

UN SC Res.1373 (2001) and International Law-making: A Transformation in the Nature of the Legal Obligations for the Fight against Terrorism?

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1. Introduction

The adoption of Resolution 1373 (2001) on 28 September 2001 represented a departure from the previous activity of the UN Security Council. The resolution provides a series of general and abstract mandatory rules on the fight against terrorism that seem to be intended to remain in force without any limitation in space and time.¹

The rising global threat to the international peace and security constituted by terrorism required the international community to respond universally with legally binding regulations for all States. However, the urgency to counter a phenomenon which threatens the international community interests collided with the inadequacy of the classical international law-making process to establish universal detailed obligations in a short time². Both customary law and treaty law present shortcomings which prevent a quick response: as for the former, because of its lengthy process of formation and the often too vague content, as for the latter, because of the limited number of State parties, the lengthy internal procedures of ratification and the faculty to make reservations.³

The urgency to respond to the threat posed by global terrorist networks, found a useful tool in the potential enshrined in a *multilateral forum*, represented by the Security Council. Starting from the early sixties, several commentators had emphasised the role played by the political organs of the United Nations in the development of international law: in particular the attention was focused on the function exercised by General Assembly resolutions.⁴ It is noteworthy that the post-cold war system of international relations influenced the substitution in that task of the General Assembly by the Security Council: as a further step of this process, the adoption of Resolution 1373 paved the way for the use of Security Council acts as a source of universal binding legislation.

Since much criticism has been addressed to the alleged law-making power of the Security Council, the paper devotes particular attention on whether the measures adopted by resolution are within the scope of the competencies conferred to the Council by the United Nations Charter or whether the resolution might be better explained outside of the Charter framework, as expression of functions conferred by States to the Security Council under general international law. In this latter respect, I will draw on the contributions offered by two alternative approaches elaborated by two Italian authors as useful elements for further discussion.

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¹ UN Doc. S/RES/1373 (2001), 28 September 2001

² Cfr. P. M. Dupuy, 'The Law After the Destruction of the Towers', in <http://www.ejil.org/forum_WTC/ny-dupuy.html>; Bianchi, 'Enforcing International Law Norms Against Terrorism: Achievements and Prospects', in A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (2004), 491 at 515.

³ Cf. Charney, 'Universal International Law', 87 *AJIL* (1993), 529 et seq.

⁴ See *infra*, the authors cited in notes 21-24.

2. The Interplay between Res.1373 (2001) and the Pre-existing Anti-terrorist Legal Regime

Before dealing with the issue of the Security Council law-making power, it is necessary to recall the peculiarities of Resolution 1373, ‘a landmark in the international fight against terrorism’⁵. I emphasize that the adoption of the resolution was only possible against the background of the existing legal regime provided by general international law and the universal counter-terrorism instruments, which operative paragraph 3 calls upon to States to ratify.

Essentially, I will consider: a) whether those obligations, apart from their inclusion in the resolution, were pre-existing international customary rules; b) whether Resolution 1373, recalling measures already included in relevant international Conventions, brought about a change in their legal nature, determining the formation of new norms of general international law, corresponding to their content; c) finally, whether UN Security Council, by adopting Resolution 1373, exercised a legislative function, imposing *inter alia* obligations which do not have any reference to previous acts.

The first option to consider the resolution simply as a restatement of pre-existing customary legal measures is obviously untenable, since the resolution was clearly aimed at filling a gap in the international legal system. Suffice to say that the importance of the financing issue, in fact, arose only in the last ten years and that the 1999 Convention on the financing of terrorism was not yet in force at the time of the adoption.⁶ However, there is no doubt that the resolution, in its operative paragraph 2, reaffirms the principle, whose customary character is well established, according to which every State has the duty to refrain from providing any form of support, active or passive, to entities or persons involved in terrorist activities. The provision mirrors the formulation included in the 1970 Declaration on Friendly Relations which is explicitly invoked in the preamble.⁷

The second approach focuses on the interplay between the res.1373 *régime* and previous counter-terrorism instruments, having regard to the possible role played by the resolution in the formation of customary international law.

The very close relationship between the resolution and the 12 universal conventions for the prevention and repression of international terrorist acts is particularly evident. In this respect, it is necessary to stress the essential function played by the Counter-terrorism Committee,

⁵ UN Doc. S/2004/70, *Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council resolution 1373 (2001)*, at 4. See Condorelli, ‘Les attentats du 11 septembre et leurs suites: Où va le droit international?’, 104 *RGDIP* (2001), 829 et seq.; Aston, ‘Die Bekämpfung abstrakter Gefahren für den Weltfrieden durch legislative Massnahmen des Sicherheitsrats – Resolution 1373 (2001) im Kontext’, 62 *ZaöRV* (2002) 257 et seq.; Rosand, ‘Security Council Resolution 1373, the Counter-Terrorism Committee and the Fight Against Terrorism’, 97 *AJIL* (2003), 333 et seq.

⁶ On the 1999 Financing Convention, see Lavalle, ‘The International Convention for the Suppression of the Financing of Terrorism’, 60 *ZaöRV* (2000), 491 et seq.; Aust, ‘Counter-terrorism: a New Approach: the International Convention for the Suppression of the Financing of Terrorism’, 5 *Max Planck Yearbook of United Nations Law* (2001), 285 et seq.; Wagner, ‘Die wirtschaftlichen Maßnahmen des Sicherheitsrates nach dem 11. September 2001 im völkerrechtlichen Kontext : von Wirtschaftssanktionen zur Wirtschaftsgesetzgebung?’, 63 *ZaöRV* (2003) 879 et seq.

⁷ GA res. 2625 (XXV), 24 October 1970. See G. Arangio-Ruiz, *The United Nations Declarations on Friendly Relations and the System of the Sources of International Law* (1979).

established under paragraph 6, to monitor Member States' implementation of the resolution: the Committee rapidly enhanced its role to embrace new tasks especially as for the assistance and cooperation with States and international organizations, claiming to be one of the crucial actors in the global efforts against terrorism.⁸ By stating that the operative paragraph 1 should be read and interpreted in conjunction with sub-paragraph 3 (d) of the resolution, the Committee stressed that the implementation of the resolution required a speeding-up of the ratification process. However, the interpretation given by the Committee to operative paragraph 2 (c), on the principle *aut dedere aut judicare*, seems to go further than a simple restatement of the principle, which – putting here aside the question of its customary nature – is the core element of the international conventions. The Committee has indeed pushed towards an interpretation of the paragraph as permitting universal jurisdiction with regard to all acts of international terrorism.⁹

Further development of counter-terrorism measures in comparison with treaty law is to be found in paragraph 2 (a): member States are urged to expand the range of measures against the support of terrorism, to cover not only the financing but also the recruitment and the supply of weapons. The same might be said with regard to the preventive measures included in subparagraph 2 (g), which requires a strengthening of internal and international security by enacting an effective border control strategy.

Summing up, it is not easy to evaluate whether, by virtue of Resolution 1373, the Security Council brought about a transformation of counter-terrorism treaty law into general international law. Neither the debates which brought to the adoption of the resolution nor subsequent practice make clear whether the Security Council intended to affirm the binding nature of the measures included in Resolution 1373 beyond the range provided by Chapter VII of the Charter. The Presidential Statement issued on 11 September 2002 kept this ambiguity by stating that the Council, by adopting the resolution, 'made the fight against terrorism a mandatory obligation of the international community, consistent with the United Nations Charter *and* international law'.¹⁰

The discussion on this issue cannot be easily compared with that occurred with regard to the General Assembly Declarations of principles, mainly because of the binding nature of the Security Council resolutions, by virtue of Article 25, and the prevalence of their obligations over those deriving from any other international agreement, by virtue of Article 103. It is however doubtful that the mere existence of the resolution might have accelerated the creation of customary rules which – in the opinion of an author¹¹ – have an *erga omnes* character, as they are aimed at safeguarding international peace and security from the threat posed by terrorist network.

3. The Legal Basis of the Security Council Law-making Power

The previous observations suggest that one of the most innovative aspects of Resolution 1373 resides in the fact that the binding nature of the adopted measures would simply result from an authoritative decision of the Security Council under Chapter VII of the Charter.

⁸ See Ward, 'Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council', 8 *Journal of Conflict and Security Law* (2003), 289.

⁹ Cf. *Report by the Chair of the Counter-Terrorism Committee*, supra note 5, at 6; Gehr, 'Recurrent Issues: Briefing for Member States on 4 April 2002', available at <<http://www.un.org/docs/sc/committees/1373>>

¹⁰ UN Doc. PRST/2002/25, 11 September 2002 (italics added).

¹¹ Cf. Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future', 8 *Journal of Conflict and Security Law* (2003), 15 et seq., at 42-43, 58.

Significant scholarly debate has been dedicated to the fact that the Security Council for the first time ever declared an abstract phenomenon, international terrorism, to be *per se* a threat to international peace and security, since the notion of a threat to peace had in the past been related to the existence of a specific situation, located in a territorial area.¹² Whether such a determination of a threat to peace is in conformity with Article 39 of the Charter and whether the measures adopted by the resolution are within the scope of the powers conferred to the Council by the UN Charter have been particularly controversial.

A. Full Exercise of Statutory Powers under Chapter VII

It is undisputed that the Security Council enjoys a large margin of discretion in the ascertainment of a threat to peace, but that this power is not unlimited. Since 1990, in particular, the concept has been dramatically expanded to cover civil wars, gross violations of human rights and humanitarian law, such as flows of refugees and humanitarian emergencies and finally State terrorism¹³. Several authors have discussed the issue of the nature of the inherent limits to Security Council actions.¹⁴

In my opinion, it is difficult to see why the reference to a specific situation should operate as a delimiting factor for the competence of the Security Council: Article 39 does not exclude that the Security Council can take action in regard to certain activities in general, when their very existence is held to be incompatible with fundamental interests of international community (as confirmed, for example, by the qualification of *scourge* given to terrorism in the preamble of

¹² See N. Angelet, 'Vers un renforcement de la prévention et la répression du terrorisme par de moyens financiers et économiques?', in K. Bannelier et al. (dir.), *Le droit international face au terrorisme : après le 11 septembre 2001* (2003) 219 et seq.; Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations', 16 *Leiden Journal of international Law* (2003), 593 et seq.

¹³ As the Security Council recognized unequivocally in the first meeting at the level of Heads of State and Government in January 1992 (UN Doc. S/23500), the absence of war, as interstate military confrontation, does not ensure *per se* international peace and new risks might endanger stability and security, among these risks international terrorism was included. For a comprehensive overview of the Security Council practice after 1989 see I. Österdahl, *Threat to the Peace* (1998) 45-84.

¹⁴ See *inter alia* Gowlland-Debbas, 'Security Council Enforcement Actions and Issues of State Responsibility', 43 *ICLQ* (1994), 55 et seq.; 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) 361 et seq.; Particular attention has been devoted to the substantive limits contained in Art.24 par.2 of the Charter, which explicitly states that the Security Council shall act in accordance with the principles and purposes of the United Nations. So, for some authors it was only a logical step that, in the first half of the nineties the Security Council recognised a connection between peace and security and the other purposes included in the Charter. (See P. M. Dupuy, 'Sécurité collective et organisation de la paix', 97 *RGDIP* (1993), 617 et seq.) Other authors have explained the extensive way in which the Council has interpreted the notion of threat to peace by the exigency to respond to violations of international obligations essential for the protection of the fundamental interests of the international community. (Gaja, 'Réflexions sur le rôle du Conseil de Sécurité dans le nouvel ordre mondial, 97 *RGDIP* (1993), 298 et seq., at 307)

Resolution 1377¹⁵). In this regard, one must not forget that the powers of the Security Council in relation to a ‘threat to peace’ have a preventive character and were specifically conceived to impede certain risks from having destructive effects on international peace and security.¹⁶ The adoption of Resolution 1373 can properly be understood as taking in account this prevailing element of urgency, invoked also in the Preamble. At least initially, the Security Council aimed at establishing a temporary regime under Chapter VII to take measures against terrorism in a situation of particular emergency, in order to overcome the classical limitation of consent.¹⁷

Article 41 of the Charter, providing for measures not implying the use of force, is formulated in such a general way that it represents, according to some authors’ view, the adequate instrument for the adoption by the Security Council of rules of general and abstract character¹⁸.

However, it is well-known that this approach is far from gaining unconditional support. In particular, it found the opposition of one of the most influential Italian scholars, Arangio-Ruiz. In a long essay¹⁹ written before 9/11 events, the author widely discussed the notion of the measures that the Security Council can adopt under Chapter VII of the United Nations Charter: he strongly pleaded for ‘the legal characterization of Chapter VII measures as peace-enforcement measures rather than law-enforcing, law-making or law-determining measures’.²⁰ Following Arangio-Ruiz’s argument, one has to recognise that the Security Council, by adopting Resolution 1373, acted *ultra vires*.

Instead of insisting on the strict alternative ‘*legitimate/illegal*’ under the Charter, I will examine the possibility to find other ways which could permit an evaluation of the resolution outside the United Nations framework.

¹⁵ UN Doc. S/RES/1377, 28 November 2001.

¹⁶ Cf. Tomuschat, ‘Obligations Arising for States without or against Their Will’, 195 *RdC*, IV (2003) at 344

¹⁷ The element of urgency is confirmed in a briefing to UN Member States by Ambassador Jeremy Greenstock, the first President of the Counter-Terrorism Committee, the monitoring body established by Res.1373 (2001). (19 October 2001), available at <<http://www.un.org/docs/sc/committees/1373>>. In this respect, it not convincing the position held by Condorelli (see *supra* note 5, 835), who tried to solve the question of the abstract character of the ‘threat to peace’ by confining the mandatory character of the resolution ‘dans le cas présent seulement, c’est-à-dire par rapport aux activités et aux réseaux terroristes qui sont derrière les événements du 11 septembre ».

¹⁸ Cf. Aston, *supra* note 5, at 274 et seq.; *contra* Happold, *supra* note 12.

¹⁹ See Arangio-Ruiz, ‘On the Security Council’s ‘Law-Making’’, 83 *RDI* (2000), 609 et seq.

²⁰ *Ibid.*, at 724. The approach held by Arangio Ruiz needs to be understood against the background of his previous works: Since 1950, the author coherently developed his theory on the social basis of international law and the general theory of international law and organisation. Cf., *inter alia*, G. Arangio-Ruiz, *Sulla dinamica della base sociale nel diritto internazionale* (1954) and Id., *The United Nations Declaration on Friendly Relations*, *supra* note 7, 199 et seq., at 243. In his view, ‘[w]ithin the framework of a law of nations understood as the law of the relations among political units constituted in fact and coexisting as equals within the universal society of men but outside of an inter-individual legal order ‘of the whole’ expressed by that society, any organisation set up by inter-State compact bears within itself [...] an ‘original flaw’, inherent in the very nature of the transaction which is at the basis of its existence: the inter-State compact.’

B. Security Council Resolution as Informal or Simplified Agreement

In consideration of the difficulties expressed by many authors to reconcile the adoption by the Security Council of Resolution 1373 with its statutory powers in matters relating to the maintenance of peace and security, one might wonder whether this activity of the Security Council would be more adequately understood, once detached from the framework of the United Nations Charter. In this respect, the theories developed by two eminent Italian scholars seem relevant to our discussion.

The first approach was elaborated in the late sixties by Conforti,²¹ developing previous suggestions put forward by, among the others, Higgins²² and Asamoah.²³ Conforti tried to look at the resolutions of General Assembly not as activities of the organization but as activities of the Member States. Those resolutions, besides producing their statutory effects as ‘organic acts’, could be considered to some extent international agreements, that would be binding for the State expressing its consent. Evidence of that would be the explicit indication that the failure to comply with their provisions would be equated to a violation of the UN Charter.²⁴ From this, one can easily notice that the theory was developed by Conforti only with regard to General Assembly resolutions and Security Council resolutions of a recommendatory nature. Therefore it is of limited help for our purposes.

Furthermore, I share the view that the equivalence resolution=agreement, proposed by Conforti, is criticisable insofar as it failed to recognize that the resolution remains an act of the organisation. In other terms, as observed by Arangio-Ruiz, the fact that the content of a declaration becomes the content of an (informal) agreement, does not transform the resolution into an agreement: the resolution remains what it was²⁵.

C. Security Council as Material Organ of the International Community

On the other hand, I find particularly helpful in this discussion the theory developed by Picone. Since the beginning of the nineties, the author has individuated, with regard to the decisions enacted by the Security Council, the coexistence of two distinct normative models. In particular, when authorizing States to react to violations of *erga omnes* obligations, the Security Council would act as a sort of *material* organ of the international community, exercising powers conferred to it by the States acting *uti universi*, under general international law. In those cases, the Council provides further ‘legitimacy’ to interventions which States could carry out autonomously.²⁶

Developing further the approach proposed by Picone, it might be interesting to explore the possibility that the Security Council, by adopting Resolution 1373, acted indeed as the material organ of the international community to provide further legitimacy to a decision already

²¹ B. Conforti, *La funzione dell'accordo nel sistema delle Nazioni Unite* (1968).

²² R. Higgins, *The Development of International Law through the political organs of the United Nations* (1963) at .67 et seq.

²³ O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966).

²⁴ B. Conforti, *supra* note 18, at 136.

²⁵ G. Arangio-Ruiz, *supra* note 7, at 59, 73

²⁶ See, in particular, Picone, ‘Interventi delle Nazioni Unite e obblighi *erga omnes*’, in P. Picone (a cura di), *Interventi delle Nazioni Unite e diritto internazionale* (1995) 517 et seq., 542-545, 552 et seq.

taken autonomously by the leading States, and not necessarily by the only superpower. The first difficulty resides in the fact that the decision would consist in this case not just in a reaction to a violation of pre-existing *erga omnes* obligations, but in the normative activity of identifying the counter-terrorism *erga omnes* obligations herself.

This obstacle might be surmounted only if we could prove that the international legal system has evolved to such an extent that the leading States are acknowledged to have a law-making function and that the development of new measures is legitimately aimed at reacting to serious threats to the international community fundamental interests. While this latter condition seems to be satisfied by Resolution 1373, there is no evidence that such an evolution has already occurred in the international legal system²⁷. Therefore the explanation of the status of Resolution 1373 here elaborated is far from persuading.

Moreover, as for the character of the legislative measures, the theory would further require that they should not violate *erga omnes* obligations and the peremptory norms of international law. In this respect, I would like to draw the attention to the selective character of the measures included in Resolution 1373. This appeared to some authors the result of an opportunistic choice²⁸ which, by introducing an inadequate coordination with the *erga omnes* obligations on the respect for fundamental human rights, could support an unbalanced conception of the fight against terrorism. Apart from the absence of any definition of terrorism as a legal notion²⁹, it is worth observing the lack of a clear reference to international humanitarian law and to the international standards of human rights, despite the fact that the preamble affirms the need to combat terrorism in accordance with the Charter of the United Nations. The Security Council tried to qualify its position only in the ministerial Declaration annexed to Resolution 1456 (2003) by stating that ‘states must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.’

4. Conclusion

The conclusion on the legal status of Resolution 1373 is still controversial, depending on the interpretation one chooses of the notion of ‘threat to peace’ under Article 39. Although several authors have argued that the Security Council can only act in response to specific situations³⁰, the recent practice of the Security Council seems to show a tendency to perceive the *scourge* of international terrorism, *in its various world-wide manifestations*, as a constantly incumbent threat

²⁷ See the contributions to the book edited by M. Byers and G. Nolte, *United States Hegemony and the Foundations of International Law* (2003)

²⁸ Cf. Angelet, *supra* note 12, 227; Alvarez, ‘Hegemonic International Law Revisited’, 97 *AJIL* (2003), 873, at 875.

²⁹ However, see recently UN Doc. S/RES/1566 (2004), 8 October 2004. On the difficult issue of the definition of terrorism as a legal notion see Subedi, ‘The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of Definition of Terrorism in International Law’, in *International Law FORUM du droit International* (2002), 159; Walter, ‘Defining Terrorism in National and International Law’, in C. Walter *et al.*, *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (2004), 7 *et seq.*

³⁰ See *supra* note 12.

creating destabilizing effects on the international order,³¹ which the Council is called on to counter by way of prevention.

The adoption of Resolution 1540³² on non proliferation of weapons of mass destruction shows that Resolution 1373 can be already seen as a model for further legislative activity by the Security Council.

It is noteworthy that the adoption of res.1540 is characterized by the presence of some defining elements which might constitute, if repeated, the formal procedure for the new law-making process of the Security Council. First, the approval of the resolution came after a general debate at the Security Council, in which all States were invited to express their position.³³ Second, all States supporting the resolution stressed the necessity, as a matter of urgency, to counter a grave threat posed to international peace and security.³⁴ Third, the resolution was regarded as an exceptional measure filling a gap in international law.³⁵ Fourth, the resolution established a Committee to monitor the implementation: moreover, the duration of its life ('no longer than two years') seems to confirm that the resolution does not possess an open-ended nature. Fifth, the sponsors gave assurances that the resolution in no way would attempt to modify the objectives indicated in the relevant treaty-law, which remains the essential normative basis³⁶. Finally, the Chapter VII legal base 'underlines the seriousness of [the] response and the binding nature on all States of the obligation it contains'³⁷ and the resolution does not authorise the use of force to ensure its implementation against States or against non-State actors in the territory of another country

An analogy with some national legal systems might be of some interest in this regard. It seems to me that the reasons for the adoption of legislative resolutions by the Security Council mirror those which, in several legal systems, expressly recognise, under exceptional circumstances, the power of the executive to issue acts with force of law. I am referring here in particular to the practice of *decreti-legge* in Italy. However, these acts are provisional measures which necessarily need ratification by the Parliament within a short period of time. The question therefore arises: which body can play this role with regard to the law-making power of the Security Council? Pushing the analogy further, one could suggest the General Assembly, as several commentators have already proposed³⁸. A stronger degree of cooperation between the two bodies, albeit difficult in the near future, seems therefore not only politically preferable but also suitable to better determine the scope of the Security Council's law making power.

³¹ See, *inter alia*, Frowein/Krisch, 'Article 39', in B. Simma (ed.), *The Charter of the United Nations: a Commentary*, (2002), 721

³² UN Doc. S/RES/1540, 28 April 2004.

³³ UN Doc. S/PV.4950, 22 April 2004; S/PV.4956, 28 April 2004. Cf. in particular the statement by the representative of China (S/PV.4950, 6): 'It is [...] our consistent positions that the opinions of all Security Council members and of the majority of United Nations Members must be fully taken into account and their reasonable proposals and suggestions reflected in the current draft resolution.'

³⁴ See the statement of the representative of United States (*ibid.*, 18)

³⁵ *Ibid.* See also the statements of the representatives of Brazil (*ibid.*, 3) and Algeria (*ibid.*, 5) and the doubts and concerns expressed by Pakistan (*ibid.*, 15)

³⁶ See the statement of the representatives of United Kingdom (*ibid.*, 11) and United States.

³⁷ Statement of the representative of United Kingdom (UN Doc. S/PV.4956, 7)

³⁸ Cf. P. Szasz, 'The Security Council Starts Legislating', 96 *AJIL* (2002), 901, at 903; A. Bianchi, *supra* note 2, at 518.