

*Bartłomiej Krzan**

THE UN SECURITY COUNCIL AND INTERNATIONAL TERRORISM

Abstract: *The present contribution pays tribute to the late Professor Janusz Symonides by examining the position of United Nations Security Council towards international terrorism. The analysis concentrates on how the phenomenon is perceived by the main political organ of the United Nations, and offers some cursory remarks on its reactions (both actual and potential).*

Keywords: terrorism, Security Council, Symonides, United Nations

INTRODUCTION

Without doubt, international terrorism has attracted the attention of international law scholars for many decades. One cannot but subscribe to the view expressed by Dame Rosalyn Higgins that it is “a pernicious contemporary phenomenon which both presents complicated legal problems and affords an interesting opportunity to see the efforts made within the United Nations to respond to these problems.”¹ The hitherto attempts to define and combat terrorism have quite a long history, but nevertheless have been of rather limited effectiveness. Over the last decades however the UN has been very active in dealing with different issues related to terrorism. It has adopted different positions and initiatives, including those of the United Nations (UN) Global Counter-Terrorism Strategy,² or more recently the UN Office for Counter Terrorism,³ as well as the UN Global Counterterrorism Coordination Compact and the UN Counter-Terrorism Centre.

* Associate Professor (dr. habil.), Department of International Law, Faculty of Law, Administration and Economics, University of Wrocław; e-mail: bartlomiej.krzan@uw.edu.pl; ORCID: 0000-0003-3964-114X.

¹ R. Higgins, *The general international law of terrorism*, in: R. Higgins, M. Flory (eds.), *Terrorism and international law*, Routledge, London: 1997, p. 14.

² UN Doc. A/RES/60/288 is a unique global instrument to enhance national, regional and international efforts to counter terrorism. Through its adoption by consensus in 2006, all UN Member States agreed for the first time to a common strategic and operational approach to fighting terrorism.

³ Established on 15 June 2017 through the adoption of UN General Assembly Resolution 71/291.

The purpose of this article is to pay tribute to the late Professor Janusz Symonides by examining the position of the UN Security Council towards international terrorism and addressing the respective implications thereof. It may be argued that its changing attitude triggers additional problems. Our analysis concentrates on how the phenomenon is perceived by the main political organ of the UN (the Security Council) and offers some cursory remarks on its reactions (both actual and potential). Of course, an overall assessment of the practice of the UN as a whole, or even only of the Security Council, would definitely exceed the space allotted for this contribution, as it would have to result in a very extensive analysis comparable in volume to the monumental seminal work on the practice of the United Nations edited by Professor Symonides.⁴ Hence it is worth remarking here that this impressive collection of analyses under his chairmanship is only one of the many lasting achievements by Professor Symonides with respect to the doctrine of international law and international relations. In several contributions the learned Scholar considered the structural changes of the international legal order, which may seem to have been one of his favourite topics.⁵ Naturally enough, he also recognized the UN's involvement in addressing the threat of terrorism and alluded to the obvious and pressing need for international cooperation in combating it, and in particular to its normative dimension.⁶

Given this clearly discernible thread of thought it may seem natural to examine the respective developments in the practice of the Security Council and to offer the following remarks as a tribute to the memory of an outstanding Scholar of international law. Since the end of the Cold War it has been possible to observe a general growth in the activity of the Security Council with respect to the application of Chapter VII of the UN Charter,⁷

⁴ One and half decades ago he offered, together with a numerous group of influential researchers, a panoramic view of almost all aspects and problems related to the operation of the UN: J. Symonides (ed.), *Organizacja Narodów Zjednoczonych. Bilans i perspektywy* [The United Nations. Balance and prospects], Wydawnictwo Naukowe Scholar, Warszawa: 2006.

⁵ See e.g. J. Symonides, *Konieczność dostosowania porządku międzynarodowego do wyzwań i zagrożeń XXI wieku* [The necessity to adjust the international order to the challenges and threats of the 21st century], in: J. Symonides (ed.), *Świat wobec współczesnych wyzwań i zagrożeń*, Wydawnictwo Naukowe Scholar, Warszawa: 2010, pp. 637ff. When referring to the attacks on World Trade Center and the Pentagon and their perception as a turning point, or the beginning of a new era in international relations, Symonides remained skeptical, if only by alluding to the obstacles to obtaining the consent of numerous states to the proposal for a new order, dominated by the fight with international terrorism: J. Symonides, *Normatywne teorie ładu międzynarodowego po zimnej wojnie* [Normative theories of the international order after the Cold War], in: R. Kuźniar (ed.), *Porządek międzynarodowy u progu XXI wieku*, Wydawnictwo Uniwersytetu Wrocławskiego, Warszawa: 2005, p. 100.

⁶ Symonides (*Normatywne teorie*), *supra* note 5, p. 99. See also J. Symonides, *Prawnomiędzynarodowe aspekty walki z międzynarodowym terroryzmem* [International law aspects of the fight against international terrorism], 4 Sprawy Międzynarodowe 23 (2001).

⁷ Attention is drawn to this by, *inter alia*, W. Czapliński, *Ewolucja kompetencji Rady Bezpieczeństwa ONZ* [Evolution of powers by the UN Security Council], in: K. Lankosz (ed.), *Aktualne problemy prawa międzynarodowego we współczesnym świecie. Księga pamiątkowa poświęcona pamięci Profesora Mariana Iwaniejko*, Akademia Ekonomiczna, Kraków: 1995, p. 28. For a detailed analysis, including from a statistical perspective, see P. Wallensteen, P. Johansson, *Security Council Decisions in Perspective*, in: D.M. Malone

in particular with regard to terrorism.⁸ Before, if the Security Council decided to employ specific measures, they were a concrete response to a given threat in a defined situation. This practice was broken for the first time with the changing attitude towards terrorism. The goal of this analysis is thus to trace and to assess the attitude of the main political organ of the UN towards the latter problem, as well as to point to the consequences (including some problematic ones) of the broadened approach.

1. TERRORISM DETERMINATION

Although it may seem obvious, it needs to be borne in mind that the Security Council, exercising rather executive functions, bears primary responsibility for international peace and security.⁹ Art. 39 of the UN Charter does not define the threats, breaches, or acts of aggression, having regard to the need for the Security Council to react in a flexible way to any of those phenomena. The organ thus was deliberately granted broad discretion when it comes to determination of a threat to international peace and security¹⁰, as well as to taking decisions on what measures to apply.

The evolution and/or constant expansion of the organ's powers is most clearly visible with respect to how the Security Council considers and reacts to terrorism. Traditionally, the notion "threat to peace" was interpreted narrowly, coupling it tightly with the threat of force, which is prohibited under Art. 2(4) of the UN Charter.¹¹ However, with the passage of time a gradual broadening of the meaning of that notion took place.¹² While the practice by the Council is not always consistent in this regard, which of course may

(ed.), *The UN Security Council: from the Cold War to the 21st Century*, Lynne Rienner, Boulder: 2004, pp. 18f.

⁸ See e.g. I. Rysińska, *Ewolucja stanowiska Rady Bezpieczeństwa Narodów Zjednoczonych wobec terroryzmu międzynarodowego* [The evolving position of the UN Security Council towards international terrorism], in: E. Haliżak et al. (eds.), *Terroryzm w świecie współczesnym*, Fundacja Studiów Międzynarodowych, Warszawa-Piaseczno: 2004, pp. 145ff. M. Marcinko, *ONZ wobec terroryzmu międzynarodowego* [The United Nations and international terrorism], Fundacja Instytut Studiów Strategicznych, Kraków: 2008; M. Kowalski, *Prawo do samoobrony jako środek zwalczania terroryzmu międzynarodowego* [The right to self-defence as a means of counter-terrorism], Wydawnictwo Difin, Warszawa: 2013. Cf. P. Grzebyk, *Authorizing Attacks in Response to Terrorist Attacks: A Dark Side of the Law of Armed Conflicts*, in: G. Ulrich, I. Ziemele (eds.), *How International Law Works in Times of Crisis*, Oxford University Press, Oxford: 2019.

⁹ Art. 24 of the UN Charter.

¹⁰ See M. Krökel, *Die Bindungswirkung von Resolutionen des Sicherheitsrates der Vereinten Nationen gegenüber Mitgliedstaaten*, Duncker und Humblot, Berlin: 1977, p. 73.

¹¹ See J. Arntz, *Der Begriff der Friedensbedrohung in Satzung und Praxis der Vereinten Nationen*, Duncker und Humblot, Berlin: 1975, pp. 64, 110-111.

¹² For example, it has been expanded to include a serious violation of human rights and international humanitarian law (see UN Doc. S/RES/1264 (1999)), or violations of the right of nations to self-determination (e.g. Resolution 217 (1965)). Another example may be given in the form of Resolution 2177 (2014), in: which the eruption of an epidemic of the Ebola virus was treated as a threat to international peace and security (UN Doc. S/RES/2177(2014), para. 5 of the Preamble).

affect its credibility,¹³ nevertheless, it needs to be recalled that a threat to peace in the sense of Art. 39 of the Charter refers to a situation in which the Security Council, with its competence to impose sanctions, declares there to be an actual threat to the peace.¹⁴ It should be borne in mind that when exercising this power the Security Council enjoys complete discretion.¹⁵

The opinion that international terrorism constitutes a threat to the peace is no longer controversial,¹⁶ although during the initial years of its operation the UN Security Council turned a blind eye to the issue.¹⁷ While the assassination of Count Folke Bernadotte was considered “as the result of a cowardly act which appears to have been committed by a criminal group of terrorists in Jerusalem while the United Nations representative was fulfilling his peace-seeking mission in the Holy Land,”¹⁸ even in the subsequent decades terrorism did not attract much of the Security Council’s attention, as it practiced rather a “piecemeal approach.”¹⁹

Significant changes in the attitude of the Security Council towards terrorism became visible in 1980s. In the wake of the Achillo Laure affair, a statement by the President of the Security Council was issued condemning “terrorism in all its forms, wherever and by whomever committed.”²⁰ The first resolution in which the Council used the term “in-

¹³ Cf. I. Österdahl, *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter*, Justus Forlag, Uppsala: 1998, p. 138.

¹⁴ J. Combacau, *Le pouvoir de sanction de l'ONU: Etude théorique de la coercition non militaire*, Pedone, Paris: 1974, p. 100. Cf. T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter*, 26 *Netherlands Yearbook of International Law* 72 (1995), p. 109; P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th revised edition, Routledge, London-New York: 1997, p. 426 (“a threat to the peace seems to be whatever the Security Council says is a threat to the peace, which is a political evaluation and, as a matter of principle, not easily subject to legal evaluation”).

¹⁵ P.H. Kooijmans, *The Enlargement of the Concept “Threat to the Peace”*, in: R.-J. Dupuy (ed.), *Le Développement du rôle du Conseil de sécurité – Peace-keeping and Peace-building: The Development of the Role of the Security Council, Colloque, La Haye, 21-23 Juillet 1992*, Nijhoff, Dordrecht: 1993, p. 111.

¹⁶ Österdahl, *supra* note 13, p. 75.

¹⁷ See P. Romaniuk, *Responding to terrorism*, in: S. von Einsiedel, D.M. Malone, B. Stagno Ugarte (eds.), *The UN Security Council in the 21st Century*, Lynne Rienner, Boulder: 2015, pp. 278-279.

¹⁸ J. Boulden, *The Security Council and Terrorism*, in: V. Lowe et al. (eds.), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, Oxford University Press, Oxford: 2010, p. 609.

¹⁹ Romaniuk, *supra* note 17, p. 279. It was only in the 1970s that the Security Council, in its Resolution 286, reacted to the series of aircraft hijackings, and then in 1973 when Resolution 377 condemned the mistaken interception of MEP plane. However, no analogous resolution was taken after the Israeli raid on Entebbe, Uganda, where more than 100 Jewish hostages and the crew of a hijacked AIR France aircraft were rescued. In contrast, the attack by the United Red Army of Japan at Lod airport in Israel was met with a mere announcement by the President of the Security Council of the decision on hijacking (UN Doc. S/10705, 20 June 1972). An even greater divide among the members was visible in the lack of reaction to killings of the Israeli athletes at the Munich Olympics in September 1972. Cf. E.C. Luck, *Tackling Terrorism*, in: D. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century*, Lynne Rienner, Boulder, CO: 2004, pp. 87-89; Marcinko, *supra* note 8, pp. 110ff.

²⁰ UN Doc. S/17554, 9 October 1985.

ternational terrorism” was passed in 1985.²¹ In addressing suicide attempts perpetrated in the airports of Rome and Vienna, the Council condemned “all acts of hostage-taking and abduction” regarded as “manifestations of international terrorism” and considered to be “offences of grave concern to the international community, having severe adverse consequences for the rights of the victims and for the promotion of friendly relations and co-operation among States.” Three and half years later, in Resolution 635 of 14 June 1989 on the special marking of explosives, the Security Council, “conscious of the implications of acts of terrorism for international security,” and “determined to encourage the promotion of effective measures to prevent acts of terrorism,” called upon “all States to co-operate in devising and implementing measures to prevent all acts of terrorism, including those involving explosives.” When adopting Resolution 638 (1989) of 31 July 1989 on hostage-taking, it urged “the further development of international co-operation among States in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of terrorism.” Neither of these resolutions referred to any concrete conflict, nor contained any concrete determination on the existence of a threat to peace.

More conflict-related was Resolution 687 of 3 April 1991, which required Iraq “to inform the Council that it will not commit or support any act of international terrorism or allow any organization directed towards commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism.”²²

Interestingly enough, in the subsequently-adopted resolutions, most notably in those relating to the Lockerbie incident,²³ instead of reaching directly to terrorism, the determinations of threats to peace concerned the non-extradition of the suspected terrorists or the non-compliance with the obligations imposed by previous decisions by the Security Council.²⁴ A similar approach was taken when Sudan refused the extradition of those suspected of the terrorist assassination attempt on the life of the President

²¹ UN Doc S/RES/579 (1985).

²² UN Doc S/RES/687 (1991), Part H, para. 32.

²³ As a reaction to the Lockerbie incident resulting in the destruction of Pan Am flight 103 and Union de transports aériens flight 772 and the loss of hundreds of lives in January 1992, the Security Council adopted Resolution 731 of 21 January 1992, where after “affirming the right of all States, in accordance with the Charter of the United Nations and relevant principles of international law, to protect their nationals from acts of international terrorism that constitute threats to international peace and security,” it urged “the Libyan Government to immediately provide a full and effective response to (...) requests [cooperate fully in establishing responsibility for the terrorist acts referred to] so as to contribute to the elimination of international terrorism.”

²⁴ In Resolution 748 of 31 March 1992, the Security Council was “convinced that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security” and determined that “the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 constitute a threat to international peace and security.”

of the Arab Republic of Egypt, in Addis Ababa, Ethiopia, on 26 June 1995.²⁵ Even more importantly, however, the initial Resolution 1044 stressed “the imperative need to strengthen international cooperation between States in order to make and adopt practical and effective measures to prevent, combat and eliminate all forms of terrorism that affect the international community as a whole,” and expressed its conviction that “the suppression of acts of international terrorism, including those in which States are involved, is an essential element for the maintenance of international peace and security.”²⁶

In a similar vein, the relevance of the suppression of acts of international terrorism for the maintenance of international peace and security was stressed in Resolution 1189 of 13 August 1998, when the Council condemned the terrorist bomb attacks in Nairobi, Kenya, and Dar-es-Salaam, Tanzania on 7 August 1998 and called upon “all States to adopt, in accordance with international law and as a matter of priority, effective and practical measures for security cooperation, for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators.”²⁷

One can thus ascertain a clear trend in the Council’s practice of addressing terrorism in general terms, without any connection to specific acts. Such was the perception when the Council adopted Resolution 1269 of 1999.²⁸ This discernible tendency gained even greater momentum after the attacks in the USA on 11 September 2001.²⁹ In particular, Resolution 1373, adopted on 28 September 2001, considered any act of international

²⁵ UN Doc. S/RES/1044 (1996), 31 January 1996. After Sudan refused to cooperate, the Council adopted another Resolution (UN Doc. S/RES/1054 (1996), 26 April 1996) in which it reaffirmed “that the suppression of acts of international terrorism, including those in which States are involved is essential for the maintenance of international peace and security” and further determined “that the non-compliance by the Government of Sudan with the requests set out in paragraph 4 of resolution 1044 (1996) constitutes a threat to international peace and security.” In addition, the Council expressed its determination to eliminate international terrorism and to ensure the effective implementation of resolution 1044 (1996), and to that end acted under Chapter VII of the Charter of the United Nations.

²⁶ UN Doc. S/RES/1044 (1996), 31 January 1996.

²⁷ Resolution 1214 of 8 December 1998 demanded the Taliban to “stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice,” but it took the Council several further months to determine, first in Resolution 1267 of 15 October 1999, and then again in Resolution 1333 of 19 December 2000 that “the failure of the Taliban authorities to respond to the demands in paragraph 13 of resolution 1214 (1998) constitutes a threat to international peace and security” – UN Doc. S/RES/1267 (1999), 15 October 1999; further reaffirmed in UN Doc. S/RES/1333 (2000), 19 December 2000.

²⁸ After expressing its deep concern “by the increase in acts of international terrorism which endangers the lives and well-being of individuals worldwide as well as the peace and security of all States,” the Security Council “unequivocally condemn[ed] all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whom-ever committed, in particular those which could threaten international peace and security – UN Doc. S/RES/1269 (1999), 19 October 1999, para. 1.

²⁹ Then the Council immediately condemned in the strongest terms such terrorist acts, regarding them as a threat to international peace and security and called on the international community to redouble their efforts to prevent and suppress such acts. UN Doc. S/RES/1368 (2001), 12 September 2001.

terrorism as constituting a threat to international peace and security, while at the same time imposing extensive mandatory measures for the suppression of international terrorism.³⁰ The Council decided that all states should, *inter alia*, prevent and suppress the financing of terrorist acts as well as criminalize the willful provision or collection of funds in order to carry out such acts.³¹ The plural form of the term was used, thereby suggesting it was not limited only to the attacks on New York, Washington and Pennsylvania in 2001. In a similar vein, the Council decided further that all States should “refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts (...), and to monitor the resolution wherein the Council established the Committee consisting of all the members of the Council.”³² Resolution 1373 can be thus regarded as the beginning of a new stage in the exercise of the Security Council’s powers, being the first to purport to create general and temporally undefined obligations that bind the members of the UN.

In the Declaration on the Global Effort to Combat Terrorism, which was attached to Resolution 1377 of 12 November 2001, the Security Council also declared that “acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century” and that “acts of international terrorism constitute a challenge to all States and to all of humanity.”³³ It is also important to note that it underlined that “acts of terrorism endanger innocent lives and the dignity and security of human beings everywhere, threaten the social and economic development of all States and undermine global stability and prosperity,” which in itself resembles the statement read at the conclusion of the meeting of the Security Council held at the level of Heads of State and Government on 31 January 1992.³⁴

Against the background of addressing the phenomenon of terrorism in general terms, particular attention should be paid to Resolution 1456,³⁵ which deserves additional consideration as it alluded to “a serious and growing danger of terrorist access to and use of nuclear, chemical, biological and other potentially deadly materials, and therefore a need to strengthen controls on these materials,”³⁶ thereby paving the way for the

³⁰ UN Doc. S/RES/1373 (2001), 28 September 2001.

³¹ *Ibidem*, operative para. 1(a) and (b).

³² *Ibidem*, operative paras. 2 and 4, respectively.

³³ UN Doc. S/RES/1377 (2001), Annex. The Council further stressed that “acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations.”

³⁴ See UN Doc. S/23500: “The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.”

³⁵ UN Doc. S/RES/1456 (2003), including reaffirmations that “terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security; and that any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed and are to be unequivocally condemned, especially when they indiscriminately target or injure civilians.”

³⁶ UN Doc. S/RES/1456 (2003).

unanimously-adopted Resolution 1540 of 28 April 2004, which aimed at organizing and reinforcing the fight against terrorism and the proliferation of weapons of mass destruction.³⁷

In Resolution 1566 (2004), as well as during the Security Council Summit 2005, a condemnation in the strongest terms was expressed of “all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security.”³⁸ A similar formula may be found in yet another important Resolution, i.e. no. 2178 of 24 September 2014,³⁹ which further noted “with concern that the terrorism threat has become more diffuse, with an increase, in various regions of the world, of terrorist acts including those motivated by intolerance or extremism, and expressing its determination to combat this threat.” However, the said resolution was remarkable for yet another reason, as it extends the concepts of terrorism to situations of armed conflict by dealing with (and defining⁴⁰) foreign terrorist fighters. This may pose problems because of the apparent presumption that engagement in acts of violence during an armed conflict abroad amounts to a terrorist offence, at least when fighting with certain groups.⁴¹

All in all, a gradual expansion of Council’s sensitivity is manifested also by its inclusion of terrorism within the remit of a threat to peace. This may be considered as a move from tackling specific manifestations of terrorism into a more general approach to the phenomenon.⁴² In parallel to those changes, the Council developed from introduction of a link in an indirect manner, by determining that the failure to extradite alleged terrorists as well as non-compliance with the resolutions so requesting constitutes a threat to peace, arriving at the conclusion that terrorism threatens international peace and

³⁷ The main assumption of this resolution was the danger that non-State actors, to which the Resolution 1373 applied, might make use of such weapons. As a consequence, the Council affirmed that the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security, and then decided that all States shall refrain from providing any form of support to non-State actors dealing in any way with them – UN Doc. S/RES/1540 (2004), 28 April 2004, preambular para. 8 and operative para 1.

³⁸ UN Doc. S/RES/1624 (2005), 14 September 2005. The formulation was again used in the Statement by the President of the Security Council of 2 October 2013 (S/PRST/2013/15), and in Resolution 2139 (2014) of 22 February 2014.

³⁹ “Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, and remaining determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level.”

⁴⁰ See UN Doc. S/RES/2178, preambular para. 8: “[i]ndividuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.”

⁴¹ S Krähenmann, *The Obligations under International Law of the Foreign Fighter’s State of Nationality or Habitual Residence, State of Transit and State of Destination*, in: A. de Guttry, F. Capone, C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, Springer, Berlin: 2016, p. 241.

⁴² Boulden, *supra* note 18, p. 633.

security.⁴³ It has thus been the case that the Security Council only gradually considered a more direct connection between terroristic acts and the threat to peace.

2. DEFINING TERRORISM

With regard to the definition of international terrorism, the main political organ of the UN did not follow its predecessor, the Council of the League of Nations. The latter established the Committee for the International Repression of Terrorism, that was successful in the adoption of two conventions (on terrorism⁴⁴ and on the International Criminal Court (ICC), respectively).

It goes without saying that the term “terrorism” may be used in many ways and also for many purposes. The challenge to defining terrorism has attracted the attention of many eminent international lawyers.⁴⁵ Some would even question the legal significance of the term.⁴⁶ The lack of a comprehensive normative definition blurs the whole analysis. For a long time there has been a tradition of avoiding a general definition and addressing specific issues instead.⁴⁷ One may of course rely on sectoral definitions as provided in various treaties concluded over several decades.⁴⁸ It is beyond the scope of this paper to investigate the content of the very definition or the appropriateness of a generic approach,

⁴³ Cf. V. Santori, *The UN Security Council's (Broad) Interpretation of the Notion of the Threat to Peace in Counter-terrorism*, in: G. Nesi (ed.), *International Cooperation in Counter-terrorism. The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, London: 2006, p. 98.

⁴⁴ League of Nations, Convention for the Prevention and Punishment of Terrorism, Doc. C.546. M3831937.V (1937).

⁴⁵ Suffice it here to mention a careful study by K. Skubiszewski, *Definition of Terrorism*, 19 Israel Yearbook on Human Rights 39 (1989), p. 42. See also B. Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford: 2006. For an overview of the struggle over a definition, see M. Di Filippo, *The Definition(s) of Terrorism in International Law*, in: B. Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd edition, Edward Elgar, Cheltenham: 2020, pp. 2ff, and C.M. Díaz-Barrado, *The Definition of Terrorism and International Law*, in: P.A. Fernández-Sánchez (ed.), *International Legal Dimension of Terrorism*, Brill, Leiden: 2009, pp. 27ff.

⁴⁶ Higgins, *supra* note 1, p. 28: “‘Terrorism’ is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both. International law generally, and the mechanisms of the United Nations specifically, have sought painstakingly over the years to specify exactly what is prohibited, and to provide wide possibilities for jurisdiction over such events and persons. None of that activity has in fact required an umbrella concept of ‘terrorism’, over and above the specific topics of hostages, aircraft, protected persons etc. The term is at once a shorthand to allude to a variety of problems with some common elements, and a method of indicating community condemnation for the conduct concerned.”

⁴⁷ See Ch. Walter, *Defining Terrorism in National and International Law*, in: Ch. Walter et al. (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Springer, Berlin: 2004, p. 33.

⁴⁸ See Symonides, *supra* note 6, p. 40, and A. Gioia, *The UN Conventions on the Prevention and Suppression of International Terrorism*, in: G. Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, London: 2006,

or for example the problems over how to distinguish between terrorism and a legitimate struggle for self-determination. Rather, in line with the general goal of this analysis, the task in this work is to examine the relevant practice of the UN Security Council.

Against this particular background of defining terrorism it may be of course worthwhile to look at certain definitional aspects of terrorism in the Security Council's determinations as presented above. One crucial aspect that can be derived is the irrelevance of the international character of terrorism, which is manifested in resolutions adopted by the Council after the hostage-taking in the Moscow theatre,⁴⁹ or the bomb attack in Istanbul.⁵⁰ The mentioned practice shows that even terrorist attacks of a more national scope or character are not disqualified from being considered as threats to international peace and security.

In more concrete definitional terms however, it seems noteworthy to pay attention to the much wasted potential of the definition elaborated by the Security Council itself. In Resolution 1566 it formulated the following definition of terrorist acts:

[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

Against this particular background striking similarities with the International Convention for the Suppression of the Financing of Terrorism should be noted.⁵¹ However, the potential of this formulation has not been further employed. One may only regret that this avenue has not been taken, especially given the largely diverging regional and national definitions.

3. MEASURES ADOPTED

A determination under Art. 39 opens the floor for the Security Council to adopt measures under Chapter VII. However, with regard to determinations on terrorism the complicating factor is the lack of a precise definition.

The reactions have been taken not only by the Council itself, but also by its numerous subsidiary bodies, which additionally blurs the overall picture of the attitude of the

⁴⁹ UN Doc. S/Res/1440 (2002).

⁵⁰ UN Doc. S/Res/1516 (2003).

⁵¹ This Convention was adopted by the General Assembly by Resolution 54/109 of 25 February 2000 and also relied on reference to various sectoral conventions on different aspects of terrorism, in addition to defining the latter as "any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act" – Art. 2(1)(b).

Security Council towards this phenomenon, and requires cooperation (and coordination) among the committees established pursuant to Resolutions 1373 (2001), 1267 (1999), 1989 (2011), 2253 (2015), and 1540 (2004) and their respective groups of experts.⁵² The regime of sanctions has been constantly updated. According to an accurate assessment, the Security Council adapted to the spread of transnational terrorism by demanding more from states, intervening deeper into their domestic realm, and at the same time offering more support.⁵³ Indeed, it may be rightly claimed that the UN counter-terrorism regime is probably most innovative in terms of its development of sanctions, from traditionally conceived diplomatic efforts to enforcement tools.⁵⁴ It is striking that sanctions no longer targeted exclusively the leaders (political and/or military) of a given State but reached at a worldwide terrorist organization/network. The anti-terrorism measures, as well their purpose, have continually evolved with the aim of constraining the military, financial and operational resources of different terrorist groups.⁵⁵ One can observe a metamorphosis in the functions of the Security Council, from a body addressing security threats to a body developing a criminal and security policy with both quasi-judicial and legislative functions.⁵⁶

The Security Council's legislation may be a powerful instrument in the maintenance of international peace and security. This pragmatism has the advantages of speed and its general scope of validity, as decisions of that organ bind all states. Such legislation also raises some serious problems however. If the Security Council is to legislate it should provide unanimity in voting, thus reflecting also general support for the measures adopted. It is crucial that such measures are followed by further steps from the States that endorse the Council's legislation. Otherwise, the credibility of the Council, as well as that of the whole United Nations, may be put at stake.

It is important to distinguish between different degrees of legislation. Whereas Resolution 1267 imposed specific obligations as a reaction to a specific yet global threat, i.e. Al-Qaeda, Resolution 1373 provided for more intrusive obligations, but its implementation was to be fostered by the then-created Counter-Terrorism Committee (CTC), assisted by the Counter-Terrorism Executive Directorate. In contradistinction to the Sanction Committee imposing financial and travel sanctions and embargoes, the CTC has operated in a more cooperative manner, preferring a managerial attitude towards

⁵² See e.g. UN Doc. S/PRST/2021/1, 12 January 2021.

⁵³ M. Heupel, *Adapting to Transnational Terrorism: The UN Security Council's Evolving Approach to Terrorism*, 38(4) Security Dialogue 477 (2007), p. 494.

⁵⁴ L. Ginsborg, *UN sanctions and counter-terrorism strategies: moving towards thematic sanctions against individuals?*, in: L. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, Edward Elgar, Cheltenham: 2017, p. 73.

⁵⁵ After the terrorist attacks which took place in New York, Washington and Pennsylvania on 11 September 2001, the 1267 regime was extended by the ground-breaking sanctions resolution 1390, without any link to a specific territory or State. to include the threat posed by Al-Qaeda and to convert it into a global sanctions regime, which was then reformulated by Resolution 1989 of 2011 and once again in 2014 to include the ISIL (Da'esh) in Resolution 2253.

⁵⁶ Ginsborg, *supra* note 54, p. 73.

securing compliance.⁵⁷ In turn, Resolution 1540, despite also imposing several obligations of a generic character (as in Resolution 1373) but is even more far-reaching as it has created completely novel legal obligations of a general character, relying on the nexus between terrorism and the proliferation of weapons of mass destruction. It cannot be forgotten that the interpretative possibilities of the Security Council are not boundless, and it may not interpret that notion in a manner that would amount to amending the UN Charter.⁵⁸

There can be several problems identified with targeted sanctions freezing the financial assets of individuals and entities. Among others, the listing and delisting process lacks procedural protections,⁵⁹ with additional problems concerning the confidentiality of the information on which they are based and corresponding problems with its verification.⁶⁰

The open-ended asset freezes, with no termination of the underlying ongoing conflict in sight, have provoked the temptation to assess the Security Council's sanctions regime as evolving into the realm of a permanent exception, given the fact that temporary measures taken as an exception have become *de facto* permanent confiscations.⁶¹

With Resolution 2396 (2017) the Security Council broadened the obligations of States in relation to criminal justice, border security, and cooperation and called for the creation of "watch lists or databases" of suspect persons and information sharing between States. This process was further developed in Resolution 2462 (2019), underscoring the need for "dissuasive criminal sanctions."

Going beyond the domestic criminal domain, one may also consider the avenue of the Security Council establishing an *ad hoc* tribunal pursuant to a resolution adopted under Chapter VII of the UN Charter. Needless to say, the Council has gathered considerable experience in this regard, as evidenced (but not only) by the creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.⁶² It is worth underlining that the operation of the Special Tribunal for Lebanon (STL), the first international tribunal with jurisdiction over (or confined to) the crime of terrorism resulting from the assassination of the Lebanese Prime Minister Rafiq Hariri⁶³, was only

⁵⁷ It may thus be considered as a transformation of the SC's role from that of a policeman to that of a regulator – see N. Krisch, *The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council*, in: Ch. Walter et al. (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Springer, Berlin: 2004, p. 890f.

⁵⁸ N. Angelet, *Protest against Security Council decisions*, in: K. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy*, Kluwer Law International, The Hague: 1998, p. 281.

⁵⁹ The Kadi saga is probably the most evident reflection of those problems, which continued also after the establishment of the Ombudsperson by Resolution 1904 (2009)

⁶⁰ B. van Ginkel, *Combating Terrorism: Proposals for Improving the International Legal Framework*, in: A. Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford: 2012, p. 468.

⁶¹ S. Eckert, *The Evolution and Effectiveness of UN Targeted Sanctions*, in: L. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, Edward Elgar, Cheltenham: 2017, p. 68.

⁶² UN Doc S/RES/827 (1993) and UN Doc S/RES/955(1994).

⁶³ The STL's Appeals Chamber in the Interlocutory Decision of 16 February 2011 provided a much discussed definition of terrorism in times of peace as emerging – in the opinion of judges – in customary

possible given the resolution by the Security Council that bypassed the lack of ratification of the UN-Lebanese Agreement by the latter party.⁶⁴ For a broader application, trying terrorism cases before the ICC would constitute yet another option.⁶⁵ So far the subject matter jurisdiction of the ICC has not been expanded to include terrorism as a distinct crime in its own right. However, certain manifestations of terrorism may fall within the remit of Art. 7 or 8 of the Rome Statute (to be qualified as crimes against humanity or war crimes, respectively). No plausible alternative is offered by a new treaty establishing an international tribunal for terrorism⁶⁶, which in itself may be of limited application.

In addition to responding to the actual occurrences of terrorism, it is important to prevent it by addressing “conditions conducive to the spread of terrorism.” The Security Council has indeed been employing broad and comprehensive strategies aimed also at prevention, in addition to combating terrorism, as can be discerned for example from the Security Council Resolution 2482 (2019) on preventing and combating terrorism, including terrorism benefitting from transnational organized crime. While recognizing that terrorists can benefit from organized crime, the Council has also acknowledged “that prisons can serve as potential incubators for radicalization to terrorism and terrorist recruitment.” Therefore, proper assessment and monitoring of persons convicted of terrorist offences is critical to mitigating opportunities for terrorists to attract new recruits. Attention is also paid to the roles which prisons can serve in terms of rehabilitating and reintegrating prisoners, as well as the need for continuous engagement by states with offenders after their release from prison in order to avoid recidivism.

From the Council’s perspective it is also necessary to address the conditions and factors leading to the rise of radicalization and to violence and violent extremism among youth, in itself yet another factor which can be conducive to terrorism.⁶⁷ On several occasions the Council has also stressed the important role of the media, civil and religious society, the business community, and educational institutions in the efforts to enhance dialogue and broaden understanding, in promoting tolerance and coexistence, and in fostering an environment which is not conducive to the incitement of terrorism,

international law; Special Tribunal for Lebanon, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism conspiracy, homicide, perpetration, cumulative charging, Case no. STL-11-01/I, 16 February 2011, paras. 83-123. See also K. Ambos, *Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?*, 24(3) Leiden Journal of International Law 655 (2011); M. Ventura, *Terrorism According to the STL’s Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?*, 9(5) Journal of International Criminal Justice 1021 (2011).

⁶⁴ UN Doc. S/RES/1757 (2007). It is important to note that its Appeals Chamber, in the Interlocutory Decision of 16 February 2011, provided a much-discussed definition of terrorism in times of peace as emerging, in the opinion of judges, in customary international law (Case no. STL-11-01/I, paras 83–123) – see Ambos, *supra* note 63; Ventura, *supra* note 63.

⁶⁵ Although, the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Resolution E recognized that “terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community.” It recommended that the topic be taken up at the Review Conference.

⁶⁶ Van Ginkel, *supra* note 60, p. 476.

⁶⁷ UN Doc. S/RES/2250 (2015), S/RES/2419 (2018) and S/RES/2535 (2020).

as well as in countering terrorist narratives.⁶⁸ It has been frequently remarked that “terrorism and violent extremism conducive to terrorism cannot and should not be associated with any religion, nationality, or civilization.”⁶⁹

In general, the panorama of the measures to which the Security Council can refer when addressing and preventing terrorism is indeed broad. However, this wealth of different strategies calls for better coordination, thus leading to their more effective implementation. Cooperation between the actors involved seems indispensable for the struggle against terrorism to be efficient.

CONCLUDING REMARKS

The practice of the Security Council as analysed above allows for some general conclusions. Terrorism has been gradually included as a threat to international peace and security. The Council has in principle developed ever more direct references to terrorism. Instead of merely reacting to concrete emanations of terrorism, it has approached the problem in a more general, yet more complex manner. The variety of measures adopted by the Council itself and its subsidiary bodies is both impressive and problematic, and not only because of the lack of procedural guarantees or mechanisms of review. They consist of different obligations for restraining the military, financial and operational resources of different terrorist groups, as well as with respect to prosecuting their activities. The growing legislation by the Security Council has been focused mostly on impacting the domestic reactions, but the Council could also play an important role in the international prosecution of terrorism. In the end, a rather comprehensive approach has been offered with respect to its prevention.

Without doubt, due to its growing involvement the Security Council established itself as a key – and the most active – player in the fight against terrorism, which in itself confirms the relatively optimistic conclusions arrived at by the late Professor Symonides, who stated that “the growing awareness of the limited effectiveness of unilateral actions and military strength may have positive consequences for cooperation with the United Nations, participation in its reform and return to the path of full respect for international law.”⁷⁰ Yet, as also noted by the learned Scholar, the entire process is by definition time-consuming.

⁶⁸ UN Doc. S/RES/2178 (2014) and S/RES/2354 (2017).

⁶⁹ See e.g. S/RES/2083 (2012), S/RES/2199 (2015) S/PRST/2021/1.

⁷⁰ Symonides, *Normatywne teorie*, *supra* note 5, p. 102.