
The Security Council, Counter-Terrorism, and the Legitimacy of International Law

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Abstract:

SAKTOROVÁ, Ľubica: *The Security Council, Counter-Terrorism, and the Legitimacy of International Law*. The present article examines United Nations Security Council Resolutions 1373 (2001) and No. 1540 (2004) as pivotal instances of the Council's post September 11th practices in which it assumed a quasi-legislative role by adopting binding universal obligations under Chapter VII of the UN Charter. The study assesses whether these resolutions were adopted within the Council's competence and how their form, content, and practical application have affected the legitimacy of international law. Using analytical and dialectical methodology, the article first places the resolutions in the context of the development of Article 39 practice and the expanding understanding of threats to international peace and security, and then examines their structural and normative implications. The findings suggest that, although the measures can be defended as a lawful exercise of the Council's broad discretionary powers, they have contributed to long-term challenges to legitimacy by concentrating regulatory power in a politically uneven body and creating obligations without participation and multilateralism. From today's perspective, the legacy of Resolutions 1373 and 1540 illustrates the tension between effectiveness and legitimacy that the international legal order is increasingly confronted with.

Key words:

Security Council, UN SC Resolution 1373, UN SC Resolution 1540, Legitimacy, Legality, UN SC powers, International Law

Introduction

The condition of the contemporary international legal order can hardly be described as stable. Structural fragilities have become increasingly visible, marked by the fragmentation of normative regimes, persistent patterns of selective compliance, and a growing erosion of confidence in multilateral institutions. Although this phenomenon has long been the subject of extensive scientific analysis, the current situation, characterized by a significant weakening of multilateralism, requires a new examination of its deeper roots. The author argues that one such point of departure lies in the immediate aftermath of the attacks of 11th September 2001. The United Nations Security Council's (UNSC, hereinafter "the Council") response re-cast

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terrorism not merely as a domestic or criminal matter but as a threat to international peace and security under Chapter VII of the UN Charter. Within weeks, the Council adopted Resolution 1373, obliging all Member States to criminalise terrorism-related conduct, freeze assets, deny safe haven, and cooperate in prevention and prosecution. In 2004, Resolution 1540 extended this regulatory approach to the field of non-proliferation, imposing binding duties aimed at preventing the acquisition of weapons of mass destruction by non-state actors. As the author contends, both resolutions constituted a significant departure from the Council's established practice: whereas Chapter VII had traditionally been employed to address specific conflicts or crises, such as Iraq's invasion of Kuwait, apartheid South Africa, or the wars in the Balkans, Resolutions 1373 and 1540 created general, permanent, and universally applicable obligations. This article proceeds on the premise that, notwithstanding their security rationale, these measures may be understood as early indicators of a broader dynamic that has contributed to the contemporary erosion of trust in the international rule of law. Two central debates structure the analysis. First, did the Council, in effect, assume a quasi-legislative role extending beyond the competences envisaged by the Charter? Second, assuming the measures were formally consistent with the Charter, did their adoption and implementation nonetheless deepen the legitimacy deficit that increasingly characterises the international legal order?

The methodology adopted in this article is primarily analytical and dialectical, combining doctrinal legal analysis with critical engagement with competing scholarly interpretations. The analytical component examines the text and structure of the United Nations Charter, with particular attention to competences under Chapter VII, the Security Council's power to determine threats to international peace and security, and the binding nature of its decisions under Article 25. The article then analyses the specific provisions of Resolutions 1373 (2001) and 1540 (2004), focusing on the obligations imposed and the mechanisms established for their implementation, in order to assess whether the Council acted within the limits of its Charter mandate or engaged in a novel, potentially ultra vires exercise of legislative authority. The dialectical dimension of the methodology reflects the view that this question cannot be resolved through textual analysis alone. Competing interpretations exist regarding the scope of the Council's powers: while some scholars defend the resolutions as necessary adaptations to an evolving security environment, others regard them as illegitimate assertions of authority beyond the Council's remit. Rather than endorsing either position outright, the article places these perspectives in dialogue and advances its own assessment, highlighting the tension between legality, necessity, and legitimacy that has come to characterise post 9/11 international law.

The purpose of this methodological approach is twofold. First, it addresses the doctrinal question of competence: whether the Security Council exceeded the authority conferred upon it by the Charter when adopting Resolutions 1373 and 1540. Second, it situates this inquiry within the broader debate on the legitimacy of international law by examining not only the formal legality of these measures, but also their wider implications for the authority and perceived legitimacy of international legal institutions in the twenty-first century.

I. Resolution 1373 (2001) Adopted by the Security Council at its 4385th meeting

On 28th September 2001, the United Nations Security Council unanimously adopted Resolution 1373 under Chapter VII of the Charter, acting in direct response to the terrorist attacks of 11th September 2001.¹ The resolution is framed in strong condemnatory language, affirming that acts of international terrorism constitute threats to international peace and security, and calling for urgent and coordinated international action. It builds on earlier resolutions, including Resolution 1269 (1999) and Resolution 1368 (2001), but goes further by setting out detailed, binding obligations for all UN Member States.²

The resolution addresses several key areas. First, it focuses extensively on the prevention and suppression of terrorism financing. States were required to criminalise the wilful provision or collection of funds for terrorist acts, to freeze without delay the assets and funds of individuals and organisations that commit, attempt to commit, or support terrorism, and to prohibit making funds, assets, or financial services available to such persons or entities. The resolution also calls for the monitoring of financial institutions to detect misuse, and for international cooperation in preventing and investigating financial flows connected to terrorism.

Second, Resolution 1373 requires states to deny safe haven and support to those involved in terrorism. This includes refraining from providing any form of active or passive support, preventing the recruitment of terrorists and the supply of weapons, and prohibiting the use of national territory for terrorist purposes. States must also ensure that any person who participates in the financing, planning, preparation, or execution of terrorist acts is brought to justice. To this end, the resolution obliges states to establish terrorism as a serious criminal offence in their domestic law and to ensure that the punishment reflects the gravity of such acts.

Third, the resolution highlights the importance of border control and refugee measures. States are called upon to prevent the movement of terrorists by strengthening border security and controls over identity documents and travel papers. It further emphasises that refugee status should not be granted to individuals involved in terrorism, and that claims of political motivation should not be recognised as grounds for refusing extradition of alleged terrorists.

Fourth, Resolution 1373 underlines the need for international cooperation and information-sharing. It urges states to exchange information on terrorist groups, their networks, movements, and the methods they use, including trafficking in arms, drugs, and other resources. The resolution also refers to the risk of terrorists acquiring weapons of mass destruction, noting the need to prevent illicit trafficking in nuclear, chemical, or biological materials. In addition, the Council calls upon states to become

1 United Nations Security Council. Resolution 1373 (2001) / adopted by the Security Council at its 4385th meeting, on 28 September 2001. New York: United Nations, 2001. S/RES/1373(2001).

2 In its preamble, the resolution recalls the principle first set out in the General Assembly's 1970 Declaration on Friendly Relations (Resolution 2625 (XXV)) and later reaffirmed by the Security Council in Resolution 1189 (1998), which obliges every State to abstain from organising, encouraging, assisting, or participating in terrorist acts against another State, and from tolerating activities within its territory that are aimed at committing such acts

parties to, and implement fully, the existing international conventions and protocols related to terrorism.

To ensure implementation, the resolution established the Committee, composed of all members of the Security Council. States were required to report to the Committee within 90 days of the adoption of the resolution on the steps taken to comply with its provisions.³ The Committee was also tasked with analysing these reports, identifying shortcomings, and coordinating technical assistance to states requiring support in implementing the measures.

Resolution 1373 thus provided a comprehensive framework for international action against terrorism in the areas of financing, criminalisation, border control, extradition, and cooperation. It also institutionalised a system of monitoring through the Committee, ensuring that states remained accountable for their implementation efforts.⁴

II. Resolution 1540 (2004) Adopted by the Security Council at its 4956th meeting

On 28th April 2004, at its 4956th meeting, the United Nations Security Council adopted Resolution 1540 unanimously under Chapter VII of the Charter. The resolution was motivated by growing concerns over the risk that non-State actors, including terrorist groups, might acquire nuclear, chemical or biological weapons and their means of delivery. It affirmed that the proliferation of such weapons constitutes a threat to international peace and security and declared the Council's determination to take effective action against this danger.⁵

The preambular part of the resolution reaffirmed the importance of existing multilateral treaties aimed at eliminating or preventing the proliferation of weapons of mass destruction, including the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention, and the Biological and Toxin Weapons Convention. It stressed the need for all states to fulfil their obligations under these instruments and recognised that while peaceful uses of nuclear, chemical, and biological materials should not be impeded, such purposes must not serve as a cover for proliferation. The Council expressed grave concern at the possibility that non-State actors might acquire, develop, traffic in, or use weapons of mass destruction, and also at the growth of illicit trafficking in related materials, both of which were judged to pose threats to international security.⁶

Resolution 1540 imposed several sets of obligations on all UN Member States. First, it required states to refrain from providing any form of support to non-State actors that seek to develop, acquire, manufacture, possess, transport, transfer, or

3 UNSC Res. 1373 (2001). Para 3 (6)

4 United Nations Security Council. Resolution 1535 (2004) on the establishment of the Counter-Terrorism Committee Executive Directorate (CTED). S/RES/1535 (2004), 26 March 2004.

5 United Nations Security Council, Resolution 1540 (2004), adopted April 28, 2004, S/RES/1540(2004).

6 JOYNER, D. H. Non-proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council. In *Leiden Journal of International Law*, 2007, vol. 20, n. 3, pp. 489–513.

use nuclear, chemical, or biological weapons and their means of delivery. Second, it obliged states to adopt and enforce effective laws prohibiting such activities by non-State actors, including attempts, complicity, assistance, or financing connected to them. Third, it mandated that states establish and enforce domestic controls to prevent the proliferation of these weapons and their means of delivery, including controls over “related materials” that could contribute to their production or use.

The resolution specified in more detail what these domestic controls should be. States were required to develop and maintain measures to account for and secure such items in production, use, storage, or transport; to put in place appropriate physical protection measures; and to strengthen border controls and law enforcement efforts to detect, deter, and combat illicit trafficking or brokering of sensitive items. Furthermore, they were instructed to establish national export and trans-shipment controls, including regulations and laws governing the export, transit, re-export, and financing of proliferation-sensitive materials, and to create mechanisms such as end-user controls and penalties for violations.

To oversee implementation, the Council decided to establish a committee composed of all its members, modelled on the Counter-Terrorism Committee created by Resolution 1373. This “1540 Committee” was given a two-year mandate in the first instance, and states were required to submit initial reports within six months detailing the steps they had taken or planned to take to implement the resolution. The Council also recognised that some states might lack the legal, regulatory or technical capacity to meet these obligations, and therefore invited states in a position to do so to provide assistance upon request.⁷

Resolution 1540 further called upon all states to promote universal adherence to, and full implementation of, relevant multilateral disarmament and non-proliferation treaties, and to strengthen national rules and regulations in line with their existing treaty commitments. It encouraged renewed multilateral cooperation within the frameworks of the International Atomic Energy Agency (IAEA), the Organisation for the Prohibition of Chemical Weapons (OPCHW) and the Biological and Toxin Weapons Convention (1975) and urged states to engage with industry and the public to ensure awareness of obligations under domestic non-proliferation laws.⁸

III. Security Council Authority and Legitimacy after 9/11 – critical analyses

The legal foundation of Security Council powers lies in Chapter VII of the UN Charter. Article 39 empowers the Council to determine threats to international peace and to decide on measures to address them.⁹ The scope of the Security Council’s

7 UNSC Res. 1540 (2004). Para 4.

8 UNSC Res. 1540 (2004). Para 8.

9 Article 39 states „The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.“ On the topic of the consequences of the Article 39 see ARANGIO-RUIZ, G. On the Security Council’s ‘Law Making’. In *Rivista di diritto internazionale*, 2015, vol. 83, p. 614.

practice under Article 39 reflects a gradual broadening of the concept of the “*threat to international peace and security*.” From traditional inter-state aggression, such as North Korea’s invasion of the South¹⁰ or Iraq’s occupation of Kuwait¹¹, the Council moved towards recognising internal situations such as apartheid¹², humanitarian crises in Somalia¹³ and Rwanda¹⁴, and even gross human rights violations, as falling within its mandate. By the 1990s, the creation of international criminal tribunals for Yugoslavia and Rwanda further confirmed the Council’s willingness to use Chapter VII for institutional innovation. Against this backdrop, the post 9/11 resolutions did not emerge in a vacuum, they represented the next step in this evolutionary pattern. By imposing permanent and general obligations on all states, Resolutions 1373 and 1540 arguably marked a significant departure from earlier Security Council practice. Resolution 1373 required the criminalisation of terrorism financing and support, the freezing of terrorist assets, and the denial of safe haven. It also expressed concern at the links between international terrorism and the illicit movement of nuclear, chemical, and biological materials, thereby foreshadowing the more detailed approach of Resolution 1540. Resolution 1540 extended this logic to non-proliferation, obliging states to adopt and enforce domestic laws criminalising proliferation activities by non-state actors and to implement sophisticated regulatory frameworks, including export and border controls, physical protection measures, and law-enforcement mechanisms. These obligations were universal in scope, applying irrespective of whether a state posed a proliferation risk or had the institutional capacity to comply.¹⁵

Critics argue that such measures exceeded the Council’s competences, since the UN Charter does not grant it legislative authority.¹⁶ Under Chapter VII, the Council is empowered to maintain international peace and security through binding decisions, but historically this meant imposing sanctions, authorising the use of force, or

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- 10 United Nations Security Council. Resolution 82 (1950) on the Korean Question. New York: UN, 25 June 1950; United Nations Security Council. Resolution 83 (1950) recommending military assistance to the Republic of Korea. New York: UN, 27 June 1950.
 - 11 United Nations Security Council. Resolution 660 (1990) condemning Iraq’s invasion of Kuwait. New York: UN, 2 Aug 1990; United Nations Security Council. Resolution 662 (1990) declaring Iraq’s purported annexation of Kuwait null and void. New York: UN, 9 Aug 1990; Iraqi Revolutionary Command Council. Decree annexing Kuwait as Iraq’s nineteenth province. Baghdad, 8 Aug 1990.
 - 12 United Nations Security Council. Resolution 418 (1977) imposing an arms embargo on South Africa. New York: UN, 4 Nov 1977, see also United Nations General Assembly. Resolution 2202 A (XXI) on apartheid. 16 Dec 1966.
 - 13 United Nations Security Council. Resolution 794 (1992) determining the situation in Somalia a threat to international peace and security. New York: UN, 3 Dec 1992.
 - 14 United Nations Security Council. Resolution 929 (1994) authorising a humanitarian operation in Rwanda. New York: UN, 22 June 1994; United Nations Security Council. Resolution 955 (1994) establishing the International Criminal Tribunal for Rwanda. New York: UN, 8 Nov 1994.
 - 15 ROSAND, E. Security council resolution 1373, the counter-terrorism committee, and the fight against terrorism. In *American Journal of International Law*, 2003, vol. 97, pp. 333–341.
 - 16 HAPPOLD, M. Security Council Resolution 1373 and the Constitution of the United Nations. In *Leiden Journal of International Law*, 2003, vol. 16, no. 3, p. 607.

prescribing targeted measures in response to specific conflicts or crises. The creation of permanent, general rules of conduct binding on all states has traditionally been the preserve of treaty-making processes involving the consent of the international community. By adopting resolutions that imposed detailed, enduring, and universal obligations, the Council moved into a quasi-legislative role not actually anticipated in 1945, when law-making authority was expected to remain with states collectively, through inclusive negotiations in forums such as the General Assembly.¹⁷

This lack of participation has been described as a democratic deficit. International law generally relies on the principle of state consent, expressed through negotiation and ratification of treaties.¹⁸ Resolution 1373, by contrast, was allegedly drafted rapidly by a handful of Council members in the immediate aftermath of 9/11 and adopted unanimously without debate. The result was the imposition of obligations resembling those of a multilateral treaty, but without the deliberative safeguards of treaty-making.¹⁹

The democratic deficit was aggravated by the failure of Resolution 1373 to define terrorism.²⁰ The absence of a definition granted states wide discretion, enabling some to label political opposition, separatist movements, or even peaceful dissent as terrorism. While flexibility may have reflected the urgency of the moment and the difficulty of reaching consensus, it also facilitated practices inconsistent with human rights and humanitarian law.²¹ The institutional mechanism established to monitor compliance, embodied in the Counter-Terrorism Committee (CTC), was mandated only to assess technical implementation, such as criminalisation and asset-freezing, without regard to human rights safeguards.²²

The practical implications of this shift soon became visible. In the United States and several allied States, Resolution 1373 was invoked as a source of international

17 ELBERLING, B. The ultra vires character of legislative action by the Security Council. In *Int'l Org. L. Rev.*, 2, 337; TALMON, S. The Security Council as World Legislature. In *American Journal of International Law*, 2005, vol. 99, p. 176; ABI-SAAD, G. (2008). The Security Council as Legislator and as Executive in its Fight Against Terrorism and Against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy. In WOLFRUM, R., RÖBEN, V. (eds) *Legitimacy in International Law. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol 194. Berlin, Heidelberg : Springer. https://doi.org/10.1007/978-3-540-77764-9_6

18 Ibid.

19 ALVAREZ, J. E. *International Organizations as Law-makers*. Oxford : Oxford University Press, 2005, pp. 173–176.

20 TALMON, S. The Security Council as World Legislature. In *American Journal of International Law*, 2005, vol. 99, p. 188.

21 BIANCHI, A. Assessing the effectiveness of the UN Security Council's anti-terrorism measures: the quest for legitimacy. In *European Journal of International Law*, 2006, vol. 17, p. 889.

22 SCHEPPELE, K. L. The International State of Emergency: Challenges to Constitutionalism after September 11. Available at: https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1048&context=schmooze_papers p. 21 – 22; See also GEARTY, C. 11 September 2001, Counter-terrorism, and the Human Rights Act. In *Journal of Law and Society*, 2005, vol. 32, n. 1, pp. 18–33.

legitimacy for counterterrorism measures that were widely criticised for their implications for fundamental rights and the rule of law.²³ The detention regime at Guantánamo Bay is frequently cited as a prominent illustration of these concerns. Hundreds of individuals were held as “unlawful enemy combatants,” a classification that placed them outside the protections ordinarily afforded under the Third Geneva Convention. Many were detained for prolonged periods without access to legal counsel or judicial review.²⁴ Several detainees appeared before military commissions whose conformity with international fair-trial standards was subject to sustained academic and judicial critique.²⁵ Allegations of coercive interrogation methods contrary to international humanitarian law and the Convention against Torture further underscored the systemic challenges posed by the post 9/11 counterterrorism framework.²⁶ In addition, the practice known as “extraordinary rendition,” e.i. the transfer of suspects to jurisdictions where effective legal safeguards were lacking, raised significant questions regarding compliance with the prohibitions of torture and refoulement under international law.²⁷

Comparable dynamics emerged in other jurisdictions, where States invoked Resolution 1373 to legitimise domestic counterterrorism policies with significant implications for human rights and political participation. In the Russian Federation, for example, government authorities framed military operations in Chechnya as part of the global campaign against terrorism, drawing on the language of Resolution 1373 to situate the conflict within an international counterterrorism paradigm. This framing persisted notwithstanding extensive reports by United Nations bodies and human rights organisations documenting indiscriminate use of force, enforced disappearances, and ill-treatment of detainees.²⁸

A similar pattern can be observed in the People’s Republic of China, where authorities increasingly designated Uyghur groups and activists as terrorist entities in the years following 2001. Academic commentators and UN Special Procedures have noted that counterterrorism measures were progressively expanded to encompass

23 See FITZPATRICK, J. 2003. Speaking law to power: the war against terrorism and human rights. In *European Journal of International Law*, 2003, vol. 14, pp. 241–264.

24 INTERNATIONAL COMMITTEE OF THE RED CROSS. 2002–2004. Reports on Guantánamo Bay. Available at: <https://casebook.icrc.org/case-study/united-states-status-and-treatment-detainees-held-guantanamo-naval-base>. U.S. Supreme Court: *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

25 *Ibid.* n 22, n 23, n 24

26 Council of Europe, Parliamentary Assembly, Report by Dick Marty on Alleged CIA Secret Detentions (2006) Available at : https://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf

27 European Court of Human Rights, *El-Masri v. North Macedonia*, Judgment of 13 December 2012. Human Rights Watch, *The Road to Abu Ghraib* (2004) Available at: <https://www.hrw.org/report/2004/06/09/road-abu-ghraib>

28 See - WHEELER, N. *Chechnya: Anti-Terrorist Operation or Human Rights Disaster*. Available at: <https://www.wilsoncenter.org/publication/chechnya-anti-terrorist-operation-or-human-rights-disaster>; See also HUGHES, J. *The Chechnya conflict: freedom fighters or terrorists?* In *Demokratizatsiya*, 2007, vol. 15, n. 3.p. 295

cultural expression, religious practice, and non-violent political advocacy, raising serious concerns regarding proportionality, discrimination, and compatibility with international human rights law.²⁹

In Egypt, legislation adopted in the early 2000s explicitly justified (in part through reference to Resolution 1373) granted broad powers to the executive to detain individuals preventively, restrict political participation, and regulate civil society organisations. Scholars have observed that the legal framework was applied not only to violent actors but also to political opposition groups or civil society organisations, thereby blurring the distinction between security-based regulation and the suppression of dissent.³⁰

These examples demonstrate that the Council's turn to legislative-style resolutions not only raised questions of formal competence but also of substantive legitimacy. Even if formally valid, Resolutions 1373 and 1540 altered the institutional balance of the Charter by concentrating law-making authority in a small body dominated by the permanent (powerful) five. Universal obligations were imposed without negotiation, participation, or ratification, reinforcing the perception that international law was being created through imposition rather than consent.

IV. Security Council Authority and Legitimacy after 9/11 – arguments in favour

Supporters of the resolutions argue that the Security Council acted well within the scope of its authority under the UN Charter. Article 39 vests the Council with the power to determine what constitutes a “*threat to international peace and security*,” and this provision has long been interpreted broadly.³¹ Since the end of the Cold War, the Council has recognised not only inter-State conflicts but also internal crises such as apartheid³², humanitarian catastrophes³³, and mass violations of human rights³⁴ as threats to peace. Against this background, the claim that transnational terrorism and

29 United Nations Human Rights Council. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Addendum: Communications with Governments. A/HRC/4/26/Add.1. 15 March 2007; See p. 43 OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China of 31 August 2022 Available online <https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf> ; See also GILL, B., MURPHY, M. China's Evolving Approach to Counterterrorism. In *Harvard Asia Quarterly*, 2005, vol 9. p. 25

30 Amnesty International, Egypt: Counter-Terrorism Law and Human Rights (2003) Available at: <https://www.amnesty.org/en/wp-content/uploads/2021/07/mde120012007en.pdf> ; See also HASSIB, B. Shrinking civic space: Egypt's counter-terrorism policy post-9/11 and beyond. In *Counter-terrorism and civil society*. Manchester University Press, pp. 233–254.

31 SIMMA, B. et al. *The Charter of the United Nations: A Commentary*. 3rd ed. Oxford : Oxford University Press, 2012 (Art. 39 commentary).

32 United Nations Security Council. Resolution 418 (1977). S/RES/418 (1977), 4 November 1977.

33 United Nations Security Council. Resolution 794 (1992). S/RES/794 (1992), 3 December 1992.

34 United Nations Security Council. Resolution 929 (1994). S/RES/929 (1994), 22 June 1994.

the proliferation of weapons of mass destruction are global threats of the highest order appears uncontroversial. Both phenomena transcend national borders, destabilise regions, and require coordinated international responses.³⁵ Thus, in substance, the Council's decision to act decisively after 9/11 was consistent with established practice and with the open-ended terms of Chapter VII.³⁶

In procedural terms, nothing in the Charter prevents the Council from adopting obligations of general and direct application if necessary to address a threat it has identified. Articles 41 and 42 give the Council discretion to decide what measures are required, and these are not textually limited to case-specific sanctions or authorisations of force. Indeed, previous Council measures, such as the establishment of the ad hoc international criminal tribunals for Yugoslavia and Rwanda, already showed a willingness to use Chapter VII innovatively to create institutions and impose obligations beyond the immediate crisis.³⁷ From this perspective, Resolutions 1373 and 1540 were not a rupture but an evolutionary extension of the Council's creative use of Chapter VII to meet novel security challenges.³⁸

State reactions also provide evidence of tacit acceptance. Despite the unprecedented scope of the obligations imposed, no sustained legal challenge to the Council's authority emerged. On the contrary, States complied, reported to the Counter-Terrorism Committee and the 1540 Committee, and frequently enacted domestic legislation to implement the resolutions. Within the framework of international institutional law,

35 ROSAND, E. Security council resolution 1373, the counter-terrorism committee, and the fight against terrorism. In *American Journal of International Law*, 2003, vol. 97, pp. 333–341.; TALMON, S. The Security Council as World Legislature. In *American Journal of International Law*, 2005, vol. 99, p. 182.

36 See DE WET, E. *The Chapter VII Powers of the United Nations Security Council*. Oxford : Hart Publishing, pp. 38–40

37 This interpretation has also been confirmed by the appeals chamber of the ICTY, which held in the Tadić case:

It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve “the use of force.” It is a negative definition.

„Article 39 [which provides that the Security Council shall decide what measures shall be taken in accordance with Article 41 to maintain or restore international peace and security] leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations“ Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT-94-1-AR72, para. 35 - 38 (Oct. 2, 1995), 35 ILM 32 (1996)

38 See CHESTERMAN, S. *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System. Final Report and Recommendations*, 2008; ALVAREZ, J. The Security Council's War on Terrorism: Problems and Policy Options. In *European Journal of International Law*, 2003, vol. 14, pp. 219–244; ROSAND, E. Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism. In *American Journal of International Law*, 2003, vol. 97, pp. 333–341; DE WET, E. *The Chapter VII Powers of the United Nations Security Council*. Oxford : Hart Publishing, 2004; TALMON, S. The Security Council as World Legislature. In *American Journal of International Law*, 2005, vol. 99, pp. 175–193.

such conduct can be read as evidence of State practice that supports, or at least does not contest, the legality of the Council's approach.

Finally, defenders contend that the Council's legitimacy rests not only on strict adherence to Charter formalities but also on its capacity to respond effectively to evolving security threats. The drafters of 1945 could not have foreseen transnational terrorist networks or non-State actors seeking weapons of mass destruction, and a rigid, literal interpretation of the Charter would have risked rendering the Council incapable of addressing such challenges. On this view, the Council's reliance on the flexible architecture of Chapter VII reflects an adaptive, rather than ultra vires, use of its authority. Resolutions 1373 and 1540 are therefore characterised as pragmatic extensions of existing practice, enabling the Council to fulfil its collective security mandate in circumstances unforeseen by the Charter's framers. Nothing in the Charter's text expressly precludes the Council from adopting obligations of a general or enduring character, provided they are directed toward maintaining international peace and security.³⁹ In practice, the scope of the Council's authority has been checked less by legal interpretation than by political will, in particular, the consensus or veto of the permanent five members.⁴⁰

V. Resolutions 1373 and 1540 and the Legitimacy of International Law

The debate over the legality of Resolutions 1373 and 1540 is closely intertwined with a wider question of legitimacy. Even if one accepts that the Security Council acted within the broad scope of its authority under Chapter VII of the UN Charter, the manner in which these resolutions were drafted, implemented, and subsequently interpreted has generated consequences that extend far beyond the immediate security concerns they sought to address. The concern is not merely that the Council assumed a quasi-legislative role, but that the modalities and effects of this assumption have weakened the perceived inclusivity, fairness, and normative coherence of the contemporary international legal order.

A first source of legitimacy concern lies in the open-ended nature of Resolution 1373. By imposing wide-ranging obligations on States to criminalise terrorism, freeze assets, and deny safe haven, yet without providing any definition of "terrorism", the resolution delegated broad discretion to States in determining its scope and application. Although this indeterminacy facilitated rapid collective action in the immediate aftermath of 11 September 2001, it also enabled governments to extend the "terrorism" label to a wide variety of activities far removed from genuine terrorist violence. In practice, separatist movements, political opposition groups, or minority activists were frequently characterised as terrorist actors. This dynamic was evident, for example, in Russia's approach to Chechnya, China's policies in Xinjiang, or Egypt's suppression of domestic political opponents. In such cases, the invocation

39 UŠIAK, J., SAKTOROVÁ, E. The International Court of Justice and the Legality of UN Security Council Resolutions. In *Danube: Law and Economics Review*, 2014 vol 5, n. 3, pp. 201–212.

40 See HURD, I. Legitimacy, power, and the symbolic life of the UN Security Council. In *Global Governance*, 2002, vol. 8, pp. 35–51.

of Resolution 1373 furnished a veneer of international legitimacy for measures incompatible with international human rights or humanitarian law. The absence of definitional clarity thus created structural space for expansive and often abusive applications, undermining confidence in the neutrality and predictability of the international legal order.⁴¹

A second factor that intensified these legitimacy concerns was the conspicuous lack of any human-rights component in the mechanisms created by the Council. The Counter-Terrorism Committee (CTC), entrusted with monitoring State compliance with Resolution 1373, operated under a narrowly technical mandate. Its assessments focused on legislative enactment, asset-freezing regimes, and law-enforcement capacities, without examining whether such measures were consistent with due process guarantees, proportionality requirements, or fundamental freedoms. This asymmetry produced a significant accountability gap: compliance was evaluated primarily in terms of criminalisation and enforcement, rather than respect for human rights. As a result, the Council effectively institutionalised a model of global counter-terrorism governance in which security imperatives took precedence over established rights-based safeguards.⁴²

Resolution 1540, though less directly implicated in human rights controversies, generated legitimacy challenges of a different nature. It required all States, irrespective of their resources, institutional capacity, or exposure to proliferation risks, to adopt complex domestic controls against the acquisition of weapons of mass destruction by non-State actors. These obligations included export-control legislation, border-management systems, physical protection of sensitive materials, and enhanced inter-agency coordination. For many developing States, implementation necessitated considerable financial, administrative, and technical resources, diverting attention from pressing domestic economic priorities. Although Resolution 1540 called upon States in a position to do so to provide assistance, the mechanisms established proved limited and uneven, reinforcing perceptions that universal obligations were being shaped by the security priorities of powerful States while weaker States were left to struggle with implementation burdens they had played little role in designing.

A fourth and increasingly salient legitimacy concern emerges from the Council's subsequent need, almost two decades later, to issue detailed interpretative guidance to clarify the content and implementation of the obligations originally imposed under Resolution 1373. The adoption of the 2019 Technical Guide by the Counter-Terrorism Committee Executive Directorate (CTED) represents an important but limited attempt to address the normative deficiencies of Resolution 1373. While the Guide systematically integrates international human rights, humanitarian and refugee law into counter-terrorism assessments for the first time, its legal nature remains

41 HAPPOLD, M. "Security Council Resolution 1373 and the Constitution of the United Nations." In *Leiden Journal of International Law* 16, no. 3 (2003): pp.593–610.

42 United Nations. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. A/59/401. 1 October 2004; United Nations Human Rights Council. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Addendum: Mission to [State]. A/HRC/6/17/Add.1. 14 December 2007.

that of non-binding soft law. As such, it neither amends the original resolution nor creates enforceable constraints on State practice. In practical terms, the Guide has not prevented authoritarian regimes from continuing to instrumentalise counter-terrorism obligations to suppress political opposition, restrict civic space, or target minority groups. The persistence of abusive practices in various jurisdictions demonstrates that ex post interpretative guidance cannot compensate for the absence of human rights safeguards embedded in the binding resolution itself.⁴³ Rather than curing the legitimacy deficit of Resolution 1373, the Technical Guide arguably confirms it. The need for extensive clarification nearly two decades after the adoption of the resolution illustrates the structural risks inherent in the Security Council's legislative-style action. Norms adopted rapidly, without participatory negotiation and without integrated safeguards, require subsequent technocratic correction that lacks democratic legitimacy and effective enforcement mechanisms. The Guide thus functions more as a symptom of the original design failure than as a remedy capable of restoring normative balance between security imperatives and fundamental rights.

From today's perspective, it is appropriate to reassess how the Security Council's post 9/11 practice has affected its institutional credibility, particularly in light of developments since 2022. Russia's invasion of Ukraine, widely characterised in legal terms as an "*act of aggression*"⁴⁴ and the subsequent paralysis of the Security Council caused by vetoes cast by permanent members, exposed a fundamental weakness in the Council's claim to manage global threats to international peace and security.⁴⁵ Paradoxically, as this study has shown, a body that once imposed and enforced universally binding norms proved powerless in the face of one of the most serious violations of the prohibition on the use of force against the territorial integrity of a sovereign state since 1945, unable to agree even on minimal collective measures.

The same scenario occurred in the latest Gaza conflict. Repeated vetoes obstructed the Council's response to severe humanitarian and human rights crises, receiving the legal designation of *genocide*.⁴⁶ Taken together, these cases call into question a core

43 ONDROVÁ, J., ÚRADNÍK, M. *Upřednostnění právního materializmu ako základná požiadavka moderného právneho štátu*. Praha : Leges, s. r. o., 2022, p. 173.

44 "Act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, in a manner constituting a manifest violation of the Charter of the United Nations, as defined in Article 8 bis of the Rome Statute of the International Criminal Court and United Nations General Assembly Resolution 3314.

45 See DUMAN, T.I., RAKIPOĞLU, M. THE STRUCTURAL PARALYSIS OF THE UN SECURITY COUNCIL: GREAT POWER POLITICS AND THE GAZA CRISIS. *Muhafazakar Düşünce Dergisi*, 2025, 21.68-Yeni Dünya Yeni Düzen: Küresel Sistemin Geleceğinde Türkiye, pp. 44-71; VERDEJA, E. The Gaza Genocide in Five Crises. In *Journal of Genocide Research*, 2025, pp. 1–23. Available at: <https://doi.org/10.1080/14623528.2025.2452707>

46 United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory and Israel (16 September 2025). Legal analysis of the conduct of Israel in Gaza pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide (PDF). OHCHR (Report) Available at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session60/advance-version/a-hrc-60-crp-3.pdf>

assumption underlying the Council's post 9/11 approach, that in moments of crisis it can act decisively and legitimately on behalf of the international community as a whole. The Council's latest paralysis retrospectively sharpens the long-discussed legitimacy deficit that has accompanied Resolutions 1373 and 1540. Where a politically divided body lacks the capacity to fulfil its primary responsibility for the maintenance of international peace and security, its earlier claim to authority as a global legislator in "crisis situations" becomes increasingly difficult to defend. Measures introduced in the early 2000s as pragmatic responses to urgent security threats thus today appear as instances of institutional abuses of power whose durability depended on a degree of political cohesion that no longer exists.

These developments also reflect broader structural dynamics shaping the role of the United States within the contemporary international legal order. As a principal architect of the Security Council's post 9/11 practice, the United States strongly supported the use of binding Chapter VII resolutions as instruments of global regulation in the field of counter-terrorism. In doing so, the Council's authority functioned as a means of conferring universality and legal legitimacy on norms that largely reflected the security priorities of a limited group of powerful states. Yet subsequent practice has revealed the limits of this model. While the Council was able to act where major power interests converged, it became ineffective once those interests diverged. The repeated use of the veto to block responses to military conflicts or serious humanitarian crises, particularly where permanent members or their allies were involved, has reinforced perceptions of selective application of international law, applied rigorously to some states but leniently to others.

Combined with the Security Council's paralysis since 2022, this pattern points to a deeper problem of credibility. A system in which universally binding rules are created through centralized authority but applied inconsistently due to political division risks further fragmenting international law. The Council's post 9/11 practice thus appears increasingly less like a stable framework for the collective management of global security and more like the product of exceptional political circumstances that no longer prevail. The experience of Resolutions 1373 and 1540 illustrates how even legally defensible exercises of institutional authority may, over time, undermine confidence in international law as a coherent, fair, and principled system.

VI. Conclusion

The analysis undertaken in this study demonstrates that United Nations Security Council Resolutions 1373 (2001) and 1540 (2004) occupy a pivotal place in the evolution of international law after 9/11. Adopted under the pressure of urgent and unprecedented security challenges, both resolutions expanded the Security Council's practice in ways that were, at once, legally defensible and institutionally disruptive. They reflected the Council's determination to act decisively in the face of transnational terrorism and the proliferation risks posed by non-State actors. Yet they also revealed structural tensions within the UN Charter system, particularly concerning the distribution of law-making authority, the balance between security and rights, and the legitimacy of global governance processes.

From a doctrinal standpoint, the study situates the Council's conduct within contrasting scholarly interpretations and finds that it falls within the broad discretion afforded by Chapter VII. Article 39 neither limits the types of threats the Council may identify nor prescribes the form and content of measures adopted in response. In this respect, the Council's approach in 2001 and 2004 did not turn from its evolving post Cold War practice, which had already seen the identification of internal conflicts, humanitarian catastrophes, and grave violations of human rights as threats to international peace and security. Precedents such as the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda illustrate that the Council had long exercised creative and expansive powers under Chapter VII. Accordingly, the argument that Resolutions 1373 and 1540 are in principle *ultra vires* cannot be sustained solely on textual or structural grounds. However, the question of legitimacy extends beyond formal legality. The study's broader inquiry into the political, procedural, and normative dimensions of legitimacy reveals that the Council's post 9/11 legislative turn generated several systemic concerns.

First, the absence of a definition of terrorism in Resolution 1373 created significant space for discretionary and, at times, abusive state practice. In the absence of clear parameters, states were able to use the counterterrorism mandate to justify measures against political opponents, separatist groups, but also civil societies, often with profound human rights implications. This undermined confidence in the neutrality and normative coherence of the international legal system.

Second, the institutional mechanisms established to monitor implementation suffered from a marked absence of human rights oversight. The Counter-Terrorism Committee (CTC), tasked with reviewing state compliance, was limited to assessing technical measures like legislation, asset freezing, or border controls, without examining whether such measures were consistent with due process or fundamental freedoms. This structural asymmetry between security imperatives and rights protections produced an accountability deficit that characterised the global counterterrorism regime for more than a decade.

Third, Resolution 1540, although rooted in legitimate non-proliferation objectives, imposed technically complex and resource-intensive obligations on all states, irrespective of capacity or risk profile. As demonstrated, developing states often faced disproportionate compliance burdens, diverting attention from urgent domestic priorities and reinforcing perceptions that the global security agenda was asymmetrically shaped by the interests of powerful states.

Fourth, the cumulative effect of the aforementioned dynamics reshaped the Charter framework in ways that were neither foreseen nor democratically negotiated. Resolutions 1373 and 1540 demonstrated the Council's capacity to legislate for the international community without the participatory safeguards inherent in treaty-making. While this may have been expedient in the immediate aftermath of the crisis, it reinforced a model of hierarchical global governance that does not truly follow foundational principles of state consent, multilateralism, and accountability.

In light of these considerations, the experience of Resolutions 1373 and 1540 suggests that the Security Council's experiment with legislative-style governance has not withstood the test of time. While the Council's actions may be defended as

formally lawful within the flexible framework of Chapter VII, legality alone has proven insufficient to sustain institutional legitimacy. The concentration of global norm-making authority in a politically uneven body, combined with the absence of participation, definitional clarity and rights-based safeguards, has generated a regulatory model vulnerable to abuse, selective implementation, and long-term erosion of trust.

More fundamentally, the post-2022 paralysis of the Security Council reveals the structural limits of the ‘global legislator’ model. A body whose decision-making is subject to veto by a small number of powerful States cannot credibly function as a stable source of universal and enduring legal obligations. The inability of the Council to act decisively in response to contemporary conflicts marked by large-scale violence and humanitarian suffering undermines the normative authority of its earlier legislative ambitions. In this sense, the post 9/11 resolutions illustrate not merely a tension between effectiveness and legitimacy, but the practical failure of a governance model that sought to substitute hierarchical decision-making for inclusive multilateral law-making.

If the authority of international law is to remain credible, future responses to global security threats cannot rely on the replication of this model. The maintenance of international peace and security requires regulatory frameworks that are not only effective but also grounded in participation, accountability, and respect for fundamental rights. Without such safeguards, the exercise of exceptional powers by the Security Council risks further deepening scepticism towards international institutions and accelerating the fragmentation of the international legal order.

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Summary: The Security Council, Counter Terrorism, and the Legitimacy of International Law

This article examines United Nations Security Council Resolutions 1373 (2001) and 1540 (2004) as key moments in the Council's post 9/11 transformation from a crisis-management body into a quasi-legislative actor. Adopted under Chapter VII of the UN Charter, both resolutions imposed binding and generally applicable obligations on all UN Member States in the fields of counter-terrorism and non-proliferation. The article analyses whether this expansion of authority fell within the Council's legal competence and how it has affected the legitimacy of international law. Using doctrinal and critical analysis, the study argues that while the resolutions can be defended as formally lawful under the broad discretion afforded by Article 39, they generated significant legitimacy concerns. Resolution 1373, in particular, lacked a definition of terrorism and was implemented through oversight mechanisms that prioritised enforcement over human rights safeguards. Resolution 1540 imposed complex regulatory duties that disproportionately burdened developing States. Together, these measures concentrated regulatory power in a politically uneven body and bypassed participatory law-making processes. The article further shows that developments since 2022, including the Security Council's inability to respond effectively to major international crises, have exposed the limits of this legislative model. The post 9/11 practice therefore, illustrates a persistent tension between effectiveness and legitimacy, highlighting the risks of centralized global regulation without participation, accountability, and consistent application of international law. Ensuring the long-term credibility of the international legal order requires greater transparency, inclusivity, and human rights integration, as well as mechanisms that prevent global regulation from depending solely on the preferences of the most powerful States.

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