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back on the argument that Article 41 expressly empowers the Security Council to take any non-forcible measure it deems necessary for peace and security is not enough. Before moving on to the doctrine of implied powers, it is worthwhile taking another example of a controversial piece of Security Council practice, in which it seemed to exercise *legislative* powers.

### **Case Study 8: The Security Council as legislator**

Significant changes in both international law and UN law often happen after world-changing events, such as the end of the Second World War, the emergence of the state of Israel in the Middle East, the end of the Cold War and the attacks by members of Al-Qaida on the United States of 11 September 2001. The latter triggered many changes: in states' understanding of the right of self-defence and the new or expanded threat caused by transnational terrorism. It was the realisation of the significance of this threat that led the Security Council to adopt its first piece of legislation – in Resolution 1373 of 2001. Hitherto, the Security Council's power to adopt binding decisions on states was confined to responding to specific threats, including threats emerging from acts of terrorism such as the Lockerbie bombing of 1988.<sup>32</sup> 'Legislation' of a general abstract nature, immediately binding and creating new norms addressed at general mischiefs as opposed to specific issues, is said to be lacking in international law, as there is no such mention in the list of sources contained in Article 38 of the Statute of the International Court of Justice, which has emerged as the 'authoritative' secondary rule on sources.<sup>33</sup>

A number of states have strongly objected to Security Council acts of legislation, starting with Resolution 1373, and continuing through Resolution 1540 of 2004 that legislated on preventing the proliferation of weapons of mass destruction to NSAs. For instance, at the time of the adoption of Resolution 1540 the representative of India in the Security Council expressed its 'basic concerns over the increasing tendency of the Council in recent years to assume new and wider powers of legislation on behalf of the international community', while Egypt stated that the Security Council did not possess any 'legislative authority', and Indonesia stated that such enactments were inconsistent with the provisions of the Charter.<sup>34</sup> Many jurists have been more strident in their objections. Legal analysis prior to 2001 was clear. For example, Bowett wrote:

Not even the General Assembly is a 'legislature' and the Council certainly is not. The obligations of Member States stem from the UN Charter, and the role of the Security Council is not to create or impose new obligations having no basis in the Charter, but rather to identify the conduct required of a Member State because of its

<sup>32</sup> UN Doc S/RES/748 (1992).

<sup>33</sup> S. Talmon, 'The Security Council as World Legislature' (2005) 99 *AJIL* 174.

<sup>34</sup> UN Doc S/PV/4950 (2004).

pre-existing Charter obligations. Thus, the Council does not 'legislate': it enforces Charter obligations.<sup>35</sup>

Goodrich, Hambro and Simons stated:

The Charter – on the assumption that the General Assembly was an organ of deliberation and the Security Council an organ of action – defined in considerable detail the functions and powers of each, emphasising the primary responsibility of the Council for making specific decisions to maintain or restore international peace and security, and the responsibility of the Assembly to develop and recommend general principles of cooperation for strengthening peace and security.<sup>36</sup>

Happold, writing in response to Resolution 1373, declared:

The Security Council is the global policeman. It is concerned with the maintenance and restoration of order. Its role can be contrasted with that of the General Assembly .... The General Assembly has the role of considering international peace and security generally. The Security Council acts in specific situations. The General Assembly acts prospectively. It is its role to obtain agreement on what is necessary for the good life.<sup>37</sup>

Most eloquently, Koskenneimi has written:

A policeman and a Temple of Justice: neither has been a tremendous success .... The principle of division of competences, however, remains sound. The Security Council should establish/maintain order: for this purpose, its composition and structures are justifiable. The Assembly should deal with the acceptability of that order: its composition and powers are understandable from this perspective. Both bodies provide a check on each other.<sup>38</sup>

However, a closer look at the 'legislative' Resolutions (1373 and 1540) and the powers of the Security Council produce a less black and white picture. They arguably show that, subject to limits of legality and legitimacy, there is room in the Council's armoury for emergency legislation necessary for the preservation of peace and security. Indeed, given the expectation that the Security Council should be less reactive to events and more proactive to emerging and general threats, the trend towards more general and less reactive legislation appears inevitable.

In Resolution 1373 of 2001 the Security Council determined that acts of international terrorism such as those that had recently occurred on 9/11 constituted threats to international peace and security. This implicit determination under

<sup>35</sup> D.W. Bowett, 'Judicial and Political Functions of the Security Council and the International Court of Justice' in H. Fox (ed.), *The Changing Constitution of the United Nations* (BIICL 1997) 79–80.

<sup>36</sup> L.M. Goodrich, E. Hambro and A.P. Simons, *Charter of the United Nations: Commentary and Documents* (Columbia University Press 3rd edn 1969) 11.

<sup>37</sup> M. Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *LJIL* 593 at 600.

<sup>38</sup> M. Koskenneimi, 'The Police in the Temple Order, Justice and the UN: A Dialectical View' (1995) 6 *EJIL* 325 at 339.



Article 39 placed the Council squarely within Chapter VII, and implicitly within Article 41 of the Charter that empowers the Council to impose non-forcible measures, when it obliged all states to: prevent and suppress financing and other forms of support for terrorism; criminalise such actions; seize assets of suspected terrorists; deny provision of safe haven and other support for terrorists; and share with other governments information about groups practising or planning terrorists acts. Effectively the Resolution obliges states to adhere to many of the obligations that they would have had if they had become parties to the International Convention on the Financing of Terrorism of 1999 (which had received only four ratifications by 2001). The Security Council was, in effect, legislating into force those norms, but this means that the source of obligation upon states is the UN Charter, specifically Article 25, rather than obligations arising under the treaty. This was based on the Security Council's wide competence to determine what constitutes threats to international peace and security under Article 39, a provision that has been expanded over the years to cover a wide range of threats, and a concept that would undoubtedly cover international terrorism of the sort practised by Al-Qaida, as well as being based upon its competence to impose non-forcible measures under Article 41, requiring states to take measures short of the use of force.

While Article 41 expressly mentions the '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', the examples are clearly not meant to be exhaustive and, therefore, requiring that states themselves legislate to stem and prevent support for terrorism seems within these powers. Furthermore, although Resolution 1373 established a Counter-Terrorism Committee of the Security Council to monitor implementation of the Resolution by states, there is no attempt to directly legislate into the legal systems of states. The development of a legislative competence in the Council is a radical development within the international legal system, bypassing, in the area of peace and security at least, the laborious system of treaty and custom-making, but it is not acting like the leviathan or Frankenstein's monster of Gothic imagination. As Talmon points out: 'The Charter does not establish the Council as an omnipotent world legislator but, rather, as a single issue legislator'.<sup>39</sup> Furthermore, 'Council legislation is always emergency legislation',<sup>40</sup> aimed at filling gaps in the law revealed by threats caused by terrorism and other developments. After 9/11 the Security Council legislated to plug the gaps in international laws by preventing support for terrorism caused by the failure of states to ratify the relevant counter-terrorist treaty; and in 2004 the Security Council legislated to fill the gaps

<sup>39</sup> Talmon n. 33 at 182.

<sup>40</sup> Ibid. See further D. Whittle, 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action' (2015) 26 *EJIL* 671; T. Tzimas, 'International Public Emergency and Collective Security' (2015) 20 *JCSL* 335.

in non-proliferation law that hitherto had been concerned with proliferation of weapons of mass destruction among states and not to NSAs such as Al-Qaida.

The limitations upon the Security Council's legislative competence are found within the Charter, especially the functional limitation that its lawmaking, as a power implied from Articles 39 and 41 of Chapter VII, is confined to imposing measures that are necessary for maintaining international peace and security as the primary purpose of the UN. There are clearly dangers in this competence, particularly weaknesses in drafting norms of general application in an organ geared to take executive action, a weakness shown in Resolution 1373's lack of definition of the mischief against which it is directed, namely terrorism.<sup>41</sup> However, that is a weakness of general international law, where a definition of terrorism has eluded states for decades. There is the additional problem of emergency legislation becoming embedded without any temporal limitation due to the effects of the so-called reverse veto, whereby any attempt to terminate a resolution can be blocked by just one permanent member. Nonetheless, the Security Council's legitimacy as an emergency lawmaker will be enhanced if it can provide precision in its legislative resolutions, both in terms of the threat being addressed and in terms of the duration of the obligations, and also if it consults with the wider membership to ensure that such resolution gains broad support.<sup>42</sup> In theory, the Security Council could impose its legislative will against a reluctant membership, but widespread disobedience would quickly undermine even the hardest of 'hard' laws.

### **Implied powers**

While functionally confined legislative powers are defensible, the implication to the Security Council of a power to create a judicial organ appears more problematic, although the ICTY's legitimacy is not perhaps as widely questioned as the work of the Counter Terrorism Committee created by Resolution 1373. Some support for an implied power to create tribunals can be found in an advisory opinion of the ICJ. In 1956, in the *Effect of Awards* opinion, the ICJ accepted the legality of the creation of a judicial body by the General Assembly. In that opinion the Court was addressing the competence of the Assembly to establish an Administrative Tribunal to ensure the protection of UN employees – a tribunal whose decisions were binding on the Assembly itself.<sup>43</sup> The Court invoked the implied powers doctrine to justify the establishment of such a tribunal within the UN system:

The Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the

<sup>41</sup> A gap partially filled by UN Doc S/RES/1566 (2004).

<sup>42</sup> Talmon n. 33 at 193.

<sup>43</sup> *Effect of Awards of Compensation made by the UN Administrative Tribunal* (1954) ICJ Rep 47.