

# **The Security Council's Chapter VII action on Terrorism In Light of the United Nations' normative powers**

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## **1. Introduction**

The normative action of the United Nations (UN) on international terrorism, namely after the events of September 11, 2001 has been most significant, signalling a renewed commitment in international affairs. It has brought to the international community new challenges, as trans-national criminality and more particularly terrorism have lead traditional nation States to increased cooperation and integration at international law and practice<sup>1</sup>. Terrorism came to be regarded as a threat to international peace, and as such addressed by the UN under the Chapter VII of the UN Charter authority, which has led to an imposing action on States with which they had never before been confronted. Such action came to affect the present terms of International Law-making, namely in regard to the International Organizations' normative action. However, it has also raised some concerns particularly felt as national jurisdictions implement such measures and the judiciary enforce them. These normative concerns, fundamentally a question of sources of International Law, draw from these recent events as an inspiration while trying to assess the impact that the most recent (normative or else) action of the UN has had on international law.

The present analysis comes in light of a reality, nowadays referred to as terrorism, which over time has taken on so many different forms and motivations. Terrorism is said to have its origin at the French revolution's bloodiest period of the

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<sup>1</sup> Which could be referred to as an emerging Post-National Constellation, based thereon, for as Habermas has referred that The world-people has objectively been for a long time brought together on an involuntary Risk-society (originally "Die Weltbevölkerung ist objektiv längst zu unfreiwilligen Risikogemeinschaft zusammengeschlossen worden") in Jürgen Habermas, *Die Postnationale Konstellation*, Politische Essays, Edition Suhrkamp, 1998, page 89 while questioning the terms on which Globalisation affects the (a) certainty of law and the effectiveness of the administration-state (b) the sovereignty of the territorial-state (c) the collective identity (d) the democratic legitimacy of the Nation-state idem, page 405. [Both translations from the original of mine responsibility]

Jacobin “Reign of Terror” under Robespierre<sup>2</sup>. Most recent manifestations surfaced in Europe namely in Germany the Baden-Meinhof, in Italy the Brigade Rossi, in Spain ETA, in the UK the IRA but also Middle East and elsewhere. To such an extent that it can be said that there are Terrorisms and not terrorism. Some common elements have, however, been identified and, hence, terrorism has been characterized by a special intention (subjective element) in certain crimes (objective element)<sup>3</sup>. Nevertheless, the fact that terrorism is, generally, referred to the practice of autonomously criminally sanctioned acts renders its definition highly problematic to the point of being dubbed “without any legal significance”<sup>4</sup>. In fact, a number of jurisdictions do not define terrorism, reverting to the special intention of crimes its special punishability<sup>5</sup>.

Terrorism became a major concern of international law<sup>6</sup> as the criminological reality imposed the increasing need of such supra national address, for the means used are of such scale and global commitment and the targets and intents of

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<sup>2</sup> On the matter vide Jackson Nyamuya Maogoto, “War on the enemy: Self Defense and State Sponsored Terrorism”, Melbourne Journal of International Law, Vol. 4, (2003) page 408.

<sup>3</sup> At the National level the underlying offences have, for some time, specially protected people but recently some came to encompass crimes against property. Besides, the subjective element as also changed demanding, alternatively (not cumulatively as traditionally), a special intention, now thought of as to create fear among the population or to coerce a government or international organization, disregarding in some cases any political, religious or else motive. Lastly, it has been thought of as possibly being committed by a single individual not requiring any sort of organization. For all vide Nico Krisch, The rise and fall of Collective Security: Terrorism, US hegemony and the plight of the Security Council in <http://edoc.mpil.de/conference-on-terrorism/index.html>, at 11.06.2004.

These elements also purport to the international plain, but definition there has been much harder, namely due to the distinction between terrorists and freedom fighters and the address of the issue of State Terrorism. Vide idem, but also Maogoto, op. cit , page 410.

On the matter vide also Jochen A. Frowein, “The present State of research carried out by the English-speaking section of the Center for Studies and Research in The Legal Aspects of International Terrorism, Center for Studies and Research in International Law and International Relations of the Hague Academy of International Law, 1988, page 55 et seq.

<sup>4</sup> Rosalyn Higgins, “The General International Law of Terrorism” in Terrorism and International Law, Ed. by Rosalyn Higgins and Maurice Flory, 1997, page 28.

<sup>5</sup> Germany being the most renowned case, even thought, the German Strafgesetzbuch defines and autonomously punishes the foundation or membership on Terrorist Organizations, under its § 129a - Bildung terroristischer Vereinigungen. On the matter vide Schönke / Schröder, Strafgesetzbuch, Kommentar, 1991 § 129 a. Vide also the case of Portugal where terrorism is defined with reference to Terrorist Organizations – vide Lei 52/2003 de 8 de Agosto.

For a comparative analysis, in this regard interesting, of European Union countries legislation on Terrorism vide Council Framework Decision of 13 June 2002 on combating terrorism, Official Journal, L 164 (2002) pages 3 – 7, and the ensuing Report from the Commission, based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, Doc.COM(2004)409 final, Brussels, 08.06.2004.

<sup>6</sup> Even though Maogoto, op. cit, refers that it was ever since the assassination of French statesman Jean-Louis Barthou and King Alexander of Yugoslavia, for the purpose the present work will revert solemnly to its even most recent examples in the last decades of the XX th century.

multinational nature and origin<sup>7</sup>, which was only strengthened after the September 2001 and the events that on 9.11 are said to have inaugurated “*a new era*”<sup>8</sup>.

## 2. International Organizations normative action

The ensuing legal action of the UN on terrorism has in many ways questioned the design of International Organizations normative powers. International Organizations have had a growing impact on international law, namely as they take on increasingly diverse matters and address them more imposingly. Ever since the 1929 Postal Union<sup>9</sup>, but most notably after the experience of the League of Nations, the ensuing United Nation and most recently the European Union integration example and the GATT, International Organizations' role in International Law has been paramount<sup>10</sup>. Notwithstanding, it was only as International Organizations were recognized as “subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims”<sup>11</sup> that the legal foundations were laid to accept that

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<sup>7</sup>This has been, most recently, tragically portrayed (from 9.11 to 3.11) but had already been legally addressed previously. On the matter Nicholas Rostow, “Before and After: The Changed UN Response to Terrorism since September 11<sup>th</sup>”, 35, *Cornell Int'l L. J.*, 475 (2002).

<sup>8</sup>Rainer Grote, *Between Crime Prevention and the Laws of War: Are the traditional categories of International Law adequate for assessing the use of force against terrorists?*, in <http://edoc.mpil.de/conference-on-terrorism/index.html>, at 11.06.2004, vide also Christian Tomuschat, “Der 11. September 2001 und seine rechtlichen Konsequenzen”, in *Europäische Zeitschrift*, December 31, 2001, page 535 et seq.

<sup>9</sup>Notwithstanding some references to the Congress of Vienna and the fact that Athens, Sparta and Macedonia once shared a common currency that would have required a high degree of sophistication.

<sup>10</sup>International Organizations were regarded as possessing a derivative legal personality (Brownlie, Ian. *Principles of Public International Law*, Sixth Edition, 2003, page 648 et seq., which Matthias Herdegen, *Völkerrecht*, 2002, page 66, refers as relative *Völkerrechtssubjektivität*) as an expression of sovereign states legal will, expressed at their constitutive treaties. In turn, this meant that legal acts of International Organizations had no autonomous nature for they were the consensual expression of states. This was precisely the case of the economic sanctions dictated against Italy on the count of the invasion of Ethiopia, which meant a consensual determination of (equally) sovereign states to bilaterally sever economic relations with another (equally) sovereign state, vide Frowein in Simma, op. cit., page 623 et seq.

<sup>11</sup>*Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of the International Court of Justice, 11 April 1949, I.C.J. Reports, 1949 [Reparations Case]. The relevant quotation goes: “Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal capacity and rights and duties are the same as those of a State. Still less

International Organizations could “incur [in] certain obligations”<sup>12</sup> as well as formulate decisions that “are consequently binding on all States who are Members”<sup>13</sup>. It can always be argued that such binding nature of International Organizations’ legal actions can be referred to the original acceptance of such, as it is the member states original expression at the constitutive treaty of any given international organization. Notwithstanding, the binding nature of International Organizations’ actions comes not only as it is expressly provided for in its constitutive treaty<sup>14</sup>, but as it also encompasses “those powers, which not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties”<sup>15</sup>.

It comes to show not only the autonomous nature of International Organizations’ acts but also that its binding nature is founded, not on the individual expression of a state will, but on the overall aims intended for the Organization by all its member states. This allows for the adoption of measures concerning both the internal functioning of the organization (*auto normative*) and the fulfilment of its intent in relation to its member states or external (*hetero normative*)<sup>16</sup>. The latter adopt not only the form of *law-executing rules* (in the sense that they execute existing rules of international law, whatever their nature) but also *law-enacting rules* (as they impose

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is it the same thing as saying that it is ‘a super-State’, whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane”. This doctrine was later confirmed by the Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request by WHO) Advisory Opinion of 8 July 1996, I.C.J. Reports 1996 [WHO Advisory Opinion] which stated, on much more precise terms that: “The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them”.

<sup>12</sup> Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, [Certain Expenses]

<sup>13</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 - Advisory Opinion of 21 June., ICJ Reports (1971) 52, [Namibia Opinion]

<sup>14</sup> WHO Advisory Opinion vide supra ft 11.

<sup>15</sup> Reparations Case idem.

<sup>16</sup> However problematic that may prove as referred by William E. Holder, Gerhard Hafner, Karel Wellens, “Can international organizations be controlled? accountability and responsibility” in ASIL Proceedings of the Annual Meeting; April 2-5, 2003, page 231 et seq.

*ex novo* obligation on member states)<sup>17</sup>. Therefore, International Organizations have been said to be able to “create directly obligations on Member States (...) in order to exert their functions of unification and integration”<sup>18</sup>. These obligations on States are to be sources of International Law as Unilateral Acts of International Organizations, part of the *voluntary modes of non-conventional formation of International Law*<sup>19</sup>.

## 1.1 The (co-natural) Exceptionalism of the UNSC

On the wake of the Second World War and in light of the paralysis of the League of Nations on the building thereto, the founding members of the UN “*Determined* to save succeeding generations from the scourge of war”<sup>20</sup> intended to create a strong executive organ<sup>21</sup> with the “primary responsibility for the maintenance of international peace and security” (article 24 (1) of the Charter)<sup>22</sup>. Based on the relation of forces coming out of the war, it represented “the ‘*tyranny*’ of the Great Powers”<sup>23</sup> as the prohibition of the use of force emerged as the cornerstone of the collective security system envisaged by the drafters of the UN Charter<sup>24</sup> and the SC as its enforcer<sup>25</sup>. Hence, the competences of the GA on the maintenance of peace

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<sup>17</sup> On the matter Renata Sonnenfeld, Resolutions of the United Nations Security Council, November 1988, page 1 et seq.

<sup>18</sup> Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *Droit International Public*, 7.e Edition, 2002, page 372, [translation of mine responsibility].

<sup>19</sup> *Idem*, p. 367.

<sup>20</sup> Preamble of the UN Charter.

<sup>21</sup> Regarded as the executive body of the UN action, the directorate, with the ability to take binding decisions on member states, wary as the drafters of Charter were of the League of Nations' consensual *modus operandi* that so dramatically had marked the previous years. On the matter vide Geiger and Delbrück in *The Charter of the United Nations – A Commentary*, Bruno Simma (ed), 1999, page 393 et seq. Yet these same body was not considered as a global government but more as an enforcement agent – a police according to Martti Koskenniemi “The Police in the Temple, Order, Justice and the UN: a Dialectical View”, *EJIL*, 6, (1995), p. 1 et seq. or as reported by the by the US delegate to the S. Francisco Conference when stating that the Security Council was not to be interpreted as a World Government

<sup>22</sup> On the historic development of the UN and its foundation vide Ernest R. May and Angeliki E. Laiou, editors, *The Dumbarton Oaks conversations and the United Nations, 1944-1994*, 1998 and Evan Luard, *A history of the United Nations*, London, 1982

<sup>23</sup> Martti Koskenniemi, “The Police in the Temple...”, *op. cit.*, page 13.

<sup>24</sup> On the issue vide the more detailed account in Sven Bernhard Gareis, Johannes Varwick, *Die Vereinigten Nationen – Aufgabe, Instrumente und Reformen*, 3.rd Edition, 2003.

<sup>25</sup> Despite efforts to attribute wider competences on the maintenance of peace and security to the GA, on the one hand and on the other the attempt to include other matters as social development, humanitarian concerns and justice on the concerns of the UN and its forceful action.

and security are rather limited (as is its overall binding action)<sup>26</sup> and the UN forceful action (by way of the SC's binding acts) is limited to the maintenance of peace and security<sup>27</sup>. It was in light of such regime that the SC has been said to be "law unto itself"<sup>28</sup> or that in disposing of its powers in relation to the maintenance of international peace and security the SC "may create law for the concrete case"<sup>29</sup>. The extent of the SC's powers has long been discussed on many instances, but the idea that the Charter could not render *carte blanche* to the SC, in disposing of its powers, found its place from the UN inception already at Dumbarton Oaks<sup>30</sup> and has ever since marked most of the practice of the UN<sup>31</sup>.

### *The Limits of its action*

The SC performing its duties under the terms referred at article 24 (2) "shall act in accordance with the Purposes and Principles of the United Nations." The reference "in accordance with the present Charter" has been, differently read, both as the source of the abidingness of the SC decisions or a limit to its action<sup>32</sup>. Regardless of such discussion, the fact that any organ is bound by the treaty that creates it seems to be *self-evident*<sup>33</sup>, and was confirmed by the ICJ at the

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<sup>26</sup> Despite the UN GA Resolution United for Peace (UN Resolution 377). The Cold War battles between the United States and the Soviet Union in the Security Council in the form of vetoes on both sides made it clear that some new rules governing the use of Chapter VII procedure in the maintenance of international peace and security. Hence, in 1950, the General Assembly adopted the United for Peace Resolution, providing that the General Assembly would be able to make immediate considerations in cases of Security Council veto blocking to deal with threats to peace or security.

<sup>27</sup> Despite the intent enlargement of the UN SC actions of An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping - Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992 – (UN Document A/47/277 - S/24111 of 17 June 1992), which §12 and 13 read: "The concept of peace is easy to grasp; that of international security is more complex, for a pattern of contradictions has arisen here as well. (...) This new dimension of insecurity must not be allowed to obscure the continuing and devastating problems of unchecked population growth, crushing debt burdens, barriers to trade, drugs and the growing disparity between rich and poor. Poverty, disease, famine, oppression and despair abound".

<sup>28</sup> John Foster Dulle, War or Peace, 1950, page 194-195 refers "The Security Council is not a body that merely enforces agreed law. It is law unto itself" cited by Mohammed Bedjaoui, The New World Order and the Security Council – testing the legality of its acts, 1994, page 1.

<sup>29</sup> Hans Kelsen cited by Mohammed Bedjaoui, op. cit., page 31.

<sup>30</sup> Vide Bedjaoui, op. cit., page 9 et seq.

<sup>31</sup> To such an extent that it gives rise to distinct readings of the UN Charter, and most precisely of the powers of the SC: on the one hand, a realist approach to the interpretation of the UNSC powers, that refers to the SC itself the ultimate competence of legal interpretation of its powers, as opposed to a normative one that intends to limit the powers of the SC by way of both of the overall system of the Charter and in face of other sources of law Martti Koskenniemi, op. cit.

<sup>32</sup> On the matter vide Delbrück in Simma, op. cit., pages 407 et seq.

<sup>33</sup> Mohammed Bedjaoui, op. cit., page 14.

*Reparations case* as “the rights and duties of an entity such as the Organization depend upon its purposes and functions as specified or implied in its constituent document and developed in practice”<sup>34</sup>. This means to say that the “Security Council must respect the Charter, on the one hand because it is the act to which it owes its very existence and also and above all because it serves this Charter and the United Nations Organization”<sup>35</sup>. Similarly, “That such limitations are real and important appears when one considers the *travaux préparatoires* leading to the adoption of the Charter.”<sup>36</sup>. This overall limitation<sup>37</sup> arises as it determined the original terms upon which Member States agreed on the conferral of powers to the organization, which is still understood to limit the action of the organizations itself<sup>38</sup> despite the subsequent changes admitted<sup>39</sup>.

Besides this *immanent* limitation to the action of the UN<sup>40</sup>, the question then turns to identifying the precise limits to the action of the SC. According to article 103 of the Charter “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”, which is to say that no conventional form of international law shall prevail over the UN action under the Charter. The International Court of Justice (ICJ) at the *Lockerbie case* also recognized this, when it refused to concede Libya the right to invoke the fulfilment of the obligations under the Montreal Convention against the executive action of the UN taken by the SC resolutions under Chapter VII.

Alongside these *internal* limitations to the SC's action, presented by the UN Charter, further questions arise, as the Charter does not exhaust the full regime of sources of International Law. The Charter does not refer expressly the SC's action

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<sup>34</sup> Reparations case. Even though at the UN Charter such clarity fades in light of the exceptional nature of the SC and the imprecise formulation of the Purposes and Principles of the Charter as recognized by Bedjaoui.

<sup>35</sup> Cfr. the dissenting opinion of Judge Bedjaoui to the Order of 19 June 1992 in Lockerbie Case [Questions of Interpretation and Application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)].

<sup>36</sup> Cfr. the dissenting opinion of Judge Weeramantry to the Order of 19 June 1992.

<sup>37</sup> Thomas Franck, *Fairness in International law and Institutions*, 1998, page... refers to Charter of limited powers reverting namely to the limits imposed on the UN SC actions.

<sup>38</sup> On the matter vide Dan Sarooshi, *Some Preliminary Remarks on the Conferral by States of Powers on International Organizations*, Jean Monnet Working Paper 4/03, in <http://www.jeanmonnetprogram.org/papers> in 11.06.2004.

<sup>39</sup> Namely those resulting from the subsequent practice doctrine and the implied powers. On the matter vide *idem* and on the ICJ interpretation of constitutive treaties vide Edward Gordon, *The World Court and the interpretation of Constitutive Treaties: some observations on the development of an international constitutional law*, *AJIL*, Vol. 59, n.° 4, Oct 1965, 794 et seq.

<sup>40</sup> That includes the procedural limits as determined by the Charter, namely the voting procedures.

in regard to General International Law. On the one hand, it creates a largely exceptional regime based on the binding enforceable action of an *exclusive* executive organ, with competence in the maintenance peace and security. On the other hand, the UN is set up as its Peoples were “determined (...) to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained” (*Preamble of the UN Charter*). It naturally seems highly unlikely that it was ever in the mind of the founders of the UN to derogate altogether from International Law (despite the refusal of some proposed amendments at the S. Francisco Conference intent precisely at expressly consecrating such limitation for the SC action); which would, anyway, make no sense presently at a time when “*the restoration of peace can only be illusory without the observance of international law*”<sup>41</sup> as international law asserts its presence in the relation among states and in light of the overall system of sources of international law, as presently understood<sup>42</sup>. Moreover, since the participation of the addressees of a certain legal command is a necessary democratic input to the international law-making procedures<sup>43</sup>. This legitimating of any imposing legislative action<sup>44</sup> would be absolutely lacking at the SC legislative action, hence, highly crippling its legitimacy and enforceability<sup>45</sup>.

Similarly, the Charter is unclear on the limits imposed by the *ius cogens* norms on the action of the SC. However, unlike the reference to its conventional nature

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<sup>41</sup> Bedjaoui, op. cit, page 35.

<sup>42</sup> Also in this sense vide, Bedjaoui, op. cit, Pierre Marie Dupuy, *Droit International Public*, 1992, Tetsuo Sato, "The Legitimacy of Security Council Activities under Chapter VII of the UN Charter since the End of the Cold War", in *The Legitimacy of International Organizations* (UNU Press, J.-M. Coicaud & V. Heiskanen eds., 2001) pp. 309-352, maxime page 340.

<sup>43</sup> Inasmuch as it is built on the meaning building potential of law making processes. In this sense vide Deborah Cao, *Chinese Lawmaking as a Communicative Act?*, *International Journal for the Semiotics of Law - Revue Internationale de S'emiologie Juridique* 16 (2003), pages 211–232, maxime page 223.

<sup>44</sup> The consensus building (communicative) action, on Habermasian terms, that allows for the legitimate enforcement of state violent action (the *öffentliche Gewalt*). Moreover, such dialectic action is a pragmatically relevant instrument, allowing for the subjective identification of the addressees with the obligations there intent. On the matter vide Tom Tyler, *Why people obey the law* quoted in Thomas Franck, *Fairness*, op. cit., page 25.

<sup>45</sup> The more important at international law making as reported by Michael Reisman, “International Law making: A process of communication” in Martti Koskenniemi, *Sources of International Law*, page 162. Moreover so, a time when the democratic entitlement of the people is growingly finding its way into national legal systems, Thomas Franck “The Emerging Right to Democratic Governance” (1992) 86 *AJIL* 46 in line with the assertion of a post-ontological moment of international law, Franck, *Fairness*, op. cit., page 6, but moreover so when the individual itself is emancipating from such national politically organized communities into a universal area, which acknowledgement cannot be denied, Thomas Franck *The empowered self: law and society in the age of individualism*, 1999.

(which would allow the invocation of article 103 of the Charter<sup>46</sup>), the true nature of *ius cogens* cannot be found on a conventional deliberation of states<sup>47</sup>. Otherwise, the nature of norms, which allows for no derogation, would be precluded if the UNSC, acting under Chapter VII could derogate from them. This same thought was conveyed, recently, at Judge Sidhwa's Separate Opinion on the *Tadic* case<sup>48</sup> when, referring that "...it cannot be assumed that in delegating their authority to the Security Council the States granted full powers to the Security Council to act according to its whims or purely on capricious considerations". The same, very thorough analysis of the role of the Security Council under Chapter VII, goes on to say that "Where serious doubts arise as regards the action of the Council being *ultra vires*, or against the principles and purposes of the Charter, or violating the *jus cogens* rule, a speedy remedy is desirable."<sup>49</sup>

The idea that UN SC action, namely under the exceptional authority of Chapter VII, is subject to limits begs the question of determining its *vires*. The actions of the UN have been put up to review on several instances. At the International level the ICJ has been confronted with this same question previously<sup>50</sup>. At the Namibia case<sup>51</sup> it referred that: "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." However, the same opinion among the majority the proceedings' judges, goes on to refer that "in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions". More precisely at the *Lockerbie* case, for it concerns UN SC actions under the authority of Chapter VII the ICJ, again, did not shy from analysing all the aspects of the legal question put before it, even if it meant looking

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<sup>46</sup> Bernd Martenczuk, "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?", EJIL, Vol. 10 (1999) No. 3, page 517 et seq., refers that "The notion of *jus cogens* has its foundations on article 53 of the Vienna Convention on the Law of the Treaties. Therefore, it is essentially a concept from the law of international treaties that cannot easily be transplanted into law of the United Nations", page 546.

<sup>47</sup> As referred by Anthony D'Amato, "It's a Bird, It's a Plane, It's *Jus Cogens*!", Connecticut Journal of International Law, 6, 1 (1991). Also on the matter vide Manfred Lachs, Collected Courses, Hague Academy of International Law, Volume 169 (1980-IV), page 201 et seq.

<sup>48</sup> Prosecutor v. Tadic aka Dule (Case IT-94-1) which proceedings are available at [www.un.org/icty](http://www.un.org/icty) In the same sense Bedjaoui, op. cit., page ...

<sup>49</sup> Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

<sup>50</sup> For an overall assessment, despite obvious historic limitations, vide Jose Alvarez, "Judging the Security Council", 90 AJIL (1996), p. 1 et seq.

<sup>51</sup> Advisory Opinion requested by the Security Council on the Namibia Opinion as in footnote 22.

in to SC resolutions, hence claiming an *incidental jurisdiction*<sup>52</sup> over the UN SC resolutions<sup>53</sup>. More recently, this same idea was confirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY), when addressing the lawfulness of its own establishment under Chapter VII of the UN Charter<sup>54</sup>, referring that: “Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, (...) In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.”

It could be said that the interpretation of the limits to the SC actions eventually purports that if not unconditional, such action could be the subject of “*national examine or review*”<sup>55</sup>, hence endangering its binding nature. However, “*in accordance with the present Charter*” member states are also obliged to accept and carry out the decisions of the SC (article 25) namely those taken under the authority of the Chapter VII, providing the UN all assistance (article 2(5)), regardless of their domestic jurisdiction (article 2(7)), and of all other conventional commitments (article 103). However, this is not to contradict that the “action[s] required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine” according to article 48. This is to say that decisions taken under Chapter VII are to be implemented by member states, some or all, at their national jurisdictions’ own terms. This, of course, comes in line with the principle of equal sovereignty, prescribed by article 2(1), applicable under the prescribed terms<sup>56</sup>, not entailing, though, that Member States are able in any way to review the measures adopted and their implementation<sup>57</sup>. So purports the nature of UN SC resolutions, as a primary organ of the UN with the competence on

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<sup>52</sup> Not primary jurisdiction for, even though it is to be regarded as a UN principal legal organ, no such powers were granted by the system arising from the combined structure of the UN Charter and the ICJ Statute, namely from its jurisdiction clauses under article 36 of the ICJ Statute.

<sup>53</sup> On the matter vide Bernd Martenczuk, op. cit. and Bernhard Graefrath, “Leave to the Court What Belongs to the Court-The Libyan Case”, EJIL, Vol. 4 (1993) No. 2, page 184 et seq.

<sup>54</sup> Tadic case, Appeals Chamber Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

<sup>55</sup> Delbrück, in Simma, op. cit, page 414.

<sup>56</sup> This means nothing on the hierarchical value of UN SC resolutions on national jurisdictions. That is naturally a question to be addressed by the latter, which determine the relationship between national and international law on their own constitutional terms. On the matter vide Frowein, in Simma, op. cit., page 626.

<sup>57</sup> Even judicially, on the matter vide for the American example *Diggs v Schultz* at idem.

the maintenance of peace and enforcement of the collective security system<sup>58</sup>. It could, then, be read as the imposition on UN member states of a *de facto* direct applicability<sup>59</sup> of UN SC resolutions. That such may be the option of national jurisdictions seems acceptable<sup>60</sup>, however, it is highly problematic to endorse such understanding as a rule of international law, namely in light of the UN Charter (*maxime* article 48 and article 2(7)) and the legal nature of UN SC resolutions, most notably the present inexistence of judicial review mechanisms at the international level (for states, let alone for individuals increasingly affected by them).

The understanding of the overall nature of UNSC resolutions and its nature as a source of international law is presently particularly important, as it has come to encompass new obligation in forms previously unheard<sup>61</sup>.

### 3. UNSC action on Terrorism

International normative action on terrorism has long been of the concern of International Organizations'. The League of Nations had already in 1938 drafted a *Convention for the Prevention and Punishment of Terrorism*<sup>62</sup>, but the fact remained that treaties dealing with the matter have long been unable to define

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<sup>58</sup> Also referred to as exclusive competence by Judge Weeramantry, full competence by Judge Kooijmans and more limitedly as wide discretion by the ICTY at Tadic case, all in Martenczuk, *op. cit.*, page 541.

<sup>59</sup> Borrowing from a domestic jurisdiction example in Paulo Canelas de Castro, Portugal's World Outlook in the Constitution of 1976, *Boletim da Faculdade de Direito da Universidade de Coimbra*, Vol. 71 (1995), page 469 et seq., *maxime* page 536, which referred that, despite not being constitutionally determined [the Portuguese constitution allows for the direct applicability of International Organizations' acts as long as such is established in the respective constitutive act – article 8.º, n.º 3 – of which are most relevant examples the EU Council Regulations], the state practice of almost automatic publication by way of non normative acts [therefore not entailing legal transformation] would determine the recognition of such *de facto* direct applicability, which the author *de iure contendo* finds most advisable for the Portuguese case.

<sup>60</sup> Regardless of the arguments referred in the defence of such option for the Portuguese case by Canelas de Castro, *op. cit.*, such option, beyond the organization's constitutive treaty or subsequent practice (the direct applicability of EU Directives has been accepted, despite not being determined at its constitutive treaty) seems highly problematic as it encompasses a degree of openness to the practice of International Organizations (in this case the UN), not intended by latter and not accepted by other member states as admissible (mandatory) subsequent practice.

<sup>61</sup> Most notably at a time when the referred tyranny of the Permanent Members of the SC has been referred to a "monopolarité activant" as referred by René-Jean Dupuy quoted by Benedetto Conforti in *The Development of the Role of the Security Council / Le développement du rôle du Conseil de Sécurité, Peace-Keeping and Peace-Building Workshop 1992 / Colloque 1992, The Hague Academy of International Law*, Edited by R.J. Dupuy, page 51.

<sup>62</sup> *Convention for the Prevention and Punishment of Terrorism*, (1938) 19 League of Nations Official Journal 23 that never entered into force.

terrorism, despite being seized on the matter for long, namely codifying many of the existing rules. The UN refers 12 universal conventions and protocols on terrorism<sup>63</sup> in different stages of adoption or entry into force and the ongoing negotiations on a *Draft Comprehensive Convention against Terrorism*<sup>64</sup>. These impose on State Parties certain obligations concerning the prevention and punishment of terrorist acts, most recently regarded at the Convention on the Suppression of the Financing of Terrorism, in 1999. Among others, it exhorts cooperation among state parties in numerous fields, namely criminal prevention and prosecution, imposes on states parties various obligations, among which the criminalization of certain conducts (i.e. terrorism financing), or certain actions (i.e. the prevention of terrorism financing by freezing of assets and seizure of funds)<sup>65</sup>.

The UN General Assembly (GA) has on many instances been concerned with terrorism. At Resolution 3314 on the definition of Aggression, it included as such: “The sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State, of such gravity as to amount to the acts listed above, or its substantial involvement therein”<sup>66</sup> whereas Resolution 40/61 adopted in 1985 “condemn[ed], as criminal, all acts, methods and practices of terrorism wherever and by whomever committed ... [and] call[ing] upon all States to fulfil their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts”<sup>67</sup>.

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<sup>63</sup> In [http://www.unodc.org/unodc/en/terrorism\\_conventions.html](http://www.unodc.org/unodc/en/terrorism_conventions.html).

<sup>64</sup> Taking place in a Ad-Hoc Committee of the General Assembly. For a historical recount of the UN position on terrorism vide Malvina Halberstam, *The Evolution of the United Nations Position on Terrorism: from exempting national liberation movements to criminalizing terrorism wherever and by whomever committed*, Colum, J. Transnat'l L., 41 (2002-2003), page 573 et seq.

<sup>65</sup> In this sense, International Organizations have taken up a significant role at the international coordination on the matter, and besides the UN other organizations have also, at different levels, taken up the fight on Terrorism. Vide in particular: The Council's of Europe Convention on the Suppression of Terrorism, Strasbourg, 27/01/1977, available at <http://conventions.coe.int/> and the Protocol amending the European Convention on the Suppression on Terrorism, Strasbourg, 15/05/2003, at <http://assembly.coe.int.>; the SAARC Regional Convention on Suppression of Terrorism, 1st November 1987, at <http://www.saarc-sec.org>; The Arab Convention for the suppression of terrorism, adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice, Cairo, April 1998, *Unofficial translation from Arabic by the United Nations English translation service*, at <http://www.al-bab.com> and the Convention of the Organization of the Islamic Conference on combating international terrorism, adopted in Ouagadougou 1st July 1999 at <http://www.oic-un.org/>.

<sup>66</sup> Definition of Aggression, GA Res 3314, UN GAOR, 29th Sess, 2319th plen mtg, Annex, Supp No 31, UN Doc A/RES/3314 (1974) 142.

<sup>67</sup> GA Res 40/61, 40th sess, 108th plen mtg, UN Doc A/RES/40/61 (1985) [1], [6].

The UN Security Council (SC) referred to terrorism<sup>68</sup> in Resolution 635 (1989) – on the making of plastic or sheet explosives for the purpose of detection - that “call[ed] upon all states to cooperate in devising an implementing measures to prevent all acts of terrorism...”. Yet, ever since terrorism was considered a “threat to international peace and security” and hence allowed for UN SC action under Chapter VII, its actions took on a different form. In this regard the destruction of Pan American flight 103 and *Union des transports aériens* flights 772 and the ensuing sanctions against the Libyan Arab Jamahiriya, respectively addressed by Resolutions 731(1992) 748 (1992), for their innovative nature played a crucial role. Notwithstanding, it were resolutions on the situation in Afghanistan - 1214 (1998) – and on measures against the Taliban - 1267(1999) and 1333 (2000) – that marked a shift in the action of the UNSC on terrorism, signalling a commitment to the fight on terrorism and to the implementation of such measures not seen before. Later resolutions came to confirm this idea, namely UNSC resolutions 1363 (2001) on the establishment of a mechanism to monitor the implementation of measures imposed by resolutions 1267 (1999) and 1333 (2000).

### 3.1. “Necessary Measures not involving the use of armed force”

It is when adopting the *necessary measures*<sup>69</sup> that the UN SC actions under Chapter VII (in line with the determination of the existence of a “threat to international peace and security”) may present some normative concerns as article 41 of the Charter referring “*measures not involving the use of armed force*” allows for a wide range of action, not really limited by the ensuing exemplification<sup>70</sup>. The nature of such measures was hotly debated at Dumbarton Oaks as it was suggested (Soviet proposal) that such measures were to be exhaustively enumerate. This intention did not find its way into the Charter has the other Great Powers did not want to limit in that regard the action of the SC, providing only for an illustrative catalogue<sup>71</sup>. Such measures have over the years adopted numerous forms and, though not expressly referred by the SC Resolutions, which refer the overall

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<sup>68</sup> It had previously been addressed but in the context of states' action, namely as the invocation of the right of self defence alleged by Israel on attacking PLO's headquarters' in Tunisia, condemned by UNSC Resolution 573 (1985).

<sup>69</sup> It is precisely at this instance that the UN SC's action may adopt normative nature that concern this work and not so much as member states claim to exercise the inherent right to self defense, under article 51 of the Charter, hence, limiting the UN intervention to the reception of a communication.

<sup>70</sup> Article 41, in fine refers: “These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

<sup>71</sup> In this regard vide Frowein, in Simma, op. cit, page 624.

Chapter VII authority, have been the legal basis for much of the non-military action against terrorism.

Most notably, these actions fall within the same line of reasoning by which the SC, under Chapter VII authority, had resorted to mandatory sanctions as an enforcement tool. In the last decade, such sanctions have been imposed against Iraq, Libya, Somalia, UNITA forces in Angola, Rwanda, Liberia, Sierra Leone, the former Yugoslavia (including Kosovo) and Eritrea and Ethiopia<sup>72</sup>. The range of sanctions has included comprehensive economic and trade sanctions and/or more targeted measures such as arms embargoes, travel bans, financial or diplomatic restrictions.

The (general) use of mandatory sanctions is directed at applying pressure on a State or entity to comply with the objectives set by the Security Council without resorting to the use of force. Yet, in line with expressed concerns at the possible adverse impact of sanctions<sup>73</sup>, which are believed to be reduced either by incorporating humanitarian exemptions in the resolutions<sup>74</sup> or by better targeting them, on the fight on terrorism, the UNSC has adopted the referred *smart sanctions*<sup>75</sup> (or *target sanction*), which seek to pressure regimes and individuals or organizations thought to be involved in terrorism practices, and can involve the freezing of financial assets and blocking of financial transactions, travel bans, etc. However, the SC, under Chapter VII authority, has adopted numerous other measures short of military intervention. It has determined the enforcement of

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<sup>72</sup> Respectively enforced by Security Council Committees established by UN SC resolution 661 (1990) concerning the situation between Iraq and Kuwait (Terminated pursuant to resolution 1483 (2003) of 22 May 2003 –but reinstated by 1518 Committee); resolution 748 (1992) concerning the Libyan Arab Jamahiriya (Terminated pursuant to resolution 1506 (2003) of 12 September 2003), resolution 751 (1992) concerning Somalia; resolution 864 (1993) concerning the situation in Angola (Monitoring Mechanism on Sanctions against UNITA)(Terminated pursuant to resolution 1448 (2002) of 9 December 2002); resolution 918 (1994) concerning Rwanda; resolution 985 (1995) concerning Liberia (Terminated pursuant to resolution 1343 (2001) of 7 March 2001 but reinstated by resolution 1521 (2003)); resolution 1132 (1997) concerning Sierra Leone; resolution 1160 (1998) on Federal Republic of Yugoslavia, including Kosovo (Terminated pursuant to resolution 1367 (2001) of 10 September 2001); resolution 1298 (2000) concerning the situation between Eritrea and Ethiopia (Terminated in pursuance of Presidential Statement S/PRST/2001/14 of 15 May 2001); resolution 1343 (2001) concerning Liberia (Terminated pursuant to resolution 1521 (2003) of 22 December 2003, see below); concerning Liberia.

<sup>73</sup> On the matter vide Boris Kondoch, “The Limits of Economic Sanctions under International Law: The Case of Iraq”, *International Peacekeeping* Volume 7 (2001), 267-94 and W. Michael Reisman and Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, EJIL, Vol. 9 (1998) No. 1, page 86 et seq.

<sup>74</sup> Like the Oil-for-food programme in Iraq established by resolution 986 (1995). On the matter vide Kondoch, op. cit., page 269 et seq. and Reisman and Stevick, op. cit., maxime page 99.

<sup>75</sup> On the subject, Iain Cameron, *Targeted Sanctions and Legal Safeguards*, Report to the Swedish Foreign Office on Legal Safeguards and Targeted Sanctions, 2002, in [resources.jur.uu.se/repository/5/PDF/staff/sanctions.pdf](http://resources.jur.uu.se/repository/5/PDF/staff/sanctions.pdf) viewed in 11.06.2004. For a update account of UN target sanctions vide [www.smartsanctions.org](http://www.smartsanctions.org)

previously decided embargoes<sup>76</sup> or it has created judicial organs like the International Court for the former Yugoslavia and the International Court for Rwanda<sup>77</sup>.

More recently, the global commitment on the terrorism prevention and repression, has been particularly marked by Resolution 1373 (2001)<sup>78</sup>, on international cooperation to combat threats to international peace and security caused by terrorist acts, which besides reaffirming the unequivocal condemnation of the terrorist attacks of 11 September 2001, also established the Counter-Terrorism Committee (CTC)<sup>79</sup>, intended to monitor the implementation of resolution 1373 by all States and to increase the capability of States to fight terrorism.

### 3.2. Terrorism as a “threat to international peace and security”

On September 12, 2001 the UN SC passed Resolution 1368 (2001), which “*Reaffirming* the principles and purposes of the Charter of the United Nations, *Determined* to combat by all means threats to international peace and security caused by terrorist acts, *Recognizing* the inherent right of individual or collective self-defence in accordance with the Charter, (1) *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks”. This resolution has often been cited as the basis for the military response to terrorism<sup>80</sup> based on the right to self-defence, under article 51 of the UN Charter<sup>81</sup>. The inherent right to self-defence must, however, be read in the backdrop of the overall prohibition of the use of force

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<sup>76</sup> Like Resolution 221 of April 9, 1966 which charged the United Kingdom and Portugal with the power to prevent the arrival of oil products to Southern Rhodesia in line with the then in place sanctions. Vide Frowein, page 624 et seq. in Brunno Simma, op. cit.

<sup>77</sup> Referring to the exercise of “quasi judicial functions by establishing a judicial organ” vide Tetsuo Sato, op. cit., page 331.

<sup>78</sup> More recently resolution 1455 (2003) intent on improving implementation of measures imposed by paragraph 4 (b) of Resolution 1267 (1999), paragraph 8 (c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002) on measures against the Taliban and Al-Qaida.

<sup>79</sup> Revitalized by resolution 1535 (2004).

<sup>80</sup> Namely in Afghanistan but apparently continuing elsewhere as referred by Mark Drumbl “Self-defense in an age of terrorism” in ASIL Proceedings of the Annual Meeting; April 2-5, 2003, page 141.

<sup>81</sup> The nature of the right to self-defence prescribed by article 51, namely the terms of its inherency, have long been discussed and Resolution 1368 further contributes to that discussion by not addressing the matter directly, because, although “Recognizing the inherent right of individual or collective self-defence in accordance with the Charter” it does not expressly recognize such possibility nor does it acknowledge the events of 9.11 as an armed attack, which would allow for the legitimate use of article 51.

(*Gewaltverbot*) in international relations that gives form to the UN Charter<sup>82</sup>, which is said to be one of the constituent rules of International Law<sup>83</sup>.

The system of collective defence that regards the UN SC (and not individual member states) as the guardian of international peace and security<sup>84</sup>, seems to set this possibility as an exception from the general prohibition on the use of force, precisely as it intends to exercise the sovereign competence of its members states in the maintenance of peace and security<sup>85</sup>. The negative formulation of article 51 [“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”] seems precisely to indicate that it is the self-defence mechanism that is exceptional to the Charter based collective defence system<sup>86</sup>; which is further confirmed by the limits its second part establishes [“...until the Security Council has taken measures necessary to maintain international peace and security.”].

Reverting this idea to the most recent SC actions on international terrorism<sup>87</sup>, the fact that it had long been regarded<sup>88</sup> as a “threat to international peace and security”, under article 39, lead to the adoption of measures under Chapter VII, which cannot be regarded, as other than the “*measures necessary to maintain international peace and security*” under the second part of article 51 of the UN Charter, and would, hence, seem hardly compatible with the application of article 51<sup>89</sup>. Besides, it seems highly contradictory that a single SC resolution (as Resolution 1368 did) would authorize, or even recognize, the right to self-defence under art 51, and *simultaneously* qualify the *armed attack* that gives rise to it as a

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<sup>82</sup> And not as an independent and un-derogable rule of international law, pre existent and overriding the UN Charter, namely in light of the nature of such prohibition.

<sup>83</sup> Robert Uerpman, *Internationales Verfassungsrecht*, *Juristen Zeitung*, n.° 11, (2001) page 565 et seq.

<sup>84</sup> Whether this means that the SC has the power to terminate the recourse to individual or collective self-defence is not clear. On the matter vide Randelzhofer, in Brunno Simma, *op. cit.*, p 677 and Rostow, *Until what? Enforcement Action or collective self-defence*, *AJIL*, 85(1991), p. 507 te seq.

<sup>85</sup> Randelzhofer in Simma, *op. cit.*, page refers the subsidiary nature of action under art 51 of the Charter in face of the general system of collective security.

<sup>86</sup> Vide Nabil Elaraby, *Some Reflections on The Role of the Security Council and the Prohibition of the Use of Force in International Relations: Article 2(4) Revisited in Light of Recent Developments in* <http://edoc.mpil.de/fs/2003/eitel.cfm> in 11.06.2004.

<sup>87</sup> For an historical recount of the matter vide Michael N. Schmitt, *Counter-Terrorism and the Use of Force in International Law*, *The Marshall Center Papers*, No. 5.

<sup>88</sup> At least ever since Resolution 731 (1992) on the destruction of Pan American flight 103 and Union des transports aériens flights 772 and the ensuing sanctions against the Libyan Arab Jamahiriya. The case on Afghanistan ever since in Resolution 1267 its failure to comply with resolution 1214 was regarded as a threat to international peace and security.

<sup>89</sup> With contrary understanding vide Carsten Stahn, *Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say* in *EJIL forum on WTC attacks*.

“threat to international peace and security”. Such pronouncement, under Chapter VII, would lead to the adoption of the necessary measures<sup>90</sup>, hence rendering article 51 inoperative<sup>91</sup>. Despite the (apparent) temporary<sup>92</sup> derogation from the collective security system (which is all the more significant), the fact is that the action of the UN under Chapter VII, deriving from the understanding of international terrorism as a “threat to international peace and security” and its qualifications as criminal action to be fought by all states has been prolific.

### 3.3. A Breakthrough - Resolution 1373

In this sense, the most recent UN action on Terrorism is largely based on UNSC Resolution 1373, adopted on September 28, 2001 in the still highly emotionally charged aftermath of the 9.11 events, which is said to be a “cornerstone of the United Nations counter terrorism effort. [It] also represents a departure for the institution”<sup>93</sup>. Its highly innovative nature has been identified by the imposition on Member States of a broad set of measures on prevention and suppression of terrorism. It *decides*, “*all States shall prevent... (a) Criminalize... (b) Freeze... (c) Prohibit*” focusing primarily on terrorism financing practices. It addressed all Member States, under the authority of the UN Charter Chapter VII, seemingly adopting “for the first time, a truly legislative resolution”<sup>94</sup> because it used “for the

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<sup>90</sup> The acknowledgement of the existence of a threat to international peace and security entailed the adoption of measures “to maintain or restore international peace and security” (art 39), otherwise rendering the UN action on the matter void.

<sup>91</sup> It is not for the present work to look at the qualification of the September 11 events as an armed attack, on the terms prescribed by article 51 of the Charter, that marked much of the ensuing war waged on terrorism, its lawfulness or adequacy, namely in face of the existent *ius ad bellum* and *ius in bello*. However, regardless of such determination the fact that against the same (allegedly attacking) state measures had been adopted by the SC under Chapter VII authority to face that same threat to international peace and security, seems hardly compatible with the exercise (however temporary, for shortly after other Resolutions, namely 1373, again brought the matter under the auspices of the SC) by a member state (or group of member states) of its (their) right to individual or collective self-defence; namely in light of the second part of article of article 51 [“until the Security Council has taken measures necessary to maintain international peace and security”] of the UN Charter, which, in the present case, it already had. (no texto?)

Hence seemingly reaffirming that “No, this is not War!”, Alain Pellet in EJIL forum on WTC attacks in <http://www.ejil.org/> along with the contributions on the matter of Antonio Cassese, Pierre-Marie Dupuy, Giorgio Gaja, Frederic Megret and Carsten Stahn. For another equally relevant academic debate on the issue vide ASIL Insights – Terrorist attacks on the WTC and the Pentagon in <http://www.asil.org>.

<sup>92</sup> As further UNSC Resolutions later adopted came to adopt measures under art 39, which, seems to bring the matter under the auspices of the UN SC collective security system, if it were not previously.

<sup>93</sup> Eric Rosand, Security Council Resolution 1373, The Counter-Terrorism Committee, and the Fight against Terrorism, AJIL, vol. 97, n.° 2 (April 2003), page 333.

<sup>94</sup> Krish, op. cit, page 6.

first time, its Chapter VII powers under the Charter to order all states to take or to refrain from specified actions in a context not limited to disciplining a particular country”<sup>95</sup>. In fact, the SC uses its powers under Chapter VII to address all Member States and impose on them certain conducts regardless of a concrete situation, addressee or time limit, therefore, apparently resembling the abstract and general norms emanating from legislative bodies in national law.

The *law-enacting*<sup>96</sup> powers of the SC have long been disputed<sup>97</sup>, but from the outset, despite no clear disposition on the matter, the fact that it must be regarded as subject to general international law, renders it incapable of any innovative action (legislative) that could derogate from it<sup>98</sup>. Hence, at resolution 1373, the SC seemingly limited its intervention to very specific matters that had already been addressed in international law<sup>99</sup>, which could be said to have found their way into General International Law<sup>100</sup>. It is the case of the obligation to criminalize Terrorism Financing that had already been addressed by the Convention on Terrorism Financing or general obligation to fight terrorism, not caring, though, of defining it as a Comprehensive Convention on Terrorism is being drafted, and in this sense only referred to matters that were not on discussion there. The SC would, hence, only intend to enforce obligations that its member states had already accepted as norms of International Law.

The SC powers were, nonetheless, not intent at codifying existent international customary law. Even, such action, as it goes beyond the original design of its

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<sup>95</sup> According to the formulation of traditional Modern Constitutionalism, based on the principle of separation of powers as it came to be interpreted in parliamentary regimes. More particularly on the subject vide Paul S. Szasz, *The Security Council Starts Legislating*, AJIL, 96, 901 (2002). Also in the same sense J. D. Aston, *Die Bekämpfung abstrakter Gefahren fuer den Weltfrieden durch legislative Massnahmen des Sicherheitrats – Resolution 1373 (2001) im Kontext*, ZaöRV, 62 (2002)257 et seq.

<sup>96</sup> Renata Sonnefeld, op. cit., page 1.

<sup>97</sup> In line with the supra referred exceptional nature of the UN SC, which has been said to be “law unto itself” (Dulles) or that in disposing of its powers in relation to the maintenance of international peace and security the SC “may create law for the concrete case” as regarded by Hans Kelsen.

<sup>98</sup> On the matter vide supra page 10 et seq., despite the widely accepted reference to the quasi judicial powers of the SC as in Tetsumo Sato, op. cit., page and Oscar Schachter, “United nations Law”, AJIL, Vol. 88, 1 (1994), page 1 et seq.

<sup>99</sup> Even if a *ex novo* intervention were intended it would usurping as referred by Matthew Happold, “Security Council Resolution 1373 and the Constitution of the United Nations”, *Leiden Journal of International Law*, Vol. 16 (2003) Issue 3, page 610. Such intention could also be referred to Resolution 1422 with the same consequences as referred by Happold, op. cit. and more profoundly addressed by Carsten Stahn, “The Ambiguities of Security Council Resolution 1422 (2002)” EJIL, Vol. 14 (2003) No. 1, page 85 et seq.

<sup>100</sup> Largely drawn from other conventional instruments of international law, namely the Convention on Terrorism Financing, that had not yet found universal support and hence, by way of Chapter VII authority acquired such binding universal (due to global UN membership) nature. In this sense Eric Rosand, op. cit., page 334.

powers, is of doubtful legality in face of the UN Charter. Any such action would be (as it has been) the role of the GA due to its almost universal composition, hence conform to the necessary requirements of participation in a legitimate law enacting procedure<sup>101</sup>. The full consequences of such action on the system of sources of international law are yet to be seen and, hence, a cautious analysis of the present terms of the normative action of international organizations is in hand, namely because of the limitations that the present system of sources of law places on international law formation, which are particularly felt at the UN. The traditional mechanisms of International Law formation are based on the voluntary acceptance of equally sovereign national states<sup>102</sup>, which is particularly felt at the UN as its constitution is referred to equally sovereign states (article 2 (7) of the UN Charter).

However, such idea has been absent in the recent action on terrorism, namely Resolution 1373 and the ensuing compliance measures. It is most significant that the action of the UN on terrorism has largely taken the form of SC resolutions, precisely the least participated decision-making procedure. The largely exceptional nature of the (national and international) action on Terrorism seemingly comes as the magnitude of the threat was regarded as untenable and unmanageable otherwise. On the one hand, only largely exceptional regimes would be able to curb it both preventively and repressively; on the other, the need for a rapid coordinated effort that, under the auspices of the UN, took place on the establishment of a comprehensive system of crime prevention, that under the authority of the Chapter VII imposed on States, what they had failed to accept voluntarily<sup>103</sup>.

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<sup>101</sup> In this regard Marti Koskeniemi, "The Police in the Temple..." *op. cit.* refers that the police (the UNSC) are ransacking the Temple (the GA) as the SC claims competences in the field of justice, which the dialectic nature of the UN Charter had long awarded to the GA. Even though the Charter established no separation of powers, as referred by The ICTY Appeals Chamber at the Tadic Case, the fact is that there are attributed competences and powers to each of its main organs.

<sup>102</sup> The normative competences of International organizations are generally restricted to technical matters (as the WHO regulatory competence) or clearly set up at constitutive treaties (EU). For all vide Nguyen Quoc Dinh, *op. cit.*, page 367 et seq.

<sup>103</sup> The UN action on terrorism that has been adopted by the UN SC is an example, but it has hardly been the only one. The European Union, that has given effect to the UN SC resolutions, and namely to the CTC and the sanctions committee created pursuant to resolution 1269 requests, by way of EC Regulations directly applicable at its Member States. The most relevant being Council Regulation (EC) No 881/2002, 29.5.2002, OJ L139/9- Imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the al-Qaida network and the Taliban and Council, subsequently amended and Regulation (EC) No 2580/2001, 28.12.2001, OJ, L344/70 - Specific restricted measures directed at certain individuals and entities with a view to combating terrorism, as amended by Council Decision 2004/306/EC, 3.4.2004, OJ L99/28. Also nation states have adopted such course of action, both normatively and individually. At the United States as new organs such as the Homeland Security were created, new powers were attributed by the PATRIOT Act on dealing with terrorism and much of the legislative action has taken place under the guise of Presidential Orders, most notably Executive Order 13224, Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, Sept. 23, 2001 and Executive Order 13228, Establishing the Office of Homeland Security and the Homeland Security Council, Oct. 8, 2001. On the

It is the case of Resolution 1373 and the obligation to criminalize terrorism financing or the obligation to give effect to UNSC resolutions<sup>104</sup>. The question is particularly poignant at a matter such as international terrorism or more generally at criminal matters as it is one of the last resorts of national sovereignty. Criminal protection is referred to the protection of a given political community (generally expressed at a constitution) and one that represents more faithfully its values and common heritage. Hence the incorporation of new elements arising from needs of international cooperation (imposed by new challenges that criminality has put before law enforcement) must, therefore, be carefully pondered. These questions are particularly acute at the definition of criminal offences and the exercise of jurisdiction for they are the full expression of the states *ius puniendi*.

Resolution 1373 also created the CTC intent at monitoring its implementation and at increasing the capability of States to fight terrorism. In order to accomplish its task it works with the UN Member States and pays special assistance to States in need of such, also working with International, Regional and Sub-Regional Organizations, hence, apparently creating a true “*administrative rule-maker*”<sup>105</sup>. Together with sanctions committee established pursuant to resolution 1267 (1999) targeting numerous individuals and organizations in different parts of the world like never before, it is said to have accounted for a “*stronger executive*”<sup>106</sup> body of the UN. Moreover so, when such normative action may, eventually, mean imposing on individuals (directly or not)<sup>107</sup> certain commands and obligations that, hence, are

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matter vide J. Gregory Sidak, “The Price of Experience: The Constitution after September 11, 2001”, Constitutional Commentary, 19, (37), 2002, pages 37 et seq. and also on another instance Frank Niess, “McCarthys Wiederkehr - Bekenntniszwang und Überwachung in den USA”, Blätter für deutsche und internationale Politik, 2/2004, page 233 et seq.

Besides this participatory deficit, national jurisdictions came to fight terrorism by way of special regimes, some of them immediately after the events in late 2001, namely and just in the guise of example: the German Terrorismusbekämpfungsgesetz, 9.01.2002, the US PATRIOT Act of 26.10.2001, The UK Anti Terrorism, Crime and Security Act of 16.11.2001 or the Italian Decreto-Legge 18 Ottobre 2001 n. 374 – Disposizioni urgenti per contrastare il terrorismo internazionale, some already subsequently changed. More recent legal interventions include the Spanish Ley de prevención y bloqueo de la financiación del terrorismo of 22.05.2003, the Belgian Loi relative aux infractions terroristes de 19.12.2003. Despite this overall a-systematic trend of terrorism fighting some of these changes have found their way into more permanent legal instruments, like the Belgian, French and German Criminal Codes.

<sup>104</sup> Which has lead in many cases to the criminalization of conducts contrary to the SC resolutions. This has in many instances been done (i.e. Portuguese Lei 11/2002 of 16.02 or Macao’s Lei 4/2002 of ...) by referring to the SC resolutions in force at a given jurisdictions, which is hardly compatible with the principle of legality in criminal matters (nullun crimmen sine lege previa, scripta certa) commonly accepted (vide art. of the Portuguese Constitution; art. of the Macao Basic Law, and art. of the International Covenant on Political and Social Rights).

<sup>105</sup> Krish, op. cit., page 8.

<sup>106</sup> Idem, page 7.

<sup>107</sup> vide supra page 15.

the result of the normative action of International Organizations. This is presently felt more acutely for the fight on terrorism and the action of the CTC has taken the *smart sanction* concept a *step further*<sup>108</sup> by addressing in particular individuals, namely by way of the CTC listing that found its normative foundation on UNSC Resolutions 1269 and 1373. Such (non legislative) action has been referred as *administrative* and regarded as a novelty in face of the traditional action of International Organizations', which was directed at its Member States (and at a consensual basis). It nonetheless comes in line with the wide range of *necessary measures* that the SC may adopt under article 41, which does not seem to preclude the adoption of such administrative measures<sup>109</sup>.

These measures, however, were largely based on classified intelligence and secretive decision-making procedures<sup>110</sup>, which rendered them considerably problematic. One such example is the fact that they were virtually unchallenged as they directly targeted individuals lacking international judicial personality to do so and were legally based on UNSC resolutions under Chapter VII rendering state judicial personality of little use according to the ICJ jurisprudence<sup>111</sup>. This matter came to be illustrated as the European Union implemented itself such international obligation of its (and the UN's) Member States according to article 301 of Treaty of the European Community (TEC)<sup>112</sup>. On a given occasion a Swedish citizen that found its assets frozen by such directly applicable Regulation came to challenge before the Court of Justice of the European Union the validity of such act<sup>113</sup>. The author requested the adoption of interim measures against such action, which were eventually refused (based on the inexistence of immediate economic loss), and the consideration of the alleged illegality of such act (and of the community's system incorporation of UN SC resolution), which had been left for the merits decision, was eventually precluded by the success of diplomatic efforts resulting in the *de-listing* of the challenger. Despite the sense of missed opportunity this event resulted in major changes to the Community's system of terrorism combating by listing

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<sup>108</sup> Krish, op. cit, page 9, already referring to Resolution 1269.

<sup>109</sup> On the matter vide Boris Kondoch, op. cit., page 269 et seq.

<sup>110</sup> vide Iain Cameron, op. cit.

<sup>111</sup> vide Krish, op. cit., page 15.

<sup>112</sup> On the matter vide Sebastian Bohr, Sanctions by the United Nations Security Council and the European Community, EJIL, 4 (1993), page 256 et seq. and more recently Michael Kilchling, "Financial Counterterrorism initiatives in Europe", paper presented to the International Conference on Legal instruments in the fight against International Terrorism – A Transatlantic Dialogue", at the European Parliament, May 7-8, 2002.

<sup>113</sup> Case T-306/01 R, Decision of 07.05.2002.

individuals suspected of taking part in such practices, according to UNSC resolutions<sup>114</sup>.

This has been felt and has led to some initiative calling for the observance of certain limits on the fight on terrorism, namely those resulting from the observation of given Human Rights standards. Such intent meets some of the *supra* cited limitations, namely those resulting from the exceptional nature of UN Charter Chapter VII and its prevalence over all other conventional norms. Notwithstanding, some steps have been articulated by the UN itself (according to the understanding that the HR protection falls within the *purposes and principles of the Charter* according to its article 25). The Secretary General (SG) created a Policy Working Group on the United Nations and Terrorism that submitted a Report<sup>115</sup> (latter presented by the SG to the GA and SC), which referred that: “The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism.” It went on to recall that: “States should be made aware of the responsibilities placed upon them by the various human rights instruments and reminded that key provisions of the International Covenant on Civil and Political Rights cannot be derogated from”. Other contributions have been made by the Human Rights Commission include Resolution 2003/68 on the Protection of human rights and fundamental freedoms while countering terrorism, adopted at the *62nd meeting*, 25 April 2003, which: “Recall[ing] that States are under the obligation to protect all human rights and fundamental freedoms of all persons”, and Resolution 2003/37 on Human rights and terrorism, adopted at the 58th meeting, 23 April 2003: “Guided by the Charter of the United Nations, the Universal Declaration of Human Rights, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations and the International Covenants on Human Rights”<sup>116</sup>. These actions of the UN serve to illustrate the referred intricate relations established at its normative action by its overall principles and purposes that always preside over its

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<sup>114</sup> Some of the shortcomings had already been identified and proposals put forth by Reisman and Steick, *op. cit.*

<sup>115</sup> Report of the Policy Working Group on the United Nations and Terrorism, UN Doc. S/2002/875, Annex to A/57/273. The SG had already called attention to such matters on the Report to the GA on Human Rights and terrorism (A/56/190) of 17 July 2001.

<sup>116</sup> Other relevant provisions include General Assembly resolutions on the issue of terrorism, including resolutions 46/51 of 9 December 1991, 48/122 of 20 December 1993, 49/185 of 23 December 1994, 50/186 of 22 December 1995, 52/133 of 12 December 1997 and 56/160 of 19 December 2001, as well as its own resolutions 2000/30 of 20 April 2000, 2001/37 of 23 April 2001 and 2002/35 of 22 April 2002.

action. These concerns are particularly felt at the national level when it comes to implementing such measures. However, the fact that it is for domestic jurisdictions to implement SC resolutions (as referred *supra*, in line with article 48 of the UN Charter) determines that it is for them to decide the nature of such measures (and hence its eventual judication) accordingly to (other) existing conventional and customary rules of international law and their own perception of the intervention needs in the prevention of terrorism<sup>117</sup>.

### 3.3.1. Continued Counter-Terrorism Efforts

The UN and specially the UNSC have remained committed to the fight on Terrorism. Based on the lessons learned from the experience that followed the legal response to the September 11, 2001 events, and particularly Resolution 1373, further legal action has been adopted and new organs have been created<sup>118</sup>.

More recently the Council adopted resolution 1535 (2004), which set up the *Counter Terrorism Committee Executive Directorate* (CTED), in order to control the implementation of Resolution 1373 and to promote the technical assistance to Member States. In that same year, the UNSC Resolution 1540 (2004) created yet another counter-terrorism body the *1540 Committee*, which was also comprised of all Council members, to monitor the Member States' compliance with resolution 1540, which calls on States to prevent non-State actors (including terrorist groups) from accessing weapons of mass destruction. Resolution 1566 (2004) called on Member States to take action against groups and organizations engaged in terrorist activities that were not subject to the 1267 Committee's review and created the *1566 Working Group*, which is made up of all Council members, in order to recommend practical measures against such individuals and groups, as well as to explore the possibility of setting up a compensation fund for victims of terrorism.

In conjunction with the World Summit, on 14 September 2005 the Security Council held a high-level meeting, which adopted Resolution 1624 (2005) condemning all acts of terrorism irrespective of their motivation, as well as the

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<sup>117</sup> Despite the fact that such measures have been adopted in light of an existing threat to international peace and security, on implementing such measures domestic jurisdictions are bound by their own legal limitations on fundamental rights restriction, as well as those arising from international obligations (which bind also other subjects of international law).

Hence, the degree of the threat may not be regarded as so relevant that allows for such restriction on individual's fundamental rights (which these measures necessarily represent) that derogate from existing systems of criminal prevention. In this sense the German Justice Minister Brigitte Zypries, rightly, referred "We confront Terrorism with the so-called 'classical' instruments of Criminal Law. For, terrorist attempts are firstly criminal conducts." (originally: Wir begegnen dem Terrorismus mit dem so genannten 'klassischen' Instrumentarium des Strafrechts. Denn: Terroristische Anschläge sind zu allererst Straftaten.) in <http://www.bmj.bund.de/enid/0,0/n5.html?druck=1> visited in 08.06.2004.

<sup>118</sup> Vide <http://www.un.org/terrorism>.

incitement to such acts. It also called on Member States to prohibit by law terrorist acts and incitement to commit them and to deny safe haven to anyone guilty of such conduct. However, one of the most significant steps recently adopted on the counter-terrorism efforts of the UN, was adopted by the General Assembly, which, on 8 September 2006, adopted resolution A/RES/60/288 that establishes a *Global Counter-Terrorism Strategy*, for the first time marking the global agreement to a common strategic and operational approach to fighting terrorism. On September 2008, the General Assembly held a two-day meeting to review implementation of the Strategy and adopted resolution A/RES/62/272, which reaffirmed its support for the Strategy.

#### 4. Facing the Change

The prevention and repression of terrorist acts has presented important challenges to general international law, to the point of being regarded as a truly *constitutional moment*<sup>119</sup> in the development of international law that will, hence, mark its future development. Many features have, already, been identified in international law as constitutional in nature, part of an International Constitutional Law<sup>120</sup>. Such features have been marked by recent historical development<sup>121</sup> and came in line with the *post-ontological*<sup>122</sup> assertion of international law, being referred as an emerging *Global-Constitution*<sup>123</sup> and come in line with the *verticalization* of International Law resulting from the acknowledgement of the existence of impending *obligatio erga omnes*<sup>124</sup> as well as non-derogable norms of International Law (*ius cogens*)<sup>125</sup> which in a sense marked a axiological validation of International Law<sup>126</sup>. Such constitutional nature of the international community

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<sup>119</sup> A.-M. Slaughter et W. Burke-White, "An International Constitutional Moment" (2002) 43. Harv. Int'l L.J., page 1 et seq.

<sup>120</sup> Of which the system of sources of International Law is one such example as Robert Uerpman, op. cit. page 573 refers. The author goes on to contend: "International Constitutional Law is no wishful dream, but reality" (originally Internationales Verfassungsrecht ist nicht Wünschtraum sondern realität).

<sup>121</sup> Bruce Ackerman, The Rise of World Constitutionalism, Va L Rev, 87 (1997) page 773 et seq.

<sup>122</sup> Thomas Franck, Fairness ..., op cit., page...

<sup>123</sup> Andreas Fischer-Lescano, Die emergenz der Globalverfassung, ZaöRV 63 (3/2003), pages 717-760.

<sup>124</sup> Barcelona Traction Case, Belgium v Spain [1970] ICJ Rep. 4.

<sup>125</sup> Article 53 of the Vienna Convention on the Law of the Treaties.

<sup>126</sup> Hence, allowing for the reference to a World-society (Weltgesellschaft, in Niklas Luhmann, "Die Weltgesellschaft", in Archiv für Rechts- und Sozialphilosophie 1971, page 1 et seq.,) based on a law-governed condition (rechtliche Zustand) as referred in Fischer-Lescano, op. cit., page 717.

has been referred to the UN Charter, as a result of its *quasi*-universal membership based on recognized principles of international law<sup>127</sup>.

The change in terrorism activities witnessed over the last years and the ensuing most recent action of the SC on terrorism prevention and repression has had, unarguably, a significant impact on international law in many instances. Refer to its constitutionalization must, however, still be “viewed with cautious”<sup>128</sup>. The constitutional nature of the UN Charter<sup>129</sup> necessarily reverts to the fact that it was created as an international organization, which intent was clear enough, based on the terms of an *unequal alliance* leading to an *hegemonic* exercise of powers (most notably under the authority of Chapter VII) hardly the solid ground on which to base a constitutional integration<sup>130</sup>.

The same caution must be in place when referring to the (purported) changes that the SC action on terrorism has brought to (constitutional features of international law that are not systematically placed within the UN Charter, most notably) the overall system of the sources of law, based on the consensual consent of sovereign states, as a legislative and administrative strong executive of the UN.

In both instances, any such change goes to the heart of the constitutional nature of the international community and, hence, must be referred to a widely *participated* constituent action, necessarily referred to a dialectic legislative process<sup>131</sup>. To the moment, the UN action on terrorism shows little in this regard. It

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<sup>127</sup> As referred by Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, Max Planck Yearbook of United Nations Law 1 (1997), page 1 et seq.

<sup>128</sup> As already in 1994 Mathias Herdegen had referred about the (already then) “considerable activism displayed by the Security Council over the last years and its dynamic application of the powers under Chapter VII of the UN Charter” in “The Constitutionalization of the UN Security System, Vand, J. Transnat’l L, 135 (1994), page 135 et seq.

<sup>129</sup> Recognized, though limitedly, by the Reparations case as it admitted the existence of implied powers in its development, but for the case in question decided otherwise, vide as supra footnote 33.

<sup>130</sup> In this sense, Caetano Arangio-Ruiz, “The ‘Federal Analogy’ and the UN Charter Interpretation: A Crucial Issue”, Vol. 8 (1997) No. 1, page 1 et seq. The author contends that such limitations are so grave even as to impair an constitutional interpretation of the UN Charter, allowing for any constitutional development of the UN, in line most relevantly with the implied powers theory as developed in the US by the US Supreme Court under *Missouri v. Holland*, or in the EU by the Court of Justice under Case 26/62 *Van Gend & Loos* (1963) (but most notably ever since Case 8/55 *Fédéchar* (1955-56)). A very interesting recount of the ICJ interpretation of constitutive treaties (which could be relevant for the present topic) vide Edward Gordon, op. cit. even though as a treaty most of the difficulties there recounted have been resolved by article 31 of the Vienna Convention on the Law of the Treaties when referring the interpretation elements of an Treaty.

<sup>131</sup> On UN reform Sven Bernhard Gareis, Johannes Varwick, op. cit. The deficit of democratic representativeness in international constitutional law has already been identified (Lescano, op. cit.) and contends directly with the overall emerging right to democratic governance (Franck, *Fairness...*, op. cit) moreover stressing the need of a global consensus building action (meaning building potential as referred by Deborah Cao, op. cit.) in any truly constitutional change at international society (again borrowing Weber’s *Weltgesellschaft*). Also vide as in page 10, footnotes 50 and 51.

has come at highly charged emotional moments and marked by a degree of *exceptionalism* on so many instances, which consequences to international law are not yet fully measurable<sup>132</sup> and, in this sense, more than limiting the unwanted (and historically overdue) results of the SC's *tyranny* (or hegemony) it has further stressed them, in line with the "monopolarité activant"<sup>133</sup> that has long marked it. In fact the UN SC *co-natural exceptionalism* (as referred supra in page 9) has been profited to derogate the normative action on terrorism further away from the regular terms of international law making. Such *derogational exceptionalism* that has largely marked the UNSC normative action on terrorism, is evident as the it allows, firstly, for exceptions to the Charter based collective security mechanisms (in disregard of the subsidiary nature of article 51 of the Charter) and, secondly, but more acutely felt for the present purpose, as it intends a normative action for which it was neither originally nor presently equipped, or legitimised<sup>134</sup>. This idea has also found its way into domestic jurisdictions as terrorism prevention and repression has taken the form of more expedient *exceptional* regimes.

All the referred *exceptionalism* (*qualified* as it builds on regimes themselves of exceptional nature) has been highly problematic and encompasses unforeseen consequences as it has clearly been shown by the recent judicial enforcement of measures adopted on terrorism, which questions not only the validity and legitimacy but also the efficacy of such measures. Such action<sup>135</sup> has been referred to the need of addressing those that have voluntarily put themselves outside the terms of the (present) systematic legal reasoning, and has given rise to a *law of the enemy*<sup>136</sup>, for those that do not take part, at least, in the minimum social *consensus*. This is (if not the legal reasoning) the visible result of the present action on terrorism (both international and national) and of the whole *exceptionalism* that has marked it.

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<sup>132</sup> As Stahn, op. cit., refers on resolution 1269.

<sup>133</sup> As in footnote 79.

<sup>134</sup> In the same sense Happold, op. cit., page 609.

<sup>135</sup> Confirmed everyday as most recently by the a US Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, of 6 March 2003 reported by the Wall Street Journal of 07.06.2004, which among other things, referred that the "In light of the [US] President's complete authority over the conduct of war, without a clear statement otherwise, criminal statutes are not read as infringing on the President's ultimate authority in these areas.", page 20.

<sup>136</sup> At criminal law where such implications are particularly poignantly felt it has been referred as the Straffeindlichrecht by Günter Jackobs, "Das selbverständnis der Stafrechtswissenschaft vor den Herausforderung der Gegenwart" in Die Deutsche Strafrechtswissenschaft vor der Jahrtausendwende (Hrg Eser und Hassemer) 2000, page 47 et seq.

This understanding, however, comes in grave contrast with the raise of *individualism*<sup>137</sup> in international (as well as national) legal reasoning and, not only, has hardly found its way to the mainstream legal reasoning of our time<sup>138</sup> as it clearly contradicts the terms of the *inclusive* social dialogue<sup>139</sup> that has long been the foundation of legal discourse<sup>140</sup>. Recent judicial decisions of various organs illustrate that so much *derogational* legal action on the action on terrorism may eventually be impossible to encompass with the present canons of (not only international but also municipal) legal reasoning<sup>141</sup>. The Cases *Adan*<sup>142</sup> and more recently *Kadi*<sup>143</sup> before the European Court of Justice has submitted to the control of European Union Law the enforcement of these measures. On a different note the *BundesGerishhoff* (BGH) decision on the *Motassadeq case*<sup>144</sup>, which reversed the (at the time) only conviction regarding the Sept. 11, 2001 terror attacks on the

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<sup>137</sup> Thomas M. Franck, *The empowered self...*, *op. cit.* The emancipation of the individuals from national (closed) communities as only references in personal identity that can be read as giving rise to a standing of its own in the face of international law. Which, in turn, at an increasingly (in many instances) integrated world begs the question of “a new integration form of world-civil solidarity” Jurgen Habermas, *op. cit.*, page 90. [Mine translation, in the original: “einer neue Integrationsform weltbürgerlicher Solidarität”].

Which in turn, meant that any global constitutional dialogue must necessarily be referred to the Projekt of the active members of a civil society, which transcends national frontiers, again Jurgen Habermas, *op. cit.*, page 90. [Mine translation, in the original: “die aktiven Mitglieder einer nationale Grenzen überschreitenden Zivilgesellschaft”] in line with the emergence of a Global Civil Constitution (globaler Zivilverfassung) as referred by Günther Teubner, “Globale Zivilverfassungen: alternativen zur staatszentrierten Verfassungstheorie”, *ZaöRV*, Band 63 (2003) page 1 et seq.;

<sup>138</sup> As the Judges from the German Federal Court are quoted saying, in the referred case at footnote 131: the fight against terrorism “cannot be a wild, unregulated war.” in *Frankfurter Allgemeine Zeitung* (English version, March 5, 2004)

<sup>139</sup> All the more relevant as world integration builds on existing multicultural societies a new collective solidarity as referred by Habermas, *op. cit.*, reverting to the necessary Policy of Acceptance [in the original *Politik der Anerkennung*].

<sup>140</sup> As referred by Christian Tomuschat, “The Individual Threatened by the Fight Against Terrorism?” paper presented at the colloquium “Society in Danger”, organized by the Polish National Committee of International Association of Legal Sciences and the Faculty of Law and Administration of the University of Warsaw in Warsaw on September 13, 2002.

<sup>141</sup> Also stated by the US Supreme Court at the recent decision, concerning a alleged “unlawful combatant” of American citizenship, detained at Guantanamo Bay and later within US territory, *Hamdi v. Rumsfeld*, 542 U. S. \_ (2004), referring that it should, even in regard of the action of the Executive based on a Congressional decision [Authorization for Use of Military Force (the AUMF, 115 Stat. 224)] “...necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances.” (page 29)

<sup>142</sup> Case T-306/01 R, Decision of 07.05.2002. as *supra* in page 22.

<sup>143</sup> *Caso Yusuf* (T-306/01); *Kadi* (T-315/01); *Hassan* (T-49/04) e *Ayady* (T-253/02) in [www.curia.eu](http://www.curia.eu).

<sup>144</sup> BGH Urteil - 3 StR 218/03 vom 4. März 2004.

United States, determining that the Hamburg State Court, which had convicted Mounir Motassadeq to a 15-year prison term, after being charged with 3,066 counts of accessory to murder, should have considered the testimony of an alleged co-plotter of the attacks, who was unable to be heard, as the U.S. government (which held him detained) would not allow him to testify, and protocols of his interrogation were withheld from the trial by German authorities.

Hence, addressing those that, however atrociously, violate the law, outside the terms generally prescribed for such<sup>145</sup>, signals the first instance of defeat<sup>146</sup>, precisely because it represents the overall failure of such legal system (under attack by terrorism). Therefore the admission of such *praeter lege* action in, supposed defence of law itself, is an understanding that is hardly encompassed by general international law and one that can hardly be regarded as the adequate footing for a constitutional moment of the international community, let alone the UN. Any such change must necessarily be referred to a widely accepted reform<sup>147</sup> away from a legal reasoning which the present terms of the legal response to terrorism as but enhanced.

## Brief CV

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<sup>145</sup> Intent at, and axiological based on, precisely the equal dignity of individuals as referred in Peter Häberle, “Die Menschenwürde als Grundlage der Staatlichen Gemeinschaft” in Isensee/Kirchhof (Hrsg.), *Handbuch des Staatsrechts*, 2. Aufl. 2000, Band I, Zweiter Teil, § 20.

<sup>146</sup> As grandiloquently referred by the US Supreme Court at *Hamdi v. Rumsfeld*, 542 U. S. \_ (2004) quoting a previous decision: “*United States v. Robel*, 389 U. S. 258, 264 (1967) ‘it would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties... which makes the defense of the Nation worthwhile?’” (page 25).

<sup>147</sup> As referred by Thomas M. Franck, “The ‘Powers of Appreciation’: Who Is the Ultimate Guardian of UN Legality?”, *AJIL*, 86, 519 (1992) when stating that “The more the Council use these very wide powers, especially in the absence of a broad consensus, the more urgent will be the calls for institutional reform.”