

I.f. TERRORIST ACTS AS THREATS TO INTERNATIONAL PEACE AND SECURITY

Dr. Rosa Giles Carnero
University of Huelva

Summary: Introduction. I. Terrorist acts in the configuration of the threat to international peace and security. I.I. The concept of threat to international peace and security in United Nations Security Council practice. I.II. The gradual inclusion of terrorism as a threat to international peace and security. II. The essential characteristics of the current definition of threat to international peace and security caused by terrorist acts. II.I. The general, permanent nature of the article 39 description. II.II. The absence of a definition of terrorism. II.III. The irrelevance of the international character of terrorism. Conclusions. References.

Introduction

The September 11, 2001 attacks on New York, Washington D.C. and Pennsylvania gave rise to a new approach to international counter-terrorism measures and one of its most striking features is that the United Nations Security Council has become the key coordination organ for global counter-terrorism strategy. The day after the attacks, Security Council action entered this new stage with Resolution 1368 (2001), a text which not only condemned the attacks on North American territory, but regarded any act of international terrorism as constituting a threat to international peace and security¹

At that moment and for the first time, the Security Council considered terrorism itself as a threat to peace but in addition it proclaimed, and currently continues to proclaim, that terrorism is one of the most serious threats in the twenty-first century². This emphasis represented a change of the previous Security Council practice which had never before insisted on the serious global nature of a certain threat to international peace and security.

The significance of describing terrorism as one of the categories in article 39 of the Charter of the United Nations becomes obvious when we remember that it is the legal basis on which the Security Council is entitled to adopt

¹ See Resolution 1368 (2001), para. 1, “Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington D.C. and Pennsylvania and regards such acts, like *any acts of international terrorism, as a threat to international peace and security*”. Emphasis added.

² See *Declaration on the Global Effort to Combat Terrorism*, attached to Resolution 1377 (2001) 12 November 2001, the Security Council “declares that acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century”; and more recently, Resolution 1624 (2005) 14 September 2005, preambular para. 3, the Security Council “condemning in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security [...]”.

mandatory obligations for States pursuant to Chapter VII. It is this classification which gives the Security Council coercive powers for countering terrorism and that is why defining the concept of threat to peace caused by acts of terrorism is of vital interest for determining the scope of the Council's competences in its global sphere of action. This present article was motivated by the importance of this definition within a study on international counter-terrorism and therefore includes some reflections on the content, limits and consequences of the present configuration of the threat to peace caused by acts of terrorism.

The article is in two sections. The first provides some notes on how the threat to international peace and security concept has been shaped by Security Council practice and the gradual inclusion of terrorist acts into this category. The second section considers the content and limits of the current configuration of the threat to peace caused by terrorist acts and some of the implications when Security Council adopts decisions under Chapter VII of the United Nations Charter.

This study ends with some brief conclusions where the author reflects on some of the main issues dealt with here which are offered for inclusion in the open-ended, ongoing debate raised by the 7th Symposium of International Humanitarian Law on the International Law Dimension of Terrorism.

I. Terrorist acts in the configuration of the threat to international peace and security.

For a correct analysis of the elements which currently constitute the threat to international peace and security caused by acts of terrorism, it is appropriate to consider the evolution of this notion in the practice of the United Nations Security Council. The following section -- offers some general notes on the way the threat to international peace and security concept has developed, this analysis will allow to evaluate the significance and novelty of classifying terrorist acts in this way.

In addition to this brief analysis, the second epigraph contains a study of the way terrorist acts have gradually been introduced into the notion of threat to international peace and security. Resolutions after September 11, 2001 represent a new approach to terrorism by the Security Council, but cannot be

understood without examining the previous practice on specific counter-terrorism strategies.

I.I. The threat to international peace and security concept in United Nations Security Council practice.

Under article 39 of the UN Charter the Security Council is competent to determine the existence of an act of aggression, a breach of the peace or a threat to international peace and security. Once such a classification has been made, the Security Council is authorised to adopt coercive measures pursuant to Chapter VII in the Charter³. Of the three categories included in article 39, there is no doubt that the threat to international peace and security was originally configured as the most generic and consequently has been the one with the greatest capacity to evolve⁴. The notion can therefore be regarded as being open-ended and political, and is only made specific when the Security Council exercises its wide discretionary powers to make a value judgement on particular circumstances.

In conformity with these powers, the Security Council has used this category widely in recent decades, declaring many different situations to be threats to international peace and security. While practice based on this notion was scarce until 1990, the proclamation of a “New World Order” permitted greater cooperation between the permanent members and this led the Security Council to deal not only with situations of armed conflict but also others in which the task of maintaining international peace and security was broadly interpreted.

Currently and after long practice, there is certain consensus that the threat to peace concept cannot only be linked to the risk of war. Study of

³ Opinion is divided as to whether prior article 39 classification is essential before the Security Council can act on the basis of articles 41 and 42. Although the academic debate remains, it should be noted that Security Council practice has been uniform, so that it has always alluded to the presence of article 39 circumstances when adopting Chapter VII decisions. On this debate, see, in particular, Jean-Pierre Cot and Alain Pellet, *La Charte des Nations Unies. Commentaire Article par Article*, 2^o Édition, Économica, Paris, p. 708.

⁴ At the San Francisco Conference there was discussion about whether or not to specify the content of the notions included in article 39. The debate on this would have been arduous and difficult to conclude successfully given that the Great Powers clearly preferred open categories which would give the Security Council a broad margin for interpretation. In subsequent developments after the adoption of the *Charter of the United Nations* the concept of act of aggression has obtained greater legal specification through Resolution of the General Assembly 3314 (XXXIX), of 14 December 1974. However there has been no such evolution in the other article 39 categories. For further analysis of the negotiations at the San Francisco Conference see *Ibidem*, p. 647.

Security Council Resolutions which use the concept suggests that it can include situations which affect fundamental values of the International Community, such as racial discrimination, human rights or the need to assist the victims of humanitarian crises⁵.

The threat to international peace and security concept has evolved in such a way that the situations where the Security Council has acted pursuant to Chapter VII have been extended and so the study of the notion forms part of the debate on the legal limits to the Council's competencies. Discussion of this aspect has been an arduous task and there is still a long way from providing a unanimous answer⁶. The diversity of actions which have been classified as a threat to peace demands case by case examination, although some general ideas can be outlined.

Pursuant to article 24 of the U.N. Charter, the Security Council's primary objective is to maintain international peace and security and in carrying out its duties, it must respect the purposes and principles established in the Charter. Articles 1 and 2 of the U.N. Charter are the fundamental parameters for evaluating the lawfulness of Security Council actions. Consequently, the Council's decisions must be observed case by case, according to these parameters, which limit the wide margin of discretion it has been given by the Charter.

Of course, the problem lies in deciding which organ is competent to carry out this supervisory task. The absence of any ruling on the questions of law raised by the Lockerbie case represents the loss of an important opportunity for

⁵ The Council itself declared in 1992 that "the absence of war and military conflicts amongst States does not in itself ensure international peace and security", as "non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security". In particular, the Council expressed concern "over acts of international terrorism" and stressed the need "for the international community to deal effectively with all such acts". Declaration of the President of the Council on *The Responsibility of the Security Council in the Maintenance of Peace and Security*, UN Doc. S/23500 of 31 January 1992, p. 3.

This position is also consistent with the broad definition of maintaining the peace used by other United Nations organs. In particular, see the maintaining the peace concept used by the Secretary-General Boutros Boutros-Ghali in his report *An Agenda for Peace, Preventive Diplomacy, Peace-Making and Peace-Keeping*, of 17 June 1992, UN Doc. A/47/277-S/24111, paras. 12-14 and 22.

⁶ Practice shows that the threat to international peace and security concept has a clearly political and sociological content making it complicated to analyse and evaluate. Alejandro Rodríguez Carrión has made some interesting comments on the difficulties with analysing the concept of threat of the use of force which can also be applied to this notion, see "Las nociones de "amenaza" and "uso" del arma nuclear", in *La licitud del uso de las armas nucleares en los conflictos armados*, by Pablo Antonio Fernández Sánchez (Coord.), Universidades de Huelva y Sevilla-Cruz Roja Española-Ministerio de Defensa, pp. 101- 118, p. 102 et seq.

the International Court of Justice to give its opinion on whether it is competent to review the legality of Security Council actions⁷. Finally, and in view of the political solution to the case, the Court has only been able to express its opinion on the provisional measures requested by Libya concerning the Council's Chapter VII counter-terrorism decisions.

The current description of terrorism as a threat to peace could give rise to controversy similar to that surrounding the Lockerbie case, so future practice may provide the courts with a new opportunity for a judicial pronouncement on the limits of Security Council powers in such a vital area for state sovereignty as international counter-terrorism. Until the opportunity arises, the debate on the legal limits to Security Council action will remain open and its main source of reference will continue to be compliance with the purposes and principles of the Charter of the United Nations.

I.II. The gradual inclusion of terrorism as a the threat to international peace and security.

In its post September 11, 2001 Resolutions, the Security Council began a new practice by considering acts of terrorism within the category of a threat to peace and security. This new approach was possible because of renewed consensus among Security Council members, in particular its permanent members and because of this new step was based on previous counter-terrorism experience.

The first time the Security Council referred to terrorism was in Resolution 579 (1985), of 18 December 1985 concerning suicide attempts perpetrated in the airports of Rome and Vienna. The text condemned "all acts of hostage-taking and abduction" and considered them to be "manifestations of international terrorism"⁸ Despite the fact that no allusion was made to the

⁷ For more in-depth analysis of the Lockerbie case and its influence on the study of reviewing the legality of Security Council counter-terrorism actions see in particular, Jean Allain, "The Legacy of Lockerbie: Judicial Review of Security Council Actions or the First Manifestation of "Terrorism" as a Threat to International Peace?", *Indian Journal of International Law*, vol. 44, issue 1, 2004, pp. 74-112; Scott S. Evans, "The Lockerbie Incident Cases: Libyan-Sponsored Terrorism, Judicial Review and the Political Question Doctrine", *Maryland Journal of International Law and Trade*, vol. 18, 1994, pp. 21-76; y Jonathan A. Frank, "A Return to Lockerbie and the Montreal Convention in the Wake of the September 11th Terrorist Attacks: Ramifications of Past Security Council and International Court of Justice Action", *Denver Journal of International Law and Policy*, no. 30, 2002, pp. 532-546.

⁸ See para. 1 and 5.

notions in article 39, terrorism was 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”⁹. Since this first approach, the Security Council has described acts of terrorism as a threat to international peace and security on several occasions¹⁰.

The Security Council often condemns the use of terrorism in the context of armed conflicts. In cases such as Kosovo or Georgia, the Security Council has included terrorist acts in a situation classified as a threat to international peace and security. Thus terrorism was beginning to be taken into account in article 39 decisions, but as just another aspect of armed conflict, not in its own right.

There are also other significant situations where more specific reference has been made to terrorist attacks in the threat to peace classification. These include Resolutions on the aircraft accident in Lockerbie in 1992; the Resolutions generated as the result of the assassination of the Egyptian President Hosni Mubarak in 1995; the Resolutions on the Taliban Regime’s support of terrorism issued between 1998 and 2001. In these cases, the fundamental difference with post September 11 Security Council practice lies in the fact that the threat to international peace and security is being invoked on the basis of the behaviour of the States involved and not on the acts of terrorism themselves.

Thus in the Lockerbie case, for example, Resolutions 731 (1992) and 748 (1992) of 21 January and 31 March 1992 respectively did not consider the destruction of Pan-Am flight 103 over Lockerbie on 21 December 1988 as a threat to peace but rather the subsequent action by Libya. The United States and the United Kingdom requested the extradition of two suspects from Libya, while France called for Libya’s collaboration in the investigation. Libya refused to meet the requests and the threat to peace classification is based mainly on that behaviour and not on the terrorist act.

⁹ See preambular para. 2.

¹⁰ For more in-depth analysis of the evolution of the consideration of terrorism as a threat to international peace and security see Ben Saul: “Definition of “Terrorism” in the UN Security Council: 1985-2004”, *Chinese Journal of International Law*, no. 4, 2005, pp. 141-166.

Similar considerations can be made concerning the other two situations mentioned above. Analysis of Resolution 1054 (1996), of 26 April 1996 shows that the main motivation for the threat to peace classification was Sudan's refusal to extradite those suspected of assassinating President Hosni Mubarak. Before 2001, the Taliban refusal to cooperate with counter-terrorism was the prime motivation behind the threat to peace description and not the various attacks which took place with the suspected participation of Al-Qaeda¹¹.

Therefore, and according to the cases noted here, it can be stated that the Security Council has condemned several terrorist attacks but did not include them in their own right in any of the article 39 concepts. The threat to international peace and security in the above cases was due to behaviour attributable to a particular State which refused to collaborate with counter-terrorism rather than the terrorist attacks themselves¹². Consistent with its pronouncement, the Security Council decided on specific sanctions against the States which directly or indirectly helped, encouraged or protected terrorist groups.

Resolutions 1368 (2001) and 1373 (2001) of the 12 and 28 September 2001 represent a fundamental departure from the above practice. These texts determine that the September 11 terrorist acts in the United States and any act of terrorism are in their own right a threat to international peace and security. It is thus international terrorism itself which is classified as a threat to international peace and security, wherever and by whomsoever committed. This line of argument has subsequently been used by the Security Council to describe specific attacks like part of the threat to peace and security caused by terrorism.

Practice prior to September 11 did not escape legal controversy but this controversy has increased since the appearance of a general and permanent threat to peace category such as that used to define terrorist acts¹³. Precisely

¹¹ See for example Resolution 1267 (1999), of 15 October 1999. The Security Council included in this text important counter-terrorism measures including the creation of an inspection Committee, but these were based on a classification of threat to peace motivated by "the failure of the Taliban authorities to respond to the demands in paragraph 13 of resolution 1214 (1998)" (Preambular, para. 8).

¹² For more in-depth analysis see Valeria Santori, "The UN Security Council's (Broad) Interpretation of the Notion of the Threat to Peace in Counter-terrorism", in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism. The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, England-USA, 2006, pp. 89-111, p. 90.

¹³ Vera Gowlland was already raising doubts as to the legality of the reference to terrorist acts in the threat to peace concept when she referred to the Lockerbie case, noting in particular that "as regards the Council's broad discretion under Article 39, one may invoke in

because terrorism in general is regarded as a threat to peace, the Security Council can include in this concept situations provoked by private bodies independently of their relation with a State and consequently it can decide counter-terrorism actions which attempts to cover all types of perpetrators and circumstances of perpetration. The following sections offer an analysis of some of the issues raised by this global approach to the threat to peace and security caused by acts of terrorism.

II. The essential characteristics of the current definition of the threat to international peace and security cause by terrorist acts.

The current configuration of the threat to international peace and security by acts of terrorism is a departure from common Security Council practice whereby specific situations, with determinate characteristics were classified under article 39. In comparison, Resolutions 1368 (2001) and 1373 (2001) marked the beginning of a threat to international peace and security concept that was general and permanent. This new approach brings with it significant areas of uncertainty and lacunae which writers on international law have been quick to point out.

The legal problems which arise from the general permanent nature of the threat to peace from terrorist acts are made heightened by the absence of a definition of terrorism. The Security Council's decision to offer no explicit indication in its Resolutions of what acts should be classified as terrorism creates even more ambiguity in a classification which initially was designed to be generic.

The following sections include analysis of the defining characteristics in the current configuration of the threat to international peace and security caused by acts of terrorism. A third element has been added to the above which is that the international character of terrorism has been considered irrelevant when describing the threat to peace. This last characteristic will have important consequences when it comes to defining the Security Council's powers

this context the doctrine of abuse of rights arising from failure by states to exercise their rights in good faith and with due regard to the consequences". See Vera Gowlland, "The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie Case*", *American Journal of International Law*, vol. 88, no. 4, 1994, pp. 643-677, p.663.

concerning global counter-terrorism action, and the limits imposed by the international law regime on State counter-terrorism.

II.I The general, permanent nature of the article 39 description.

In its post September 11 Resolutions, the Security Council describes the threat to international peace and security caused by acts of terrorism as being general and permanent. General, because it refers to any act of terrorism perpetrated by any individual or group anywhere. Permanent, because as it is a threat which can come from any type of terrorism it is to be expected that the description will remain in place for an unlimited time.

By configuring a type of generic threat to peace, the Security Council is not referring to some specific events but includes an enormous variety of actions in the article 39 description. This is undoubtedly a departure from previous practice where the existence of a threat to peace was determined by evaluating a specific situation. This change of approach will affect in particular the Security Council's capacity to act on the basis of Chapter VII of the Charter of the United Nations because this generic description gives it a broad authorisation to adopt coercive measures. Thus a sort of two-fold classification of events is established, firstly, a generic description of the threat to international peace and security and secondly an evaluation whereby, in the framework of this broad authorisation, the Security Council decides what action to take in terms of specific counter-terrorism measures.

The permanent nature of the configuration of the threat to peace caused by acts of terrorism is also new in Security Council practice. The Security Council normally used the threat to peace description with reference to a specific situation and real events¹⁴ By considering terrorism itself as a threat to peace, however, it must be understood that the Security Council not only refers to situations which are current when it issues specific Resolutions, but to any future moment when similar events occur. In other words, use of Chapter VII is being authorised for future circumstances which are not those which the Security Council is considering at the moment of describing the threat to peace.

¹⁴ Before 11 September 2001, doubts were raised as to the legality of Security Council actions in reference to a potential threat. This occurred for example in the Lockerbie case with regard to the action taken against Libya. See on this point Jean Allain, *op. cit.*, p. 81 et seq.

As Valeria Santori has highlighted “it appears that with Resolution 1373 and following, the Council engaged its future action by asserting, in a given moment in time, that any hypothetical future act of terrorism is a threat to the peace”¹⁵

Given this new practice, the key question is if the Security Council has article 39 authorisation to designate a general permanent phenomenon as a threat to peace. As Christian Tomuschat already highlighted in his course at The Hague Academy of International Law in 1993, article 39 should not be constructed as preventing the Security Council from deciding actions in general terms if the phenomenon to which it refers are incompatible with the International Community’s general interest. This author developed a joint construction of Charter Articles 39 and 24 to show that the very concept of threat to peace involves the idea of prevention, so that nothing prevents the Security Council from referring to general aspects of the threat and acting in consequence¹⁶.

Of course there is no doubt that the threat to peace concept is evolutionary and political in nature and that since the 1990s it has shown that it is quite capable of expanding its operational capacity. For that reason no-one should be too surprised if it departs from more traditional concepts to include others which currently require global action. This might be the case of terrorism and even other phenomena such as organised crime which could be given similar treatment. If we accept this, however, there is then an additional problem which will be dealt with in the following section but can be mentioned here, namely that this general description is accompanied by the absence of a definition of terrorism. This creates a situation which puts specification of when certain acts are to be considered a threat to international peace and security into the hands of national legal systems. As Ben Saul has highlighted, “it is one thing for the Council to identify particular incidents as terrorist -as with aggression- but quite another matter for it to allow States to arbitrarily do so, in the absence of any “criteria of reference””¹⁷

¹⁵ See Valeria Santori, *op. cit.*, p. 105.

¹⁶ See Christian Tomuschat, “Obligations Arising for States Without or Against Their Will”, *Recueil des Cours de l’Académie de Droit International de la Haye*, vol. 241-IV, 1993, pp. 199-374, p. 344 and 345.

¹⁷ See, *op. cit.*, p. 159.

The issue of the general, permanent nature of the description of the threat to international peace and security caused by acts of terrorism directly influences the type of action which can be decided as a result. Chapter VII characterisation of terrorism in general as a threat to peace rather than just specific acts makes it possible to adopt counter-terrorism measures with a general permanent nature rather than only in relation to certain situations or groups.

This is the case of the systems based on Resolution 1373 (2001) of 28 September 2001 and Resolution 1540 (2004) of 28 April 2004. The first of these resolutions requires member States to adopt national counter-terrorism measures, which include controlling funds and increased international cooperation on prevention matters. It is also mandatory to permit the Counter-Terrorism Committee to monitor implementation.

Further measures are contemplated by Resolution 1540 (2004) concerning weapons of mass destruction. This text is the result of concern that non-state actors “may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery” and consequently it requires States to adopt measures to prevent the acquisition or use of weapons of mass destruction by non-state actors and their proliferation. It also envisages the establishment of a Committee of the Security Council which States must report to every six months with information on the measures adopted.

It is clear that by establishing these systems the Security Council is considerably extending its powers for global counter-terrorism. The Council has established Chapter VII counter-terrorism cooperation systems which are mandatory for all States in the International Community. While most of the provisions in under both resolutions have arisen from earlier treaty development as part of the international fight against terrorism, Security Council decisions are using Chapter VII to extend some treaty obligations to subjects who have not consented them.

This again raises doubts about the legal limits to Security Council powers. The general permanent description of terrorism as a threat to peace has permitted general schemes to be put in place to increase the level of counter-terrorism action in each State. It thus replaces State capacity to develop counter-terrorism conventions because Resolution 1373 (2001) and

1540 (2004) obligations are coercive and therefore pre-eminent over any other legal obligation deriving from negotiation or consensus.

Decisions of this type can be seen as forming part of the way the Security Council has broadened the scope of its competencies over recent decades as clearly exemplified by the creation of the Ad Hoc International Criminal Tribunals for the former Yugoslavia and Rwanda. However, I agree on this point with Alexander Marschik who points out that the above measures were still based “on the existence of a specific situation, restricted in area and time, that the Council considered a threat to the peace” while Resolution 1373 (2001) “was the defining step towards abstract law-making, when it deemed abstract terrorism a threat against peace and security and imposed legal obligations on states to adopt specific measures, normally prescribed by international treaties”.

On the issue of terrorism, the Security Council has assumed a general regulatory capacity over and above its usual practice based on evaluating specific situations and case by case decision-making¹⁹. The Security Council is assuming a de facto quasi-legislative competence which replaces States’ negotiating power. Clearly, these powers were not envisaged in the Charter of the United Nations, although two arguments are commonly used to argue that they do in fact conform to the Charter and Public International Law: the need for efficient global counter-terrorism measures, and *opinio iuris* favourable to the assumption of new competencies.

John Harrington et al. are clear exponents of the first line of argument. These authors defend the idea that the Security Council can replace the negotiation process on treaty obligations precisely because it “is better able to shear way extraneous considerations from the treaty negotiation process and

¹⁸ See Alexander Marschik, “The Security Council’s Role: Problems and Prospects in the Fight Against Terrorism”, in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism. The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, England-USA, 2006, pp. 69-80, p. 77.

¹⁹ In this regard, Paul Szasz considers Resolution 1373 (2001) to be a new tool for the Security Council to develop its capacity to create international legal norms, see “The Security Council Starts Legislating”, *American Journal of International Law*, vol. 96, no. 4, 2002, pp. 901-905, p. 902. Ilias Bantekas has pointed out that the obligations established by Resolution 1373 (2001) create a system comparable to that which could have been developed through treaty negotiations, see “The International Law of Terrorist Financing”, *American Journal of International Law*, vol. 97, no. 2, 2003, pp. 315-333, p. 326. John Harrington et al. express similar opinions on Resolution 1540 (2004), see “International Legal Development in Review: 2005. Public International Law”, *International Lawyer*, no. 40, 2006, pp. 487-503, p. 491.

make decisions more quickly that have more direct and exclusive bearing on resolving the security threat". They also add that "When the Security Council, acting pursuant to Chapter VII, signifies that the threat is a matter of international peace and security, the process is not meant to epitomize participatory democracy of sovereign states, it is meant to get the job done"²⁰.

The argument commonly used to support the existence of a favourable general consensus on this new development of Security Council competencies, is that it is evidenced by the close collaboration of States with the system introduced by Resolution 1373 (2001). In fact this system has become the most successful in terms of the number of national reports presented²¹. It would appear therefore that State practice shows generalised support for the measures adopted in Resolution 1373 (2001).

Some considerations can be made with regard to both of the above arguments. Defending the lawfulness of Security Council actions on the basis of efficiency is open to debate. Firstly, it is debatable whether it is possible to evaluate the efficiency of systems which have been operating for such a short time. Secondly, and more importantly from the legal point of view, it is difficult to defend the lawfulness of certain decisions on the basis of their efficiency when they may be endangering some of the purposes and principles in the Charter of the United Nations. The consequences deriving from the newly assumed competencies may prove highly controversial from the legal point of view, since as Alexander Marschik has highlighted "a Security Council that acts as world legislator would affect not only how free States are in accepting binding norms but also -in view of the veto of the P5- whether all States are still equal in norm creation and in suffering the consequences of norm violation"²².

There are also doubts over the existence of *opinio iuris* favourable to this new area of Security Council competence. It is true that States have welcomed the system based on Resolution 1373 (2001), but it remains to be seen whether this support continues when the main action of the Counter-Terrorism Committee changes from monitoring to other more compulsory measures. In

²⁰ See John Harrington and others, *op. cit.*, p. 492 and 493.

²¹ For analysis of the success of the system under Resolution 1373 (2001) see Curtis A. Ward, "Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council", *Journal of Conflict & Security Law*, no. 8, 2003, pp. 289-305, p. 299 et seq.

²² See Alexander Marschik, *op. cit.*, at p. 79.

fact, some States have already shown their reticence over the obligatory nature of the good practice guides produced by the Security Council²³

In addition to this, the consensus around Resolution 1373 (2001) is not the same as that for the system established by Resolution 1540 (2004) despite the fact that this second text is also based on the classification of terrorism as a threat to international peace and security. Several States have expressed doubts as to the legality and legitimacy of the decision to establish the system. India in particular has shown concern at the Security Council's tendency in recent years to assume legislative power.

In view of the above then, it appears there are continuing doubts as to the legality of a general, permanent classification of terrorism as a threat to peace and its possible consequences. As already mentioned, these doubts are growing due to the absence of a definition of terrorism in Security Council Resolutions.

II.I The absence of a definition of terrorism.

Writers on international law have highlighted at great length the problems caused by the absence of a definition of terrorism when classifying it as a threat to international peace and security. The Security Council has obviously preferred not to include defining notes on what constitutes an act of terrorism in its Resolutions, and so the only way of deducing some of the elements involved is by observing the attacks which the Council expressly condemns. This observation reveals that the Security Council includes the acts of individuals and private entities for which it may or may not be possible to establish a link with a specific State. Beyond this general appreciation, however, little can be

²³ When the Counter-Terrorism Committee started to use guidelines from other specialised bodies in this field, it started to receive complaints from countries such as China who objected to being subject to rules developed in organisations which it is not party to. On the criticisms and objections which the system under Resolution 1373 (2001) may face in the future see Eric Rosand "Resolution 1373 and the CTC: The Security Council's Capacity-building", in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism. The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, England-USA, 2006, pp. 81-88, p. 86 et seq.

²⁴ See the statements by Indonesia, Nepal, India and Pakistan at the 4950th meeting of the Security Council on 22 April 2004 (UN-Doc. S/PV.4950).

derived from its reiterative pronouncements on the general global threat to peace caused by terrorism²⁵.

The main consequence of the absence of a Security Council definition of terrorist acts is that it is left to States to assess which events will be classified as such. Thus, national legal systems are expressly allowed to make their own definitions of terrorism which may be divergent and contradictory. This also clearly provides States with an opportunity to abuse the definition of terrorism in order to persecute dissidents and violate basic human rights under the umbrella of Security Council actions to counter-terrorism²⁶.

The Security Council itself has tried to alleviate this situation with a non-binding definition in Resolution 1566 (2004) of 8 October 2004. This definition refers to terrorism as “criminal 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, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism”²⁷.

This definition poses serious problems which prevent it from solving the difficulties caused by the lack of a definition of what constitutes a terrorist act. Firstly, the pronouncement arrives three years after the first Resolutions which - declared that terrorism is a threat to international peace and security and therefore arrives too late -- to be fully operational. Secondly, and even more significantly, it should be remembered that the definition is non-binding so the conclusion must be that States retain their capacity to make a unilateral definition. Thirdly, despite being inspired by prior treaty developments on counter-terrorism and General Assembly debates, the definition does not include any of the definitions contained in the treaties and therefore may contradict them.

²⁵ The Security Council commonly refers to certain terrorist attacks and sometimes even alludes to the perpetrators. After that, however, it can only determine that they form part of a global threat which is terrorism and therefore this channel of analysis is quite limited in terms of the search for a general definition of terrorism.

²⁶ On the problems raised by Security Council action in relation to human rights see in particular, Mark D. Kielsgard, “A Human Rights Approach to Counter-Terrorism”, *California Western International Law Journal*, no. 36, 2006, pp. 249-302.

²⁷ See Resolution 1566 (2004), par. 3.

This would suggest that the definition of terrorism in Resolution 1566 (2004) can only serve as a non-binding guide for developing State counter-terrorism obligations and it is destined to become just another element in the international debate on the search for a generally accepted definition. The Security Council has preferred therefore to limit itself to expressing a guide definition rather than offering a definitive version of what must be defined as terrorism within its sphere of action.

In fact, the debate on the appropriateness of reaching a general definition on terrorism has been going on in the United Nations General Assembly for decades and a unanimously accepted solution is still a long way off. More than a few voices are calling for the struggle to be abandoned in favour of a more pragmatic approach which avoids general notions and focuses on negotiation in specific events. Practice suggests that this is in fact the position of the Security Council as its entire counter-terrorism action has been developed without including any definition of terrorism²⁸ Despite this pragmatic view, however, it must not be forgotten that the absence of a definition poses some additional legal problems when terrorism is described as a threat to peace and security.

Firstly, the lack of a definition makes the threat to peace concept itself more ambiguous, reinforcing the Security Council's discretionary powers to adopt specific counter-terrorism measures. The difficulty in pointing out the limits to this discretion which allow global counter-terrorism measures is to assure the respect for Charter purposes and principles. Here, I would like to return to another already-mentioned aspect which is that the lack of a definition of terrorism authorises national systems to make the final decision on a situation that -- is an article 39 threat to international peace and security.

The authorization to States to define terrorism creates legal uncertainty because different, divergent or contradictory definitions may appear. In fact, the different interpretations on the limits and nature of the acts that can be classified as terrorist acts have already caused discrepancies in national legislation and regional treaties on the subject. Furthermore, the situation is negative for the

²⁸ The Counter-Terrorism Committee's position is entirely consistent with a pragmatic approach which attempts to evaluate each specific situation in its decision-making, avoiding any type of general definition. On this point Ben Saul has noted that "the CTC proposed an ad hoc approach, deciding whether an act is terrorism "where necessary" and referring political controversies to the Council or other bodies. Its mandate is based on a pragmatic view that terrorism can be combated even without agreement on its criminal wrongfulness in all situations", *op. cit.*, p. 157.

coherent development of the counter-terrorism systems established by the Security Council.

In particular, and in regard to the system established by Resolution 1373, the Counter-Terrorism Committee has already indicated that one of the problems hampering its full operational capacity is precisely the lack of a definition of terrorism²⁹. From the moment it is left to States to define terrorism, the Counter-Terrorism Committee will find it difficult to take action on groups which are not considered terrorists under national legislation. Problems such as this are unresolved and solutions will have to come from the practice on a case by case basis. The solution should be based on the search for consensus among the national systems involved.

These operational problems are joined by the fact that States, in relation to their own interests, may be inclined to develop definitions of terrorism to permit counter-terrorism operations which infringe basic human rights. As there is no general definition, there is the risk that States might develop selective definitions according to their interests in persecuting or suppressing different groups. This has already been publicly criticised by international agencies and non governmental organisations which have highlighted the use of counter-terrorism as an excuse for systematic human rights violations with certain individuals and groups³⁰.

Different measures have been adopted to -- alleviate the situation. Firstly, a dialogue has been established between the Counter-Terrorism Committee and the Human Rights Committee to try to prevent that Resolution 1373 can be used as the framework for systematic human rights violations³¹. Furthermore, the Counter-Terrorism Committee is currently asking for national reports to include data on human rights compliance in order to develop greater international control in this area.

Practice will show if the measures adopted are able to mitigate the lacunae resulting from the lack of a single definition of terrorism in the – general, permanent definition of threat to international peace and security. Significant areas of uncertainty remain.

²⁹ See Alexander Marschik, *op. cit.*, p. 71.

³⁰ For more in-depth analysis see Ben Saul, *op. cit.*, p. 158 et seq.

³¹ See UN Doc. S/PV.4512, page 3, 4512th Meeting of the Security Council, 15 April 2002.

II.II. The irrelevance of the international character of terrorism.

The absence of a definition of terrorism in Security Council practice also raises the problem of specifying whether the classification as threat to international peace and security covers only international terrorism or also includes domestic terrorism. In this case the answer can be found by examining the many different specific Security Council actions, which also reveal how the Council's position has evolved.

The Security Council's declaration in Resolution 1368 (2001) that any act of terrorism is a threat to international peace and security, included the adjective international. This pronouncement appears to reveal the Council's initial position, and in subsequent decisions it referred to acts of international terrorism. This first approach, however, was later modified as the Security Council has also referred to acts of terrorism of a merely internal nature on several occasions.

Thus for example, Resolution 1465 (2003) of 13 February 2003, concerning the attack on Club Nugal in Bogotá on 7 February 2003 which was attributed to FARC (Fuerzas Armadas Revolucionarias de Colombia), regarded this act of terrorism which was not classified as international, as being a threat to international peace and security. Resolution 1530 (2004) of 11 March 2004 concerning the attacks perpetrated in Madrid used similar terms and indicated that the perpetrators were the armed group ETA. Subsequent police investigations showed that the perpetrators belonged to a type of terrorism which could be classified as international, however, this information cannot affect a classification of threat to peace where the focus is on terrorism itself.

It should therefore be considered that terrorism of an internal nature is also classified as a threat to international peace and security. In this sense, as Valeria Santori has pointed out "acts of terrorism of a "domestic" nature acquire an international relevance consisting precisely in the fact that according to the Council they involve a threat to international peace and security"³². It is terrorism that is being classified as a general and permanent threat to peace and under this classification it is possible to state that any act of terrorism by

³² See Valeria Santori, *op. cit.*, p. 98.

whomsoever and wherever perpetrated comes within the sphere of global counter-terrorism measures.

This position corresponds to the trend in international cooperation in this area and recent Security Council practice in dealing with certain situations of a domestic nature. There is no doubt that in recent years the international fight against terrorism has been concerned not only with clearly international terrorism but also with that of a domestic nature whose prevention or punishment may involve international subjects other than the affected State³³. This cooperation has been especially fluid in the regional sphere where international negotiation on counter-terrorism issues is facilitated by converging interests.

Furthermore, describing acts of domestic terrorism as a threat to peace is not unconnected with a tendency in Security Council practice after the end of the cold war to include different internal situations within the scope of this notion. Analysis of Council practice shows that some of these situations have no international character but refer to clearly domestic situations and private entities.

Antecedents to this classification are apparent in Resolution 217 (1965) of 20 November 1965 which described the situation of racial discrimination in Rhodesia as a threat to peace and security, or in Resolution 418 (1977) of 4 November 1977 on South Africa. The main examples, however, appear in relation to the humanitarian interference concept which the Security Council developed during the 1990s leading to different humanitarian emergency situations which were declared threats to international peace and security³⁴.

The above would suggest that the description of threat to international peace and security applies to both internal and international acts of terrorism, wherever and by whomsoever they are committed, and whether linked to a particular State or not. This again brings us back to the significance of the leading role played by States in defining what is meant by terrorism and the

³³ On the basis of this situation, as early as 1992 Pablo Antonio Fernández Sánchez pointed out that there had been an internationalisation of terrorist acts, in so far as they affect human beings. For a more in-depth study in this area see the above author's work *La obligación internacional de cooperar en la lucha contra el terrorismo*, Ministerio de Justicia, Madrid, 1992, p. 22 and 23 et seq.

³⁴ There is a presentation on Security Council practice for humanitarian purposes in internal situations in Rosa Giles Carnero, *De la asistencia a la injerencia humanitaria: la práctica reciente del Consejo de Seguridad*, Universidad de Huelva-Cruz Roja Española, Huelva, 1997, pp. 43 et seq.

risks this entails. In the case of internal terrorism, state interests in counter-terrorism are heightened and certain abuses may occur which can be protected by Security Council -- counter-terrorism obligations.

Conclusions.

It is clear that in recent years the Security Council has decided to intervene on the basis of Chapter VII of the Charter of the United Nations in a sphere like counter-terrorism which is of exceeding concern to its permanent members --. The reiteration of the seriousness of this threat to peace represents a prior choice of what this organ considers to be its primary sphere of action in maintaining international peace and security. However, after evaluating this global problem as being more serious than others, a general permanent description has been chosen which generates several legal and operational risks.

This classification, which includes no specific definition of terrorism, means that a notion such as terrorism whose definition has proved elusive after decades of international negotiations, becomes the basis to activate Chapter VII measures. The argument to support this strategy is mainly based on reasons of effectiveness, but the point remains as to whether it is being used to violate the limits on Security Council action imposed by the purposes and principles of the United Nations Charter.

The Security Council has acquired a significant leading role in counter-terrorism and appears to have obtained the majority support of States in the International Community for its decisions. However, the doubts as to the legality of its actions may seriously impair the operational capacity of coercively established counter-terrorism systems. The Security Council has replaced the capacity of States to develop an effective treaty-based system of counter-terrorism. –

Practice has clearly demonstrated the problems surrounding a general consensus on international counter-terrorism action, but whether the solution lies in Chapter VII imposition of cooperation systems remains to be seen. There is a continuing need for consensus in this area which would not appear to be helped by the fact that some States are able to obtain coercive Security Council action. Practice in the years to come will have to resolve the uncertainties

raised and demonstrate whether the commitment to effectiveness has in fact been successful.