ground assets freezing. Some envisage prospective amendments to their legislation,<sup>72</sup> while others simply acknowledge the existing situation.<sup>73</sup> Finally, some states rely on existing anti-money-laundering enabling legislation to implement asset-freezing orders under SC resolutions.<sup>74</sup>

One of the areas in which domestic implementation has been most difficult is that concerning the countering of the financing of terrorism by lawful means. As is known, the peculiarity of terrorism financing is that it often takes place not so much via criminal activities but rather by the misuse of non-profit and charitable associations as well as by means of alternative money remittance agencies or informal banking systems such as *hawala*.<sup>75</sup> The impossibility of triggering anti-money laundering mechanisms due to the lawful nature of the relevant transactions makes the fight against this particular form of financing a real challenge in terms of enforcement. Indeed, as attested by some national reports, states find it difficult to effectively handle supervision of the relevant activities. Some states have simply prohibited alternative

<sup>70</sup> See the Report of the Argentine Republic on the Implementation of Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/29, at para. 9; Report on the Steps Taken by the Government of the Republic of Guatemala to Implement Security Council Resolution 1455 (2003) S/AC.37/2003/(1455)/23, at 4; Report of Chile in Implementation of Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/38, at 4 and 8.

<sup>71</sup> ‘To require local court approval prior to freezing the assets of parties listed by the UN would give judges in all 191 Member States a potential veto power over the mandatory decisions of the Security Council, acting under Chap. VII of the Charter. It would also mean that local judges could second-guess the decision of the Committee based on their own reviews of the evidence, which may or may not be the same evidence as that presented to the Committee (because the evidence given to the Committee is generally confidential). Furthermore, this would result in local courts judging United Nations listings based on criminal standards of evidence, despite the fact that the List is not a criminal list. This is untenable’: Third Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, S/2005/572, 9 Sept. 2005, at para. 48.

<sup>72</sup> See, e.g., Thailand’s Implementation Report Pursuant to Paragraphs 6 and 12 of Resolution 1455 (2003), S/AC.37/2003/(1455)/50, at 3.

<sup>73</sup> See, among others, the Report of the Government of Jamaica Pursuant to Paragraphs 6 and 12 of Security Council Resolution 1455 (2003), S/AC.37/2004/(1455)/10, at 4; Report of the Government of the Republic of Nicaragua Submitted in Compliance with Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/82, at 2.

<sup>74</sup> Report of the Principality of Andorra Pursuant to Paragraphs 6 and 12 of Security Council Resolution 1455 (2003) S/AC.37/2004/(1455)/35, at 5; Report of Croatia on the Implementation of Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/33, at para. 9.

<sup>75</sup> See Bantekas, ‘International Law of Terrorist Financing’, 97 *AJIL* (2003), 315, at 321–323 and Gardella, ‘The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation’, in Bianchi (ed.), *supra* note 35, at 415, 419–422.

banking networks,<sup>76</sup> or subjected them to registration requirements.<sup>77</sup> Yet other states are attempting to bring *hawala* within the purview of the banking system.<sup>78</sup> As stated by India, however, “registration” of Hawala is an oxymoron’, as by its very nature the system is clandestine and based on trust.<sup>79</sup> Similar difficulties apply to the control of charitable organizations. Although some ‘red flags’ have been identified to detect abuse,<sup>80</sup> their actual control remains an open challenge, given the technical complexity of supervision and the legislative constraints existing in some countries on the monitoring of such charitable activities.<sup>81</sup>

### C Structural Deficiencies, Omissions and Margin of Discretion

Many countries have signalled their lack of capacity even to honour their reporting obligations. At the occasion of the joint briefing to the SC by the Chairmen of the 1267 and 1540 Sanction Committees and the CTC, Samoa, speaking on behalf of the Pacific Islands, stressed the difficulty of small states with limited resources and ‘many pressing priorities’ to fulfil their reporting requirements.<sup>82</sup> This complaint goes hand in hand with the often-voiced grievance that states generally suffer from a ‘reporting fatigue’ caused by the many reporting requirements to which they are subject.<sup>83</sup>

<sup>76</sup> Supplementary Report of the Islamic Republic of Iran to the Security Council Counter-Terrorism Committee Pursuant to Paragraph 6 of Security Council Resolution 1373 (2001), S/2003/266, at 4; Information Provided by the Russian Federation in Response to the Additional Questions and Observations Prepared by the Counter-Terrorism Committee of the Security Council in Connection with the Supplementary Report of the Russian Federation Submitted in Accordance with Security Council Resolution 1373 (2001), S/2003/839, at 6.

<sup>77</sup> See the Fourth Report of the Netherlands on the implementation of Security Council Resolution 1373 (2001), S/2005/425, at 4.

<sup>78</sup> Third Report of the United Arab Emirates on Additional Information Submitted to the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism, S/2003/1211, at 7.

<sup>79</sup> Fourth Report of India to the Counter Terrorism Committee, S/2004/451, at 8.

<sup>80</sup> See the Fourth Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Security Council Resolutions 1526 (2004) and 1617 (2005) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, S/2006/154, at para. 81. Such red flags include: informal solicitation of donations; transactions that are more complicated than is necessary; actual use of funds different from their stated purpose at the time of collection; the absence of a donor list; hidden donations; little or no fund-raising expenditure, possibly indicating a few wealthy donors; and funds transfers to the same overseas beneficiary through multiple bank accounts.

<sup>81</sup> See the Supplementary Report Submitted by France to the Counter-Terrorism Committee Pursuant to Security Council Resolution 1373 (2001), S/2002/783, at 6; Supplementary Report by Italy to the Counter-Terrorism Committee Pursuant to Security Council Resolution 1373 (2001), S/2003/724, at 7; Denmark’s Further Information Following the Supplementary Report Submitted Pursuant to Paragraph 6 of Security Council Resolution 1373 (2001), S/2004/119, at 10. Art. 78 of the Danish Constitution precludes the State from introducing rules which require associations to obtain permission from the public authorities prior to their formation: *ibid.*

<sup>82</sup> See the letter dated 1 Dec. 2005 from the Chairman of the Security Council Committee established pursuant to Res. 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, S/2005/761, at 3–4.

<sup>83</sup> *Ibid.* The Chairman of the CTC has also recently acknowledged that ‘[t]he seemingly endless requests to report to the Council on counter-terrorism—which, to be fair, come mostly from the CTC—have led States to ask what the purpose of reporting is.’ (See the discussion held at the SC on 30 May 2006 on ‘Threats to international peace and security caused by terrorist acts’ (UN Doc. S/PV.5446), at 5).

Surely, the fact that only a handful of states acknowledge having tracked the presence of Al-Qaida in their territories<sup>84</sup> may contribute to their perception that the strict reporting requirements imposed on them are somewhat redundant. The comparatively less satisfactory record of compliance with reporting requirements under Resolution 1455 as opposed to the good record of compliance under Resolution 1373 may also well be explained on these grounds.

Incontestably, the lack of material resources by states may account for the difficulty of providing full compliance with SC anti-terror measures. For instance, in the sensitive area of immigration and border control, some states have pointed to their structural deficiencies in terms of computerized networked systems or databases at their land border checkpoints.<sup>85</sup> It would be misleading to believe that all structural deficiencies are imputable only to states. The difficulty of identifying persons and entities listed in the Consolidated List is as much the fault of states as of the SC. A significant number of states have highlighted in their reports the difficulty of properly identifying individuals, due to similarities in name, different translations, particularly from the Arabic language, and so on.<sup>86</sup> The little information available, most of the time consisting of first name and surname, makes this an 'insurmountable problem' when dealing with very common names.<sup>87</sup> Although the SC and the CTC have recently attempted to improve information gathering and dissemination of information systems concerning the identification of individuals, this is likely to remain a problem for some time yet.

The absence of an effective supervisory mechanism which ascertains the truth and accuracy of what is voluntarily disclosed by states in their national reports makes the evaluation of the relevance of omissions of and reticence on particular matters a mostly speculative exercise. However, one can hardly resist the temptation to mention that off-shore states do not have difficulties in implementing the anti-financing provisions of Resolution 1373 and that, interestingly enough, banking secrecy is not perceived by interested states as a hurdle in the implementation of asset-freezing or,

<sup>84</sup> See the First Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, S/2004/679, at para. 28.

<sup>85</sup> Report Submitted by the Republic of Benin Pursuant to Paragraph 6 of Security Council Resolution 1455 (2003) and Paragraph 23 of Security Council Resolution 1526 (2004), S/AC.37/2004/(1455)/30, at 5; Report Submitted by Bangladesh Pursuant to Resolution 1455 (2003) S/AC.37/2004/(1455)/13, at 3; Report by the Kingdom of Bhutan Pursuant to Paragraph 6 of Security Council Resolution 1455 (2003) Submitted to the Security Council Committee Established Pursuant to Security Council Resolution 1267 (1999), S/AC.37/2005/(1455)/8, at 2.

<sup>86</sup> Report of Finland Pursuant to Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/11, at 2; Report of Germany Required Pursuant to Paragraphs 6 and 12 of Resolution 1455 (2003), S/AC.37/2003/(1455)/10, at 3; Report of Honduras Prepared by the Secretary of State for Security Pursuant to Paragraph 6 of Security Council Resolution 1455 (2003), S/AC.37/2004/(1455)/16, at 2; Report of Spain in Fulfilment of United Nations Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/5, at 3; Report of the Government of the United States Called for under Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/26, at 3.

<sup>87</sup> Report Submitted by France Pursuant to Security Council Resolution 1455 (2003) Concerning Sanctions against Al-Qa'idah, S/AC.37/2003/(1455)/37, at 3.

generally, of the other anti-terrorism financing provisions.<sup>88</sup> The frequent inconsistencies between the reports rendered by states under either reporting regime is also a reason to wonder to what extent their content reflects the actual state of affairs of each state's implementing practice.<sup>89</sup>

A final note on the margin of discretion enjoyed by states in their implementation efforts may be apt. As is known, many states have seized the opportunity afforded by the implementation of the SC's anti-terror measures to introduce new legislation. In so doing, they have surely attempted to ensure adequate implementation of international standards, the many pitfalls and shortcomings evaluated above notwithstanding. However, this exercise has also allowed states to introduce measures which are not mandated by the SC that nonetheless relate to terrorism. As the Special Rapporteur to the Commission on Human Rights has noted, 'it is essential that offences created under counter-terrorist legislation, along with any associated powers of investigation or prosecution, be limited to countering terrorism' and not be instrumental to unnecessarily extending the reach of criminal law.<sup>90</sup> This risk is far from being an abstract one, particularly in light of the lack of a universally shared definition of what amounts to an act of terrorism. As is known, the Ad Hoc Committee established under General Assembly Resolution 51/210, charged with the task of promoting the adoption of a comprehensive convention on international terrorism, has failed to bring the negotiations to completion. Consideration of the 2001 draft<sup>91</sup> remains at a stalemate, given the difference of views among the negotiating parties on the scope of application of the Convention (Art. 18) and its relation to other anti-terror treaties (Art. 2 *bis*).<sup>92</sup>

An undue expansion of the reach of criminal law may manifest itself in a variety of ways. States may provide too general a definition of either 'terrorism' or 'terrorist group' in their legislation. They may criminalize membership of a terrorist group, regardless of any actual participation in otherwise criminal activities, or they may unduly expand the notion of 'providing support to international terrorism' or 'recruitment for a terrorist group', and so on.<sup>93</sup> It suffices to take a look at the EU

<sup>88</sup> Report of the Principality of Liechtenstein to the Counter-Terrorism Committee Established Pursuant to Security Council Resolution 1373 (2001), S/2001/1253, at 9; Report of the Grand Duchy of Luxembourg to the Committee Established Pursuant to Paragraph 6 of Security Council Resolution 1373 (2001), S/2002/6, at 4; Report on Counter-Terrorism submitted by Switzerland to the Security Council Committee Established Pursuant to Resolution 1373 (2001), S/2001/1224, at 5.

<sup>89</sup> See the First Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, S/2004/679, at para. 29.

<sup>90</sup> Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, E/CN.4/2006/98, at para. 47.

<sup>91</sup> UN Doc. A/59/894, App. II.

<sup>92</sup> Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 Dec. 1996 A/60/37, at 23–28.

<sup>93</sup> Liechtenstein, e.g., indicates in its Report under Res. 1267 that it will introduce into its criminal code a 'terrorist group' offence: '[t]he inclusion of this offence will criminalize mere participation in a terrorist group as a member': Report of Liechtenstein to the Security Council Committee Established Pursuant to Resolution 1267 (1999), S/AC.37/2003/(1455)/52, at 5). The Australian Criminal Code enables the Government to list specific organizations for the purpose of specified terrorist offences: '[t]he effect of this

Framework Decision on Combating Terrorism's broad definition of 'terrorism' and 'terrorist group' to realize the potential danger of the lack of a widely shared international definition of such criminal activities.<sup>94</sup> The consequences in terms of an excess in the criminalization of conduct and in terms of encroachment on human rights may be serious. It is to be regretted that the SC, whilst showing little hesitation in imposing obligations of a general character on the Member States in a number of areas, did not find the courage to also impose a definition of terrorism.<sup>95</sup> To be sure, such a move would have stirred up quite a lot of controversy. However, it would have helped to limit the potential for abuse by reducing the margin of discretion that states have in defining the precise contours of the crimes related to international terrorism in their domestic legal systems.

### D *The Ongoing Institutional Adjustments: The Quest for a Method*

It is perhaps worth mentioning at this stage that the SC has strived to find a methodology of work and an effective supervisory mechanism to follow up on the implementation of its anti-terror resolutions by Member States. This is attested to by the number of adjustments which were considered necessary for the relatively simple institutional machinery that had originally been devised by the creation of the 1267 Sanctions Committee and the 1373 CTC. As regards the latter, one may recall that the CTC was entrusted with the task of supervising the implementation of Resolution 1373, primarily on the basis of the information submitted by states in their national reports. The CTC has also acted as a broker in order to facilitate the supply of technical assistance to states and has developed codes of best practices to help states in their efforts to properly implement the provisions of Resolution 1373.<sup>96</sup>

The difficulties encountered by the CTC in discharging its tasks prompted a reconsideration of its mandate. An important step was the unanimous adoption of Resolution 1535, intended to revitalize the CTC by restructuring it and creating a

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is to criminalise a range of activities associated with those organisations, including recruitment, membership and the provision of support': Report of Australia Pursuant to Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/13, at para. 11.

<sup>94</sup> Arts 1(1) and 2 of the Council Framework Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA), OJ (2002) L164/1. Although these decisions are not meant to have direct effects, the ECJ recently ruled that '[t]he binding character of framework decisions . . . places on national authorities, and particularly national courts, an obligation to interpret national law in conformity': Case C-105/03, *Pupino*, Judgment of 16 June 2005, at para. 34.

<sup>95</sup> See Res. 1566 (2004), in which the SC '[r]ecalls 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, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature': SC Res. 1566 (2004), at para. 3.

<sup>96</sup> On the early days of the CTC see Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism', 97 *AJIL* (2003) 333. See also Bianchi, *supra* note 35, at 532–533.

Counter-Terrorism Executive Directorate (CTED). This was conceived as a 'special political mission' to enhance the capacity of the CTC to monitor the implementation of Resolution 1373. The CTED, the operation of which has been delayed by its late staffing, is to provide the CTC with analysis of implementation by states of Resolution 1373. The CTC will issue policy guidance, which the CTED must implement. By assessing both the efforts of states to implement Resolution 1373 and specific issues arising thereunder, the CTED should bring forward 'a more systematic, consistent and comprehensive' implementation of Resolution 1373, develop further relevant best practices and strengthen the role of the CTC as facilitator of technical assistance.<sup>97</sup> Undoubtedly, however, one of the most innovative tasks for the CTED is to carry out visits to the Member States, with the latter's consent. Until now, six such visits have taken place.<sup>98</sup> The main purpose of country visits is not only to assess the progress made but also to collect information about states' most pressing needs to facilitate the implementation process.

The mandate of the CTC has been further expanded by the SC by means of Resolution 1624 'to include in its dialogue with Member States' the issue of the implementation of the resolution. This resolution is taken up, *inter alia*, with measures to be taken by states to prohibit by law incitement to commit terrorist acts as well as to prevent such conduct. States are also required to ensure that implementing measures conform to their obligations under international law, including human rights, humanitarian law and refugee law. This express reference has been taken to mean that now the CTC 'has a mandate to review that counter-terrorism measures by Member States are compatible with human rights'.<sup>99</sup> Recently, the CTC has formally endorsed this commitment.<sup>100</sup>

At present the CTC is concentrating on revising the reporting regime, with a view to analysing individual states' accomplishments in the implementation of Resolution 1373 and to enhancing dialogue with states on technical assistance. It is of note that the CTED has recently provided a 'Technical Assistance Implementation Plan' pursuant to the 'Operational Conclusions for Policy Guidance Regarding Technical Assistance'

<sup>97</sup> See the Report of the Counter-Terrorism Committee to the Security Council for Its Consideration as Part of Its Comprehensive Review of the Counter-Terrorism Committee Executive Directorate, UN Doc. S/2005/800.

<sup>98</sup> Countries visited so far include Morocco, Kenya, Albania, Thailand, Algeria, and Tanzania. See the Press Release of 10 Feb. 2006, SC/8635.

<sup>99</sup> See the Special Rapporteur's Report, *supra* note 90, at 19. Reference to the duty by States to respect international human rights, humanitarian, and refugee law in the implementation in their anti-terror measures had already been made by SC Res. 1456 (2003), at para. 6.

<sup>100</sup> See 'Conclusions for policy guidance regarding human rights and the CTC', S/AC.40/2006/PG.2, 25 May 2006: '[t]he CTC and CTED, under direction of the Committee, should incorporate human rights into their communications strategy, as appropriate, noting the importance of States ensuring that in taking counter-terrorism measures they do so consistent with their obligations under international law, in particular human rights law, refugee law and humanitarian law, as reflected in the relevant Security Council resolutions'. It is of note that in its early days the CTC considered that '[m]onitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate': Briefing of the first Chair of the CTC to the Security Council on 18 Jan. 2002, S/PV.4453, at 5.

adopted by the CTC on 6 December 2005.<sup>101</sup> The other current priorities of the CTC lie in identifying and/or updating ‘best practices’ in areas covered by Resolution 1373 and in revisiting and deepening relations with international, regional and sub-regional organizations.<sup>102</sup>

As regards Resolution 1267 and its progeny, numerous adjustments have been made to the original supervisory machinery, which solely revolved around the Sanctions Committee. By means of Resolution 1333 the Sanctions Committee was complemented by a ‘Committee of Experts’ with the task of consulting with the Member States. By the same resolution, the Sanctions Committee was asked to consider, when and where appropriate, visiting countries bordering Afghanistan or any other country as may be necessary to improve the full implementation of freezing orders. The unsatisfactory results produced in terms of effectiveness of the sanctions led the SC in Resolution 1363 to create both a ‘Monitoring Group of Experts’ based in New York as well as a ‘Sanctions Enforcement Team’, located in the territory of states bordering Afghan territory. Both organs were to report to the Council through the Sanctions Committee.<sup>103</sup>

Following the enactment of Resolutions 1373 and 1390, whereby the scope of the financial sanctions was expanded to prevent funds being made available to the Taliban, Usama Bin Laden and Al-Qaida, Resolution 1455 called for better coordination between the Sanctions Committee and the CTC and imposed new reporting requirements on states. Resolution 1526 further expanded the mandate of the Sanctions Committee by entrusting it with the tasks of assessing information for the SC’s review and recommending improvements to the current regime. The same resolution also established an ‘Analytical Support and Sanctions Monitoring Team’ to provide technical assistance to the Sanctions Committee and to produce on a biannual basis a report to the SC on the implementing measures taken by Member States.<sup>104</sup> The reports submitted so far have insisted, in the broader framework of the management of the Consolidated List, on how to improve the fairness of the listing and delisting procedures, particularly *vis-à-vis* the strong reservations voiced by states.<sup>105</sup> The mandate of the ‘Analytical Support and Sanctions Monitoring Team’ was extended by Resolution 1617, which also gave guidelines for the inclusion of individuals and groups in the Consolidated List.<sup>106</sup> The Secretary-General was invited by the SC to increase the level of cooperation between Interpol and

<sup>101</sup> See the 27 Feb. 2006 letter by the Assistant Secretary General of the CTED addressed to the Chairman of the CTC regarding the revised ‘Technical Assistance Implementation Plan’.

<sup>102</sup> See the Briefing by the Counter-Terrorism Committee Chairman to the Security Council on 21 Feb. 2006, available at [www.un.org/sc/ctc/21feb.shtml](http://www.un.org/sc/ctc/21feb.shtml) (last visited on 12 May 2006).

<sup>103</sup> On the operation of the 1267 Sanctions Committee and its subsidiary bodies see Rosand, ‘The Security Council’s Effort to Monitor the Implementation of Al Qaeda/Taliban Sanctions’, 98 *AJIL* (2003) 745.

<sup>104</sup> Hitherto the Monitoring Team has produced four reports: see UN Docs. S/2004/679 of 25 Aug. 2004; S/2005/83 of 15 Feb. 2005; S/2005/572 of 9 Sept. 2005; and S/2006/154 of 10 Mar. 2006.

<sup>105</sup> See Annex I to the Letter dated 1 Dec. 2005 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council, S/2005/761, at para. 37.

<sup>106</sup> Among other things, Res. 1617: shed light on the definition of the expression ‘associated with’ Al-Qaida, Usama bin Laden, and the Taliban (para. 2); decided to authorize the release of statements of the case, under some circumstances (para. 6); and requested ‘States to inform to the extent possible, and in writing,

the Sanctions Committee. From the institutional perspective it is also worth noting that the SC has started holding briefings with the three extant anti-terror committees which, presumably, should help broach trans-sectoral issues such as state reporting and technical assistance in a more comprehensive and effective way.<sup>107</sup>

The above remarks clearly show the difficulties that the SC has encountered in managing the implementation of the sanctions regime and the obligations laid down in Resolution 1373. The numerous institutional adjustments it had to resort to in order to ensure proper supervision of the implementation of its own measures ultimately point to the SC's inadequacy in discharging a function for which it is both ill-suited and insufficiently equipped. Such a rehearsal for the road to world government has until now proved to be paved with enormous difficulties. The lack of intrusive and systematically applied supervisory mechanisms on the part of the SC makes it impossible to guarantee a satisfactory degree of effectiveness of the measures concerned. This is all the more so when reliance on states' domestic enforcement machineries for the implementation of international standards is required. However, the decentralized character of the international community, the enormous discrepancies in terms of available resources by states as well as the occasional lack of political will to actually enforce anti-terror measures make the task of ensuring harmonization and effectiveness of regulation a fairly daunting one. Clarity on intra-institutional allocation of responsibilities<sup>108</sup> and coordination among international, regional and sub-regional organizations appear to be indispensable prerequisites for the attainment of such a goal.<sup>109</sup> How to make 'paper truths' resulting from states' reports into 'ground truths', duly verified by competent supervisory organs, remains a constant challenge and an ongoing effort.<sup>110</sup>

### 3 The Legality of the Implementing Measures against the Background of Other Rules of International Law, Particularly Human Rights Law

The issue of the consistency (or lack thereof) of the SC's anti-terror measures with other rules of international law, particularly human rights law, has attracted

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where possible, individuals and entities included in the Consolidated List of the measures imposed on them . . . and, in particular, the listing and de-listing procedures' (para. 5).

<sup>107</sup> See SC/8536.

<sup>108</sup> See the concerns expressed by the CTC concerning the co-ordination between its sole responsibility for providing policy guidance to the CTED and the Secretary General's responsibility for oversight and management issues. See Report of the Counter-Terrorism Committee to the Security Council for its Consideration as Part of Its Comprehensive Review of the Counter-Terrorism Committee Executive Directorate, S/2005/800, at para. 10. Other issues of co-ordination of an intra-institutional character concern the co-ordination with the Monitoring Team established under Res. 1526 (2004) and the experts on the Committee established pursuant to Res. 1540 (2004): *ibid.*, at para. 26; the strengthening of co-operation with such other UN bodies as the UNDP as well as co-ordination with the Sanctions Committees under Res. 1267 and 1540.

<sup>109</sup> See UN Doc. E/CN.4/2006/98, *supra* note 90, at paras. 19–24.

<sup>110</sup> The expressions 'paper truths' and 'ground truths' are used by Cardenas in 'The United Nations Security Council's Quest for Effectiveness', 25 *Michigan J Int'l L* (2004) 1341, at 1343.

considerable attention, particularly from the perspective of the limits to which the SC would be subject under international law.<sup>111</sup> Less attention has been paid to the issue of whether states must respect such rules when implementing SC resolutions. The issue has become even more compelling since the adoption of Resolution 1456 (2003). The resolution adopted by the SC at the level of Ministers of Foreign Affairs affirms that ‘States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, in particular human rights, refugee and humanitarian law.’<sup>112</sup> This sweeping statement somewhat shifts to the states the burden of proving that the anti-terror measures are consistent with other rules of international law. Regardless of whether the commands emanating from the SC are consistent *per se* with international law, states are under an obligation to make sure that their implementation does not violate international law. An issue of legality proper (i.e. of consistency of a certain conduct with legally binding rules) thus arises, which may bear on the perception of legitimacy of anti-terror measures and negatively reflect on their overall effectiveness. Although the risk that implementing measures may negatively affect human rights has been the object of sparing remarks by states in their national reports,<sup>113</sup> it is fair to assume that, given the potential for encroachment upon fundamental human rights, legal proceedings challenging anti-terror measures will be on the rise in the near future.<sup>114</sup> Notwithstanding the surprisingly low number of extant legal challenges before domestic courts, at least according

<sup>111</sup> See: ‘A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change’, A/59/565, at para. 152: ‘the Security Council must proceed with caution. The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions’. See also the declaration made by Liechtenstein at the recent discussion held at the SC on 30 May 2006, *supra* note 83: ‘[t]here is no doubt that United Nations organs, when imposing measures that have a direct and dramatic impact on the rights of individuals, must respect international standards of human rights in a similar manner as States would have to’ (at 30).

<sup>112</sup> Res. 1456 (2003), at para. 6.

<sup>113</sup> Report of the Czech Republic in Fulfilment of United Nations Security Council Resolution 1455 (2003) S/AC.37/2003/(1455)/59, at 6; Report of the Republic of the Fiji Islands to Security Council Committee Al-Qaida and Taliban Resolution 1267, S/AC.37/2004/(1455)/39, at 3 and 6; Report of the United Republic of Tanzania Pursuant to Security Council Resolution 1455 (2003), S/AC.37/2005/(1455)/10, at 3.

<sup>114</sup> The Governments of Germany, Switzerland, and Sweden commissioned the Watson Institute for International Studies at Brown University to draft a report on the subject of targeted sanctions and human rights. The Report, entitled ‘Strengthening Targeted Sanctions through Fair and Clear Procedures’, is now available at [www.watsoninstitute.org](http://www.watsoninstitute.org) (last visited 6 June 2006). See also the concern voiced by Austria, speaking on behalf of the EU, at the occasion of the discussion held at the SC on 30 May 2006 on ‘Threats to international peace and security caused by terrorist acts’, *supra* note 83: ‘[w]e believe that the Security Council should devote special attention to that matter, as a negative court ruling would not only put the Member States concerned in a difficult position but might also call the whole system of targeted United Nations sanctions into question’ (at 26). For an overall view of the litigation by or relating to individuals on the Consolidated List, see Annex to the Fourth Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Security Council Resolutions 1526 (2004) and 1617 (2005) concerning Al-Qaida and the Taliban and Associated Individuals and Entities, UN Doc. S/2006/154.

to national reports,<sup>115</sup> and before international tribunals,<sup>116</sup> individual claims are likely to be raised in a number of jurisdictions. It would be desirable that such claims be framed in their proper legal context, which inevitably includes consideration of international human rights law. Below are some examples of rights which may be affected by states' implementing measures. It goes without saying that the relevance of each right will depend on its customary nature or on whether a particular state is a party to the treaty which contemplates it.

### A The Right to Fair Trial

Many of the fundamental guarantees that have come to be regarded in their entirety as constituting the right to fair trial may be of relevance in this context. In its General Comment No. 29, the Human Rights Committee (HRC) held that 'fundamental requirements of fair trial' must not be derogated from by states in a state of emergency, regardless of the right of fair trial not being included in the list of non-derogable rights under Article 4 of the ICCPR.<sup>117</sup> The International Criminal Tribunal for the former Yugoslavia also recognized the *jus cogens* character of Article 14 of the ICCPR.<sup>118</sup> The right to fair trial applies both to criminal charges as well as to the determination of rights and obligations in civil proceedings. Although the HRC has not spelt out the requirements for characterizing a criminal charge, the European Court of Human Rights (ECtHR) has identified some criteria, such as the characterization of the offence, its nature and the gravity of the sanctions attached to the offence in order to determine the applicability of fair trial guarantees in criminal proceedings.<sup>119</sup> It is worth noting that the criteria are alternative and not cumulative.<sup>120</sup> Undoubtedly, SC measures providing for inclusion of an individual in a black list and the ensuing financial sanctions could well be amenable within the notion of criminal charge under the law of the European Convention.<sup>121</sup> Although the relevant SC's measures do not

<sup>115</sup> Report of the Government of the United States Called for under Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/26, at 4; Report by Sweden on the Implementation of Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/2, at 3; Report of Italy to the Committee Established Pursuant to Security Council Resolution 1267 (1999), Submitted in Accordance with Resolution 1455 (2003), S/AC.37/2003/(1455)/40, at 9; Updated Report of Turkey on Steps Taken to Implement the Measures Imposed by Paragraph 4 (b) of Resolution 1267 (1999), Paragraph 8 of Resolution 1333 (2001) and Paragraphs 1 and 2 of Resolution 1390 (2002), S/AC.37/2003/(1455)/6, at 4; Report of Pakistan to the 1267 Committee on Implementation of United Nations Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/35, at 4.

<sup>116</sup> *Kadi v. Council and Commission*, *supra* note 29; *Yusuf v. Council and Commission*, *supra* note 29.

<sup>117</sup> See General Comment No. 29, CCPR/C/21/Rev.1/Add.11, at para. 16.

<sup>118</sup> Appeal Judgment on Allegations of Contempt against Prior Council, Milan Vujan, Case No.: IT-94-1-A-AR77, Judgment of 27 Feb. 2001.

<sup>119</sup> Other relevant criteria include the stigma of the charge, relegation of the individual to the margins of social life, and the scope of the freezing measures.

<sup>120</sup> *Ravnborg v. Sweden*, ECtHR (1994) Series A, No. 283-B, 18 EHRR (1994) 38, at para. 30.

<sup>121</sup> Quite understandably, the 1526 Monitoring Team resists the view that the List be considered a criminal list: see Third Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004), concerning Al-Qaida and the Taliban and associated individuals and entities, UN Doc. S/2005/572, at paras. 39–43.

refer to any criminal charge – if one takes the latter to mean the official notification to have committed a criminal offence – the ECtHR has held that a criminal charge ‘ . . . may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect’.<sup>122</sup> Assuming that this were the case, principles such as the presumption of innocence would be applicable.<sup>123</sup> By imposing sanctions against individuals short of any judicial proceedings in which charges have been discussed and a verdict rendered by an impartial tribunal the very essence of the right to be presumed innocent is jeopardized.<sup>124</sup> Furthermore, the nature of the SC as a tribunal as well as its impartiality<sup>125</sup> could be easily challenged. Regardless of its exercise of quasi-judicial powers, the SC remains a political organ which makes its decisions on the basis of political considerations, enjoying an almost unfettered discretion. The procedure which leads to the inclusion of persons in the list and to the triggering of sanctions against them does not qualify as a ‘fair and public hearing’ under the relevant human rights instruments. Nor are the other requirements of a right to fair trial met. The individual concerned has no right to be heard, let alone the right to examine or have examined witnesses against him or on his behalf. Such a flagrant violation of the principle of ‘equality of arms’ goes hand in hand with the practical impossibility of exercising the individual’s right to defend himself.

<sup>122</sup> See *Eckle v. Germany*, ECtHR (1982), Series A, No. 51, 5 EHRR (1983) 1, at para. 73; *Foti and others v. Italy*, ECtHR (1982), Series A, No. 56, 5 EHRR (1983) 313, at para. 52.

<sup>123</sup> The principle of presumption of innocence must be applied not only by the judiciary, but also by any other public authorities: see General Comment No. 13 of the Human Rights Committee, HR\GEN\1\Rev.1 (1994), at para. 7. See also, in the context of the ECHR, *Alenet de Ribemont v. France*, ECtHR (1995) Series A, No. 308, at para. 36.

<sup>124</sup> In this context, it is interesting to refer to a recent case decided by the ECtHR (*SEGI and others v. 15 States of the European Union*, Apps Nos 6422/02 and 9916/02, ECtHR (2002), Decision of 23 May 2002). The applicants claimed to be victims of a violation of Arts 6 and 8 of the ECHR, as they had been identified as terrorist organizations under two texts adopted by the EU Council (Common Position 2001/930/CFSP and Common Position 2001/931/CFSP). In particular, the two entities came within the purview of Art. 4 of Common Position 2001/931/CFSP, which aimed at improving police and judicial co-operation between the Member States of the EU in the fight against terrorism. The Court concluded that ‘[t]he mere fact that the names of two of the applicants (Segi and Gestoras Pro-Amnistía) appear in the list referred to in that provision as “groups or entities involved in terrorist acts” may be embarrassing, but the link is much too tenuous to justify application of the Convention. The reference in question, which is limited to Article 4 of the common position, does not amount to the indictment of the “groups or entities” listed and still less to establishment of their guilt. In the final analysis, the applicant associations are only concerned by the improved cooperation between member States on the basis of their existing powers and they must accordingly be distinguished from the persons presumed to be actually involved in terrorism who are referred to in Articles 2 and 3 of the Common Position’. The Court added that Art. 4 ‘contains only an obligation for member States to afford each other police and judicial cooperation, a form of cooperation which, as such, is not directed at individuals and does not affect them directly’. It is fair to speculate that the Court would reach a different conclusion if it were possible to prove that the two entities were directly affected by the measures, a requirement which would surely be met if individuals and/or entities were the object of financial sanctions.

<sup>125</sup> For the test of impartiality as applied by the ECtHR see *De Cubber v. Belgium*, ECtHR (1984) Series A, No. 86, 7 EHRR (1985) 236, at para. 24; *Hauschildt v. Denmark*, ECtHR (1989) Series A, No. 154, 12 EHRR (1990) 266, at para. 46.

As regards the applicability of the right to fair trial to civil proceedings, it is beyond controversy that it would apply to any suit in which the right to property is involved. Furthermore, its applicability seems warranted also in cases in which the protection of one's reputation is at stake.<sup>126</sup> The right of an individual to go before a court to seek to exculpate himself of the charges made against him has also been acknowledged by the ECtHR as a right amenable within the general scope of the right to fair trial.<sup>127</sup>

## B Nullum Crimen

Yet another ground for challenging the implementation of SC anti-terror measures from the perspective of human rights law would be the principle of *nullum crimen/ nulla poena sine lege*. The fundamental character of this principle attested to by several sources, including its qualification as a non-derogable right under relevant human rights treaty law, makes its consideration compelling in the present context. As is known, the principle requires, *inter alia*, that the offence for which sanctions are provided be clearly defined at law. Assuming that the measures of implementation of Resolution 1373 may withstand the test of *nullum crimen* in so far as domestic legislation provides for criminal law provisions which specifically characterize the offence and the penalties attached to its violation, *quid* for the freezing measures provided by Resolution 1267 as subsequently amended? Are the latter specific enough to meet the requirement of the principle of *nullum crimen*? In this respect, it is interesting to note that the ECtHR has recently held that '[i]t is not . . . apparent . . . that a resolution of the Security Council is sufficient in itself to create an "international offence" that is prosecutable'.<sup>128</sup> Along similar lines the Swiss federal tribunal has maintained that the principle of *nullum crimen* prevents the sanctioning by domestic courts of conduct, the criminal character of which is provided for only in international law, unless the relevant international law provision is directly applicable in the forum state.<sup>129</sup>

## C The Right to a Remedy

Despite the recent efforts to ameliorate the procedure for inclusion in and removal from the Consolidated List,<sup>130</sup> no judicial remedy exists within the UN to challenge

<sup>126</sup> See, for instance, *Zollmann v. UK*, in which the ECtHR held: 'statements attributing criminal or other reprehensible conduct are relevant rather to considerations of protection against defamation and adequate access to court to determine civil rights and raising potential issues under Articles 8 and 6 of the Convention': *Zollmann v. United Kingdom*, ECtHR (2003), Reports of Judgments and Decisions 2003-XII.

<sup>127</sup> See *Golder v. UK*, ECtHR (1975), Series A, No. 18, 1 EHRR (1975) 524, at para. 40. See also *Rotaru v. Romania*, ECtHR (2000), Reports of Judgments and Decisions 2000-V, at para. 44.

<sup>128</sup> *Zollmann v. UK*, *supra* note 126.

<sup>129</sup> Judgment of 29 Apr. 2002 in *Ministère public du canton de Tessin v. A and B*, summarized at 13 *Revue Suisse de Droit International* (2003) 449.

<sup>130</sup> See the minutes of the discussion held at the SC on 30 May 2006, *supra* note 83, in which several delegations stressed 'the need to establish procedural fairness and an effective remedy within the current system' (Greece, at 10). Denmark reiterated its proposal 'to establish an independent review mechanism—an ombudsman—to which individuals . . . would have direct access': *ibid.*, at 8. France proposed 'that a focal point be set up within the Secretariat for the direct receipt of listed individuals requesting delisting or exemption': *ibid.*, at 22.

one's presence in the list.<sup>131</sup> States have themselves voiced concern about the unfairness of the procedure.<sup>132</sup> Among the numerous concerns that may arise in this respect, it suffices to mention that the need to resort to the intermediation of a state for the purpose of representing one's case before the SC makes the remedy by definition 'not directly available' to the individual concerned.<sup>133</sup> Furthermore, the effectiveness of the remedy can aptly be called into question when it is administered by an entity which enjoys an unfettered discretion.<sup>134</sup> It is of particular note that the ECtHR has held that Article 13 of the ECHR 'requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress'.<sup>135</sup> It is difficult to see how states that have an obligation to guarantee an effective remedy under applicable treaty law could be deemed to be acting consistently with their international obligations if they were to implement mechanically and without further guarantees SC anti-terror measures.

#### D *The Right to Property*

Inevitably, the freezing of assets implies an encroachment on the right to property enjoyed by individuals. States' implementing measures would need to take this aspect into account against the background of domestic constitutional law provisions<sup>136</sup> and relevant treaty law obligations which may be incumbent on the state.<sup>137</sup> For the most part, all relevant legal instruments provide for exceptions to the enjoyment of the right to property which – most likely – could accommodate the security concerns on

<sup>131</sup> As is known, under Art. 2 of the ICCPR and Art. 13 of the ECHR, the right to a remedy can be invoked only in relation to the violation of another right. In the case at hand, surely the right to fair trial could be invoked, as well as the right to property, although invocation of the latter would be limited to the ECHR, as the ICCPR does not guarantee it.

<sup>132</sup> Second Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, S/2005/83, 15 Feb. 2005, at para. 53.

<sup>133</sup> In two recent judgments (Case T–253/02, *Chafiq Ayadi v. Council of the European Union*, Judgment of the CFI of 12 July 2006, at para. 146, and Case T–41/04, *Faraj Hassan v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI of 12 July 2006, at para. 116), the EC CFI drew an obligation for the EU Member States from Art. 6 EU promptly to ensure that the case of individuals and entities challenging their inclusion in the list is 'presented without delay and fairly and impartially to the [Sanctions] Committee': *Chafiq Ayadi*, at para. 149; *Faraj Hassan*, at para. 119). Should states fail to fulfil this obligation, individuals should be allowed to bring an action for judicial review before the national courts against competent national authorities.

<sup>134</sup> *Hassan and Tchaouch v. Bulgaria*, ECtHR, App. No. 30985/96 (2000), at para. 100. See also *Daniel Monguya Mbenge v. Zaire*, Human Rights Committee, Communication No. 16/1977, CCPR/C/18/D/16/1977, at para. 18.

<sup>135</sup> See *Klass and others v. Germany*, ECtHR, Series A, No. 28, 2 EHRR (1978) 214, at para. 64.

<sup>136</sup> See Art. 26 of the Federal Constitution of Switzerland; Art. 14 of the Constitution of Germany.

<sup>137</sup> See Art. 1 of the First Protocol to the ECHR; Art. 21 of the American Convention on Human Rights.

which the SC's resolutions are grounded.<sup>138</sup> The fact that Resolution 1452 provides for a regime of exceptions to the freezing of assets on humanitarian grounds<sup>139</sup> may further weaken the argument that such restrictions to the right to property are by themselves contrary to human rights. However, recent litigation concerning the right to property as enshrined in Protocol I to the ECHR sheds light on how anti-terror measures infringing on proprietary rights can be upheld. In the *Bosphorus* case, the ECtHR held that a presumption of compliance with the ECHR by contracting parties exists when the latter comply with legal obligations arising out of their EU membership. This presumption can only be rebutted by showing that the protection of Convention rights in a given case are 'manifestly deficient'.<sup>140</sup> The 'equivalent protection' test, used by the ECtHR to assess the human rights protection system under EU law and to trigger the presumption of consistency, bears equally on substantive and procedural aspects.<sup>141</sup> *A contrario*, it can be argued that if the anti-terror measures are not implemented by the EU, but by the state directly, it would be difficult to make a case for the UN guaranteeing 'equal protection' to European Convention rights. In such a case the presumption of consistency, particularly in light of the lack of any effective remedy within the UN system, could be easily rebutted and lead to a finding that the contracting party is in breach of Protocol I.

Peculiar indeed is the treatment of the issue by the European Court of First Instance (CFI) in the cases of *Kadi* and *Yusuf*. The CFI held that an arbitrary deprivation of property could be regarded as 'contrary to *jus cogens*'<sup>142</sup> and contrasted the temporary character of freezing measures to confiscation.<sup>143</sup> Indirectly, one feels entitled to infer that measures of a confiscatory nature such as expropriation without compensation

<sup>138</sup> Art. 1 of Prot. I to the ECHR reads: '[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. See also Art. 21 of the American Convention on Human Rights: '[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law'.

<sup>139</sup> The exceptions apply to funds and other financial assets or economic resources that have been determined by the relevant State(s) to be: (a) necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources, after notification by the relevant State(s) to the Committee established pursuant to resolution 1267 (1999) of the intention to authorize, where appropriate, access to such funds, assets or resources and in the absence of a negative decision by the Committee within 48 hours of such notification; (b) necessary for extraordinary expenses, provided that such determination has been notified by the relevant State(s) to the Committee and has been approved by the Committee: see Res. 1452 (2002), para. 1.

<sup>140</sup> *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, ECtHR (2005), Judgment of 30 June 2005, at para. 156.

<sup>141</sup> *Ibid.*, at para. 155.

<sup>142</sup> *Kadi v. Council and Commission*, *supra* note 29, at para. 242; *Yusuf v. Council and Commission*, *supra* note 29, at para. 293.

<sup>143</sup> *Kadi*, *supra* note 29, at para. 248; *Yusuf*, *supra* note 29, at para. 299. This reasoning was later confirmed by the CFI in *Chafiq Ayadi v. EU Council*, *supra* note 133, at para. 135 and *Faraj Hassan v. Council and Commission*, *supra* note 133, at para. 105.

could qualify as arbitrary deprivations of property and therefore might be contrary to *jus cogens*. Besides making foreign investors happy at the prospect of being able to invoke a *jus cogens* violation in case of nationalization or expropriation without compensation, the CFI presumably overlooked the circumstance that its finding would presumably render null and void those parts of SC Resolution 1483 that provides for the confiscation and transfer to the Development Fund for Iraq of the financial assets and economic resources removed from Iraq or acquired by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members.<sup>144</sup>

## 4 Institutional Unbalance, Normative Conflict and Beyond: The Risk of Undermining the Cohesion of the System

### A *The Absence of Checks and Balances*

While examining the issue of the legality of its own creation and, in particular, whether the requirement that any tribunal ‘be established by law’ was met by the modalities of its creation, the Appeals Chamber of the ICTY noted in passing that ‘the legislative, executive and judicial division of powers which is largely followed in most municipal legal systems does not apply to the international setting nor, more specifically, to the setting of an international organisation such as the United Nations’.<sup>145</sup> Few would contest the basic wisdom of these words and dare argue the contrary. Indeed, the design of the Charter is one of separation of functions and mutual non-interference. Each and every organ is supposed to operate independently of the others within their respective spheres of competence. Furthermore, the organs enjoy a wide measure of discretion as regards the auto-determination of their own competence.<sup>146</sup> Overall, the doctrine of parallelism of powers and functions, developed by the ICJ over time,<sup>147</sup> has been subject to little challenge, were it not for the recent, not too subliminal message sent by the ICJ to the SC about the evolutive interpretation of Article 12 of the Charter and the competence of the GA on matters bearing on international peace and security.<sup>148</sup> In fact, the allocation of powers by the UN Charter to the main organs of the Organization does not correspond to the traditional understanding of allocation of powers by constitutional arrangements in national legal orders. For the

<sup>144</sup> See SC Res. 1483 (2003), at para. 23.

<sup>145</sup> *Prosecutor v. Dusko Tadic aka ‘Dile’*, IT-94-1, ICTY, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, at para. 43.

<sup>146</sup> M. Bedjaoui, *The New World Order and the Security Council. Testing the Legality of its Acts* (1994), at 11–12.

<sup>147</sup> *United States Diplomatic and Consular Staff in Tehran (United States/Iran)*, [1980] ICJ Rep 3, at 21–22 (para. 40); *Military and Paramilitary Activities in and against Nicaragua*, [1984] ICJ Rep 392, at 434–435 (para. 95); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, [1993] ICJ Rep 3, at 18–19 (para. 33).

<sup>148</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136, at 149–150, at paras. 27–28. See on this point Bianchi, ‘Dismantling the Wall: the ICJ’s Advisory Opinion and Its Likely Impact on International Law’, 47 *German Yearbk Int’l L* (2004) 343, at 363 ff.

same reason, no built-in system of checks and balances was conceived by the drafters of the Charter, nor has it emerged in subsequent practice.

At closer scrutiny, however, if one takes the doctrine of separation of powers and its ancillary concept of checks and balances not as constitutional law doctrines grounded in any particular domestic system, but rather as concepts related to an area of political thought with much wider connotations,<sup>149</sup> their inspiring motif and underlying policy rationales are fairly simple: power must not be concentrated in one entity and must be subject to some control. This intuitive representation of the concept makes its transposition into the international legal system a plausible interpretive paradigm. This is all the more so at a time when the organ which was primarily conceived as a peace-enforcer is starting to legislate and take upon itself tasks which the drafters of the Charter had probably not envisaged. The UN in its current institutional setting is unsuited to accommodate a legislative function for which it was neither designed nor equipped. It is therefore not surprising that no built-in mechanism of control is in place to counter the risk of abuse by the SC of its unilaterally claimed new prerogative.<sup>150</sup>

It may also be tempting to look outside the UN framework to see whether some degree of control can be exercised by states in a diffuse way and outside any formal legal framework. In this respect, it is interesting to note that states are very reluctant to individually voice criticism of SC resolutions. While they seem willing to express a favourable attitude towards human rights when shielded by the institutional screen of the GA, for example, their voices become feeble, if they can be heard at all, when in their national reports they must account for their record of implementation of SC anti-terror measures. Nor does civil society seem willing for the time being to take on the task of putting pressure on their own governments to adjust their policies and make them more considerate of fundamental rights. Governments know very well that to many voters the terrorist threat is emotionally too compelling to allow for less than an unconditional fight. Only recently, with the self-perception that anti-terror measures may seriously encroach upon everybody's fundamental rights has the risk of drawing the line too close to security when balancing security needs and individual freedoms been unveiled to the public at large.<sup>151</sup> Generally, in the area of human rights, shame is easily mobilized against states which do not respect them. In an unexpected reversal of perspective, the mobilization of shame seems to operate in the opposite way. States that are not perceived to act harshly against terrorism are singled out and frowned upon.

Be that as it may, no mechanism of checks and balances – however primitive and rudimentary – can effectively perform its tasks without some degree of judicial involvement. This is why a look at the *vexata questio* of judicial control over SC acts now seems to be in order.

<sup>149</sup> See M.J.C. Vile, *Constitutionalism and the Separation of Powers* (2nd. edn., 1998).

<sup>150</sup> See, however, the considerations advanced *supra* at sect. 2.

<sup>151</sup> See the US Senate Judiciary Committee Hearing on 'War Time Executive Power and the NSA's Surveillance Authority' held last Feb. and available at <http://judiciary.senate.gov/hearing.cfm?id=1770> (last visited 25 May 2006).

## B Limited Judicial Scrutiny

The possibility of exercising judicial scrutiny over SC resolutions has attracted scholarly attention, particularly from the standpoint of the power – or lack thereof – of judicial review by the ICJ.<sup>152</sup> Discussion of such a thoroughly examined issue in this context would be redundant. Suffice it to recall that no express power of judicial review is provided for in the Charter as regards the acts of the GA and the SC. This is hardly surprising as the UN Charter laid down an institutional framework in which each and every organ is fundamentally free to act within the powers attributed to it by the Charter itself. No coordination mechanism, with the noticeable exception of Article 12, was envisaged to avoid overlap and mutual interference. This has not hampered the Court from exercising, at least incidentally, its judicial scrutiny over the acts of other UN organs. At times this has been done more or less explicitly, at other times the ICJ has acted somewhat surreptitiously, by denying exercise of any form of judicial scrutiny while at the same time indirectly upholding the legitimacy of resolutions of either the GA or the SC.<sup>153</sup>

Indirect instances of judicial scrutiny over the acts of UN organs can be found also in the case law of other international tribunals. The Appeals Chambers of the ICTY and the ICTR, respectively in *Dusco Tadic* and *Joseph Kanyabashi*, tackled the issue of the legitimacy or ‘constitutionality’ of the *ad hoc* tribunals.<sup>154</sup> The argument that the SC had no power to create *ad hoc* criminal tribunals was rebutted and Article 41 of the UN Charter was identified as a proper legal basis for their establishment.<sup>155</sup> More recently, in *Kadi* and *Yusuf*, the European Court of First Instance broached the issue of judicial review of SC resolutions in the context of an action for annulment of the EC Regulations imposing financial sanctions against the Taliban, Usama Bin Laden and the Al-Qaida network.<sup>156</sup> The Court, while acknowledging that in principle the resolutions of the SC fall ‘outside the ambit’ of its judicial review and that it had no authority to test even indirectly their lawfulness under Community law,<sup>157</sup> considered itself

<sup>152</sup> Callisch, ‘Is the International Court Entitled to Review Security Council Resolutions Adopted under Chapter VII of the United Nations Charter?’, in N. Al-Nauimi and R. Meese (eds.), *International Legal Issues Arising under the United Nations Decade of International Law* (1995), at 633; Akande, ‘The ICJ and the Security Council: Is There Room for Judicial Control of the Decisions of the Political Organs of the UN?’, 46 *ICLQ* (1997) 309; Alvarez, ‘Judging the Security Council’, 90 *AJIL* (1996) 1; De Wet, ‘Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice’, 47 *Netherlands Int’l LR* (2000) 181; Schweigman, *supra* note 19.

<sup>153</sup> See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] ICJ Rep 16 (where the Court exercised judicial scrutiny over GA Res. 2145 (XXI), 45–50, at paras. 87–103, and over SC Res. 284 (1970), 21–22, at paras. 20–22; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136, at 148–150, paras. 24–28, where the Court reviewed GA Res. ES-10/14, and, arguably, GA Res. 377(V); *ibid.*, at 150–151, paras. 29–31.

<sup>154</sup> See *Prosecutor v. Tadic*, IT-94-I-AR, *supra* note 145, 72; *Prosecutor v. Joseph Kanyabashi*, ICTR Trial Chamber Decision of 18 June 1997 on the Defence Motion on Jurisdiction, Case No. ICTR-96-15-T.

<sup>155</sup> *Prosecutor v. Tadic*, *supra* note 145, at para. 35; *Prosecutor v. Kanyabashi*, *supra* note 154, at para. 27.

<sup>156</sup> *Kadi v. Council and Commission*, *supra* note 29, at paras. 209–231; *Yusuf v. Council and Commission*, *supra* note 29, at paras. 260–282.

<sup>157</sup> *Kadi*, *supra* note 29, at para 225; *Yusuf*, *supra* note 29, at para. 276.

'empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*'.<sup>158</sup> The somewhat erratic character of the legal reasoning adopted by the CFI as well as the peculiar use that it has made of such relevant legal categories as *jus cogens* mean that some parts of the judgment are not very persuasive at all.<sup>159</sup> It will be necessary to await the European Court of Justice ruling,<sup>160</sup> which is not expected in the near future, to fully appreciate the extent to which the judicial organs of the EC are willing to exercise judicial review over the relevant SC resolutions.

Less likely is the prospect that municipal courts pass judgment on the legitimacy of the acts of UN organs. With specific regard to the subject at hand, it is worth noting that in the *Al-Jedda* case,<sup>161</sup> the English Court of Appeal was very cautious in approaching the issue of the extent to which SC resolutions may be subjected to the scrutiny of municipal courts. In deciding that the power of interning individuals in Iraq for imperative reasons of security, provided for in Resolution 1546, is to prevail under Article 103 of the UN Charter over any other conflicting obligations under international humanitarian and human rights law, the Court dropped several hints about the impropriety of a national court reviewing SC resolutions. It did so by holding that 'a national court would be wholly unqualified to express an opinion' on whether SC resolutions violate peremptory norms of international law.<sup>162</sup> Along similar lines, the Court qualifies as 'arguments that a national court cannot entertain' the issue of whether the SC acted *ultra vires* and the problem of determining whether even human rights norms that have not attained the status of *jus cogens* should not be trumped by SC resolutions.<sup>163</sup> Oddly enough, the Court, in determining the proper scope of Article 103 of the Charter, preferred to rely on international legal scholarship as 'it would be . . . quite wrong for a national court to indulge in an interpretative exercise of its own'.<sup>164</sup> The irony of this is that it is difficult to see in the *Al-Jedda* case an instance of judicial abstention, as for practical purposes the Court indirectly upheld Resolution 1546 and applied it to the facts of the case.

Overall, forms of judicial scrutiny remain episodic and their impact limited to specific cases. In a highly decentralized system, as the international system is, to conceive of a system of checks and balances, which are even remotely reminiscent of domestic constitutional theories, remains for the time being a purely speculative

<sup>158</sup> *Kadi*, *supra* note 29, at para. 226; *Yusuf*, *supra* note 29, at para. 277. *Jus cogens* is defined by the CFI 'as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible': *ibid.*

<sup>159</sup> See *supra* sect. 4.D.

<sup>160</sup> See appeals brought on 17 Nov. 2005 by *Kadi* and on 23 Nov. 2005 by *Yusuf* and *Al Barakaat International Foundation* against the judgments of 21 Sept. 2005 by the Second Chamber (Extended Composition) of the CFI (Cases C-402/05 P and C-415/05 P), noted respectively at [2006] OJ C39/36, at 19 and [2006] OJ C 48/11.

<sup>161</sup> *R (on the application of Al-Jedda) v. Secretary of State for Defence*, Court of Appeal, Civil Division, Judgment of 29 Mar. 2006.

<sup>162</sup> *Ibid.*, at para. 68.

<sup>163</sup> *Ibid.*, at para. 75.

<sup>164</sup> *Ibid.*, at para. 74.

exercise. Against this background, it should be noted that nothing hampers tribunals, at both international and national levels, from exercising judicial scrutiny incidentally over SC resolutions. While, as we have seen, municipal courts may be less at ease in performing such a function, judicial control at any level – however scant the instances of its exercise may be – remains a fairly powerful instrument influencing perceptions of legitimacy. In this respect, the inorganic character of the international community may favour the formation of a judicial communicative process of a transnational character.<sup>165</sup> Such a process, which is informal and decentralized and may involve judicial instances of a different nature, can ultimately lead to an evaluation of the action of the SC ‘under the binary code legal/illegal’,<sup>166</sup> irrespective of any formal mechanism of judicial review. Presumably, the validity of this paradigm will soon be tested by the way in which domestic courts accommodate human rights concerns in the implementation of SC anti-terror measures.

### *C Normative Hypertrophy and Lack of Consistency*

It would be misleading to believe that the efficacy of the fight against terrorism depends on increasing the number of international obligations incumbent on states.<sup>167</sup> The existing framework of obligations already provides an adequate cover of most of the relevant issues. Additional regulation may be necessary in some specific areas,<sup>168</sup> but, overall, normative hypertrophy is no solution to the problem of international terrorism. What is missing is rather a coherent pattern of implementation of international obligations as well as the development of internationally agreed upon policies within the framework of which states should act consistently.<sup>169</sup>

Moreover, proliferation of norms may pave the way to inconsistencies which may negatively reverberate on effectiveness and perceptions of legitimacy of the relevant legal instruments. For instance, the incorporation of numerous provisions of the Convention against the Financing of Terrorism into Resolution 1373 took place in blatant disregard of the other provisions of the Convention, particularly those concerned with the rights of the accused, which were part and parcel of the Convention negotiation.<sup>170</sup> In other words, the SC picked and chose the provisions of the Convention which it thought most effective in pursuing its normative strategy. An additional consideration regarding the fight against the financing of terrorism may be set forth. Excessive emphasis on criminalizing the financing of terrorism may have proved over time to be largely unnecessary, given that compliance costs with the massive

<sup>165</sup> Bianchi, ‘Globalization of Human Rights: the Role of Non-State Actors’, in G. Teubner, *Global Law without a State* (1997), at 179, 192 ff.

<sup>166</sup> Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’, in *ibid.*, at 3, 14.

<sup>167</sup> See Bianchi, *supra* note 35, at 494 ff.

<sup>168</sup> Besides the *vexata quaestio* of adopting a general definition of international terrorism, possibly within the framework of the would-be comprehensive UN convention on international terrorism, another example which springs to mind is the regulation of alternative and informal money-transfer systems.

<sup>169</sup> Bianchi, *supra* note 35, at 525 ff.

<sup>170</sup> See Alvarez, ‘The Security Council’s War on Terrorism: Problems and Policy Options’, in E. de Wet and A. Nollkaemper, *Review of the Security Council by Member States* (2003), at 119, 121.

anti-financing regulatory system are high and their efficacy in terms of prevention of terrorist attacks remains doubtful.<sup>171</sup> Furthermore, counter-terrorist measures of a sanctionary nature such as those adopted by the SC are arguably not the best means to deal with the problem. The dependence of many people in non-Western states on alternative money remittance systems and the obvious economic repercussions would rather call for regulation to be adopted 'on a multilateral but cooperative basis'.<sup>172</sup>

Inconsistencies also characterize domestic legislation and enforcement practices. As an overall consideration of states' reports under relevant SC resolutions clearly attests, the lack of harmonization of criminal law provisions bearing on international terrorism is self-evident, despite the efforts produced in international law. Significant discrepancies remain also within regional contexts, such as the EU, in which the 2002 Framework Decision on combating terrorism has been implemented by Member States in a manner which can hardly be deemed satisfactory in terms of consistency.<sup>173</sup> Such incongruities, whilst showing the complexity of the effort to harmonize criminal law standards, are certainly detrimental to the efficacy of anti-terror measures.

#### **D Coordination and Cohesion: The Role of Interpretation**

In order to preserve the cohesion of the system, better coordination is needed with a view to enhancing the effectiveness of the SC's anti-terror measures. Coordination is a multi-faceted concept in this context as it implies a horizontal dimension as well as a vertical one. The latter implies the smooth implementation of international normative standards into domestic law, whereas the former more properly refers to the issue of how to coordinate the operation of norms belonging to the same normative layer, i.e. international law. This is a challenge for states that may be required to enforce apparently conflicting international norms. The encroachment of SC anti-terror measures on human rights norms, examined in the previous section, is a good illustration of the problem. More generally, how to reconcile the complexity of the international legal system with the need to apply the law consistently and predictably has long attracted scholarly attention. The topic of fragmentation of international law and the difficulties arising from the diversification and expansion of international law has recently been taken up by the International Law Commission for study.<sup>174</sup> Among the various techniques that can be used at the interpretive level to ensure some degree of self-consistency, those that concern the hierarchical relation of international legal norms have been recently used by both international and national tribunals in litigation concerning anti-terror measures. As we have already seen,<sup>175</sup> the CFI, for

<sup>171</sup> See *The Economist*, 22 Oct. 2005, at 15 and 73–75.

<sup>172</sup> See Cameron, *supra* note 8, at 186.

<sup>173</sup> See the Report from the Commission, based on Art. 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, COM(2004)409 final, 8 June 2004.

<sup>174</sup> See the Report of the Study Group of the ILC finalized by Martti Koskenniemi on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', A/CN.4/L.682.

<sup>175</sup> *Supra* sect. 5.2.

instance, in the two judgments rendered in September 2001, respectively in the *Kadi* and *Yusuf* cases, held that the SC must respect *jus cogens* rules. The CFI also resorted to Article 103 to acknowledge the primacy of the Charter obligations, namely those stemming from Chapter VII resolutions, with respect to other international agreements.<sup>176</sup> The reasoning which, in principle, should have divested it of any power to exercise judicial review over the relevant SC resolutions did not prevent the CFI from assessing their lawfulness against the background of peremptory norms of international law. Be that as it may, the idea that Article 103 makes the alleged infringements of fundamental rights, as protected by the Community's legal order (other than *jus cogens*), irrelevant for the purpose of holding the SC's resolutions invalid or ineffective in the territory of the Community has a firm grounding in the judgments. Along similar lines, the English Court of Appeal in the *Al-Jedda* case held that the provisions of Resolution 1546 giving power to the Multinational Force to intern for imperative reasons of security beyond the terms provided for in international humanitarian and human rights law took precedence on the basis of Article 103 of the Charter 'in so far as there was a conflict'.<sup>177</sup>

The latter clause in the *Al-Jedda* judgment is quite telling of the interpretive challenge that judges and decision-makers are confronted with. It remains doubtful whether in the case at hand a real conflict existed between the *express* provisions of Resolution 1546 and a number of international humanitarian and human rights law provisions.<sup>178</sup> Most of the time, however, one need not resort to Article 103. Indeed, rarely would one need to construe human rights obligations as conflicting with SC anti-terror measures. A presumption of consistency of the latter with human rights obligations, and – one may add – all the more so with regard to peremptory norms, seems a perfectly viable interpretive tool to guarantee the required degree of consistency of SC resolutions with the international legal order. The power of interpretation is yet again crucial in achieving the desired outcome. Should one wish to promote an interpretation of SC anti-terror measures which is fully consonant with the systemic need of preserving the integrity of human rights obligations, techniques of interpretation can provide the necessary tools to assure this result in most cases. Nothing prevents states from granting a terrorist suspect the right to fair trial or an effective remedy under relevant human rights treaties. Nor would that be inherently prejudicial to the effectiveness of the fight against terrorism.

States, therefore, should interpret their obligations under relevant SC resolutions consistently with their other obligations under international law, particularly those that are concerned with fundamental human rights. This presumption of consistency would be perfectly consonant with the current trend by the SC to acknowledge the need to respect human rights.<sup>179</sup> Arguably, such an interpretation would strengthen

<sup>176</sup> *Kadi v. Council and Commission*, *supra* note 29, paras. 184, 224; *Yusuf v. Council and Commission*, *supra* note 29, at paras. 234, 275.

<sup>177</sup> *Al-Jedda v. Secretary of State for Defence*, *supra* note 161, at para. 87.

<sup>178</sup> In fact, SC Res. 1546 (para. 10) generally authorized the Multinational Force 'to take all necessary measures to contribute to the maintenance of security and stability in Iraq'.

<sup>179</sup> See SC Res. 1456 and SC Res. 1624, which gave the CTC the mandate to check the conformity of States' anti-terror measures with human rights.

rather than weaken the process of implementation of SC anti-terror measures by causing them to be perceived as operating in accordance with international law rules and processes.<sup>180</sup> Their enhanced legitimacy would most likely increase the chances that states effectively comply with them.<sup>181</sup>

## 5 Conclusion

In a self-contained, treaty-based system like the UN Charter that ultimately hinges on Member States' consent, the issue of the legitimacy of SC action is not one that can be treated in the abstract. The lack of a formal and express entitlement under the Charter to produce law-making resolutions<sup>182</sup> is but one factor that affects the perceptions of legitimacy. It is remarkable that states have manifested no overt opposition to SC Resolution 1373 and its alleged law-making character. The emotional shock subsequent to the 9/11 terrorist attacks may well explain the reluctance of states to voice abstract concerns about the exercise of normative powers of a general character by the SC. The quest for an efficient and prompt response has probably prevented these concerns from arising at all. More revealing is the fact that states have qualified their approval of Resolution 1540 on the acquisition of weapons of mass destruction by non-state actors. Although the resolution was adopted by consensus, several state representatives made it clear that their acceptance of a law-making resolution was dependent on the extant gaps in international regulation and the need for a prompt normative response to the clear and present danger of weapons of mass destruction being acquired by non-state actors.<sup>183</sup>

<sup>180</sup> It is of note that in a recent speech concerned with strengthening international law, delivered before the SC by the Legal Counsel of the UN on behalf of the Secretary General, the issue of how to guarantee fundamental due process rights to individuals targeted by the SC's measures came to the fore. Legal Counsel stressed that such a person should be informed of the case against him and have the right to be heard, via submissions in writing, within a reasonable time. Moreover, an independent, impartial, and effective review mechanism should be established and the measures taken should be regularly reviewed by the SC, the frequency of such reviews depending on the rights and interests involved. See 'Strengthening international law: rule of law and maintenance of international peace and security', S/PV.5474, at 5.

<sup>181</sup> As is known this is the theory propounded by T. Franck in his well-known book, *The Power of Legitimacy Among Nations* (1990).

<sup>182</sup> See the declaration made by Ecuador at San Francisco: '[i]n the fulfilment of the duties inherent in its responsibility to maintain international peace and security, the Security Council shall not establish or modify principles or rules of law': UNCIO, vol. 3, at 431). It is difficult to infer any conclusion from the fact that this proposal was eventually rejected. In this context it is interesting to note also that at San Francisco the Philippines had made a proposal whereby '[t]he General Assembly should be vested with the legislative authority to enact rules of international law which should become effective and binding upon the members of the Organization after such rules have been approved by a majority vote of the Security Council. Should the Security Council fail to act on any of such rules within a period of thirty days after submission thereof to the Security Council, the same should become effective and binding as if approved by the Security Council': UNCIO Doc., vol. 9, at 316.

<sup>183</sup> See the statement of the representative of Algeria: '[i]n the absence of binding international standards, and because of the seriousness and the urgent nature of the threat, the response to it needs to be articulated and formulated by the Security Council': S/PV. 4950, at 5. See also S/PV.4956, particularly the statements of France (at 2), Pakistan (at 3), and Spain (at 8).

The self-perception by the SC that the enactment of quasi-legislative acts is necessary seems, therefore, conditional on its conviction that there are no alternative legal instruments available at international law that can effectively counter an immediate threat to international peace and security. Quite obviously, the adoption of law-making resolutions such as Resolutions 1373 and 1540 – which entirely rely for their implementation on the Member States' willingness and capacity to enforce them at the domestic level – requires political support which must be wider than the narrow representation of the SC. This is why the backing of the General Assembly, whether express or implied, seems indispensable in order to secure the perception of legitimacy which is necessary to enhance the effectiveness of SC resolutions.<sup>184</sup> In this respect, the leverage that can be exercised on the SC is not a negligible one. It is perhaps not mere speculation to assume that the recent shift towards paying greater attention to human rights on the part of the SC<sup>185</sup> is mainly due to the increasing uneasiness felt in the GA towards unconditionally upholding security concerns to the detriment of human rights considerations.<sup>186</sup> It has been contended that whatever the SC says is the law.<sup>187</sup> However, the perception of its being fair and adopted in accordance with accepted rules and procedures may remarkably affect its effectiveness.

By way of conclusion, one may say that it may very well be that the 'police' are still in the 'temple', to borrow from the title of an influential article by Martti Koskenniemi published in this Journal.<sup>188</sup> Their temporary presence has lately turned into an embarrassing *de facto* occupation. Although the reasons for this may be understandable,<sup>189</sup> this prolonged presence is a cause for regret and preoccupation. Some of the temple's clerics who had looked to the police in the temple as a way of having their views obtain over those of their fellow clerics may soon come to realize the inconvenience of delegating their responsibility to provide for the common good of the community to those whose main task is to keep and restore order. Inevitably, '[t]he peace of the police is not the calm of the temple but the silence of the tomb'.<sup>190</sup> The abstract invocation of the will of God, or, coming out of the metaphor, of the rule of law, is unlikely to convince the police to disperse and leave the temple, particularly at times when there is still a widespread conviction that the temple is under siege by the enemy. May the police realize that its task is to represent the authority of the law – from which it draws its legitimacy and power – and lay no claim to be above

<sup>184</sup> See GA Res. A/RES/58/48 on measures to prevent terrorists from acquiring weapons of mass destruction.

<sup>185</sup> See para. 6 of the Declaration attached to SC Res. 1456 (2003), the preamble to SC Res. 1566 (2004), and para. 4 of SC Res. 1624 (2005).

<sup>186</sup> See GA resolutions on 'Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (A/RES/57/219, A/RES/58/187, A/RES/59/191, A/RES/60/158).

<sup>187</sup> '[C]e qu'il dit est le droit' : Pellet, 'Conclusions générales', in B. Stern (ed.), *Les aspects juridiques de la crise et de la guerre du Golfe* (1991), at 487, 490.

<sup>188</sup> Koskenniemi, *supra* note 32.

<sup>189</sup> See *supra*, sect. 2.B.

<sup>190</sup> See Koskenniemi, *supra* note 32, at 25.

it.<sup>191</sup> At the same time, may the temple's clerics take up responsibility for their own failures and petty quarrels to restore faith in the temple of justice in their believers. This may require time and structural renovation of the apse and nave of the temple may well be necessary. No such work can be undertaken, however, short of a common understanding of how it must be carried out and by whom. Surely it ought not to be the police.

<sup>191</sup> '[A]ll discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law', in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Dissenting Opinion of Judge Jennings, [1998] ICJ Rep 99, at 110.