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Terrorism as a Threat to Peace

Terrorism is a phenomenon that has been known to mankind for more than two millennia, but over this long period of time, no-one has succeeded in defining terrorism in a manner that is universally acceptable and encompasses all essential elements.^{*1} Therefore, the frequently utilised word ‘terrorism’ does not refer to a well-defined and clearly identified set of factual events or to a widely accepted legal doctrine.

The lack of a generic definition cannot invalidate the fact that for several decades, terrorism has been a serious security problem demanding both domestic and international countermeasures. The latter are especially important, as the leading terrorist factions operate internationally in order to gain wider exposure and, as a result, more success, but also to find supporters — namely, states that sympathise with their political objectives. The relevant international countermeasures are naturally associated with the Security Council, to whom the states have conferred primary responsibility for the maintenance of international peace and security.^{*2} The Security Council, a constantly attentive executive organ, has considerable means, of a broad range, at its disposal for that purpose, starting with diplomatic or economic sanctions and ending with military measures.^{*3} But before the Security Council can utilise these means, it must first determine whether terrorism falls within its competence. For example, does terrorism constitute a threat to peace that justifies its response?

The present article examines this matter from three perspectives. Firstly, why is the determination of the existence and nature of this situation important? Secondly, what is the nature of a threat to peace in general? Thirdly, can terrorism, generally or specifically, constitute a threat to peace? These questions are discussed in the light of the collective security system envisaged in the United Nations Charter and administered by the Security Council.

1. Determination of the situation

The Security Council is a guardian of international peace and security. Although it is composed of only 15 member states^{*4}, the Security Council acts on behalf of all UN member states when carrying out its duties in connection with maintenance of international peace and security.^{*5} Despite being a political organ whose decisions are, and also have every right to be, linked to political motivations not necessarily congruent with

¹ The search for a legal definition of terrorism resembles the quest for the Holy Grail as periodically eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed. G. Levitt. Is ‘Terrorism’ Worth Defining? – Ohio Northern University Law Review 1986 (13), p. 97.

² United Nations Charter, Article 24 (1).

³ *Ibid.*, Articles 41–42.

⁴ Altogether there are 192 member states in the United Nations.

⁵ United Nations Charter, Article 24 (1).

legal considerations, the Security Council's activity has legal consequences. It is the one organ of the United Nations that can impose legally binding obligations and non-military or military sanctions on the member states.⁶ Such means are called (collective) enforcement measures if adopted under the charter's Chapter VII in order to maintain or restore international peace and security.

1.1. The importance of determination

The Security Council cannot avail itself of enforcement measures at any given moment; it is supposed to follow certain procedure to establish that the conditions for the use of such measures are satisfied. The primary condition is the existence of a threat to peace, a breach of the peace, or an act of aggression.⁷ Through the construction of the sentence in Chapter VII⁸, the determination that a relevant situation has arisen is clearly singled out as a condition for the exercise of powers described in said chapter.⁹ So, once a positive determination is made, the door is automatically opened to enforcement measures of a non-military or military nature.¹⁰ Nevertheless, this is a procedural rather than substantive limitation, basically demanding that the Security Council as a collective organ reach consensus before imposing enforcement measures. Yet such a limitation may equally help to ensure consistency in the Security Council's practice if the determination is not made on the basis of political expediency but after a genuine assessment of the situation and comparison of the latter with other, similar situations.

The practice demonstrates that the Security Council has not always determined that a threat to peace, a breach of the peace, or an act of aggression existed before it imposed sanctions. The situation in Kosovo had deteriorated to such a point by March 1998 that the Security Council decided to impose a mandatory arms embargo on the Federal Republic of Yugoslavia, including Kosovo, without first determining the situation.¹¹ For the first time, the Security Council dispensed with declaring that the application of its powers under Chapter VII was based on a determination that there was a threat to peace.¹² Later the United Kingdom insisted that such determination was implied¹³, but the Russian Federation declared, while voting in favour, that the situation under consideration did not constitute a threat to peace.¹⁴ If a majority had shared the latter position, the resolution in question would have been an *ultra vires* act.

Two more aspects should be taken into account. Firstly, there is no need to expressly refer to Article 39 when making the determination. Indeed, in a significant number of resolutions, the Security Council has established the threat to peace without a proper reference and therefore leaving the legal basis in doubt.¹⁵ Secondly, a determination is not necessary in cases of resolutions following on from previous resolutions that did contain a determination. The latter are cited in the preambles to the former; therefore, the necessary link and legal basis are established.¹⁶ In terms of time, the validity of a determination does not expire¹⁷; that is, it remains valid until the Security Council decides otherwise, even if there is a change in the facts on the ground. While the keeping in place of enforcement measures inevitably implies that the threat continues to exist¹⁸, one cannot generally infer from their suspension or termination that there has been a reduction in threat¹⁹, because such a

⁶ *Ibid.*, Article 25. The other organs may legally bind the member states only in certain administrative matters within the United Nations, for example, the General Assembly adopts the budget and determines the amount every member states has to contribute.

⁷ United Nations Charter, Article 39.

⁸ "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." (emphasis added)

⁹ J. Frowein, N. Krisch. Article 39. – B. Simma (ed.). *The Charter of the United Nations: A Commentary*. 2nd ed. Vol. I. Oxford University Press 2002, p. 726; T. D. Gill. *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter*. – *Netherlands Yearbook of International Law* 1995 (26), p. 39; but see also B. Conforti. *The Law and Practice of the United Nations*. 3rd ed. Leiden: Martinus Nijhoff Publishers 2005, p. 172.

¹⁰ I. Österdahl. *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter*. Uppsala: Iustus 1998, p. 28.

¹¹ SC Res. 1160, 31 March 1998.

¹² See also G. Nolte. *The Limits of the Security Council's and Its Functions in the International Legal System: Some Reflections*. – M. Byers (ed.). *The Role of International Law in International Politics*. Oxford University Press 2001, p. 316.

¹³ UN Doc. S/PV.3868, paragraph 12.

¹⁴ *Ibid.*, paragraph 10.

¹⁵ See, for example, SC Res. 713, 25 September 1991; SC Res. 733, 23 January 1992; SC Res. 748, 31 March 1992; SC Res. 757, 30 May 1992; SC Res. 788, 19 November 1992; SC Res. 807, 19 February 1993; SC Res. 827, 25 May 1993; SC Res. 841, 16 June 1993.

¹⁶ See, for example, SC Res. 687, 3 April 1991; SC Res. 724, 15 December 1991; SC Res. 771, 13 August 1992; SC Res. 819, 16 April 1993; SC Res. 833, 27 May 1993; SC Res. 844, 16 June 1993.

¹⁷ See K. Wellens. *The UN Security Council and New Threats to the Peace: Back to the Future*. – *Journal of Conflict and Security Law* 2003 (8), pp. 27–28.

¹⁸ SC Res. 1439, 18 October 2002.

¹⁹ SC Res. 1022, 22 November 1995.

step may well be influenced by considerations of a humanitarian nature or by the wish to further encourage a peace process.^{*20} In other cases, the removal of an item from the Security Council's agenda or the termination of enforcement measures as their objective has been achieved leaves no doubt that, at least temporarily, the threat to peace has ceased to exist.^{*21}

1.2. Security Council discretion

The discretionary power of the Security Council is very broad under Article 39, in terms of decision of both **when** to act and **how** to act. At the San Francisco Conference when the United Nations Charter was adopted, various proposals were made that the regulations should be more detailed with regard to the conditions for the applicability of Chapter VII, but, in the end, the present wording was preferred.^{*22} It was expressly stated that the lack of more specific criteria was necessary if the Security Council were to be allowed to decide how to act on a case by case basis.^{*23} Therefore, the International Criminal Tribunal for the Former Yugoslavia has aptly stated that "it is clear [...] that the Security Council plays a pivotal role and exercises a very wide discretion".^{*24} However, there are some who adhere to a view that discretion is not unlimited here.^{*25} The legal source of potential limitations remains unclear.

A determination is essentially a judgment based on factual findings and the weighing of political considerations that cannot be measured by legal criteria. The latter usually prevail. As a result, the decisions made in the interest of international peace and security are almost exclusively taken in accordance with (national-level) political considerations.^{*26} The political nature of Article 39 is further emphasised by the fact that the permanent members^{*27} of the Security Council have a power of veto. However, as a non-judicial organ, the Security Council is not required to give reasons for its decisions.^{*28} Nonetheless, once it has made a determination, this is conclusive and all member states must accept the Security Council's verdict, even if they do not share its opinion.^{*29}

The Security Council is not obliged to make a determination and subsequently take any enforcement measures.^{*30} Both the drafting history of the United Nations Charter and the practice of the Security Council indicate that the council does not have to respond to all situations that would seem to call for exercise of its competencies but, rather, operates selectively and with discretion.^{*31}

2. The nature of threat to peace

'Threat to peace' is the most flexible and dynamic of the three terms in Article 39, and it is here that the Security Council enjoys the widest discretion. It is equally true that within this discretion lies the possibility of subjective political judgment. Hans Kelsen has expressed concern that the "threat to peace [...] allow[s] a highly subjective interpretation"^{*32}, but at the same time claimed that "it is completely within the discretion of the Security Council as to what constitutes a threat to the peace".^{*33} Michael Akehurst worded this position perhaps even more bluntly by stating that "a threat to the peace is whatever the Security Council says is a threat to the peace".^{*34} This is the accepted reality nowadays. Obviously, here one should distinguish this

²⁰ SC Res. 1432, 15 August 2002.

²¹ SC Res. 919, 26 May 1994; SC Res. 1367, 10 September 2001.

²² G. Nolte (Note 12), p. 172.

²³ 12 UNCIO 505.

²⁴ ICTY, Judgment of the Appeals Chamber (Jurisdiction), 2 October 1995, *Prosecutor v. Duško Tadić*, Case No. IT-95-I-AR-72, paragraph 28.

²⁵ See E. de Wet. *The Chapter VII Powers of the United Nations Security Council*. Oxford: Hart Publishing 2004, pp. 134–144.

²⁶ See, for example, L. M. Goodrich, E. Hambro, A. P. Simons. *The Charter of the United Nations: Commentary and Documents*. 3rd ed. Columbia University Press 1969, p. 291; D. Bowett. *The Impact of Security Council Decisions on Dispute Settlement Procedures*. – *European Journal of International Law* 1994 (5), p. 94.

²⁷ France, People's Republic of China, Russia, United Kingdom and United States.

²⁸ J. E. S. Fawcett. *Security Council Resolutions on Rhodesia*. – *British Year Book of International Law* 1965–1966 (41), pp. 116–117.

²⁹ Y. Dinstein. *War, Aggression and Self-Defence*. 4th ed. Cambridge University Press 2005, p. 285.

³⁰ J. Frowein, N. Krisch (Note 9), p. 719; H. Kelsen. *Collective Security and Collective Self-Defense under the Charter of the United Nations*. – *American Journal of International Law* 1948 (42), pp. 733, 737.

³¹ See I. Österdahl (Note 10), pp. 103–105.

³² H. Kelsen (Note 30), p. 737.

³³ *Ibid.*, p. 727.

³⁴ M. Akehurst. *A Modern Introduction to International Law*. 6th ed. London: Allen & Unwin 1987, p. 219.

discretion from the necessity of sufficient explanation to the states of the characteristics of a specific threat to peace. While this may not be necessary in cases of more traditional threats (preparing an armed attack against a state), it may well be vital if the Security Council is referring to a continuous state of affairs (inability to demonstrate the denunciation of terrorism) or an abstract phenomenon (international terrorism).

The Security Council's determinations involve almost exclusively threats to peace, whereas the existence of breaches of peace and acts of aggression is usually not specifically declared, even if obvious.^{*35} In the most typical situations, a threat to peace precedes a breach of the peace or an act of aggression. However, the range of situations potentially giving rise to a threat to peace now reaches far beyond these confines. In the United Nations Charter, there are two somewhat similar terms — namely, “threat to peace” in Article 39 and “threat of force” in Article 2 (4). Although they may look alike, the former is broader than the latter, as a ‘threat to peace’ is not necessarily linked to a past, present, or future use or threat of armed force.^{*36} A threat to peace is not even linked to any breach of international law.^{*37} In the words of Yoram Dinstein, “a threat to the peace is not necessarily a state of facts: it can be merely a state of mind; and the mind that counts is that of the [Security] Council”.^{*38}

In order to understand the threat to peace, it is also important to reflect on the meaning of the word ‘peace’. The latter can be defined either negatively (narrowly) or positively (widely). In the negative sense, the word refers to the absence of organised use of armed force; therefore, in order to constitute a threat to peace, the situation in question must have the potential of provoking armed conflict between states in the short or medium term.^{*39} Still, an actual outbreak of armed conflict is not necessary. The term ‘threat to peace’ is sufficiently flexible and dynamic to include all major forms of serious international misconduct. However, in every case, a threat to peace is a situation that objectively can be characterised as destabilising and potentially explosive.

The positive concept of peace is wider and includes also friendly relations between states, as well as other political, economic, social, and environmental conditions that are needed for a conflict-free international community.^{*40} There is some textual support for the positive notion of peace in the United Nations Charter; for example, Article 1's sections 2 and 3 speak about the strengthening of universal peace through the development of friendly relations and co-operation among nations. In a statement of the president of the Security Council, it was equally stated that the “absence of war and military conflicts amongst States does not in itself ensure international peace and security” and that the “non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security”.^{*41}

The Security Council is a reaction-oriented organ and not authorised or equipped to prevent all possible long-term tensions; its functions are normally limited to military conflicts.^{*42} The long-term problems need the attention of and integrated measures by the General Assembly as well as the Economic and Social Council, with their sub-organs. Such an approach was also envisaged in the above-mentioned statement, which included comment that “the United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters”.

Nevertheless, when examining the Security Council's practice, one notices that very different situations may qualify as a threat to peace. Over the years, the following types of situations have been deemed a threat to international or regional peace: (1) non-international armed conflicts^{*43}; (2) serious violations of human rights^{*44}; (3) violations of democratic principles^{*45}; (4) violations of international humanitarian law^{*46}; and (5) proliferation of nuclear, chemical, and biological weapons, as well as their means of delivery.^{*47}

As the Security Council is not obliged to respond to all situations that are potentially a threat to peace, it has turned a blind eye even to some clear-cut threats to peace or, perhaps more correctly, to existing breaches of

³⁵ J. Frowein, N. Krisch (Note 9), p. 722.

³⁶ The word “force” in Article 2 (4) refers to “armed force”, not to political or economic coercion. See A. Randelzhofer. Article 2 (4). – B. Simma (Note 9), pp. 117–121.

³⁷ R. Kolb. *Ius contra bellum: le droit international relatif au maintien de la paix*. Bruxelles: Bruylant 2003, p. 68.

³⁸ Y. Dinstein (Note 29), p. 284.

³⁹ B. Martenczuk. *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?* – *European Journal of International Law* 1999 (10), pp. 543–544.

⁴⁰ E. de Wet (Note 25), pp. 138–139.

⁴¹ UN Doc S/23500 (1992).

⁴² J. Frowein, N. Krisch (Note 9), p. 720.

⁴³ See, for example, SC Res. 713, 25 September 1991 (Yugoslavia); SC Res. 733, 23 January 1992 (Somalia); SC Res. 788, 19 November 1992 (Liberia); SC Res. 864, 15 September 1993 (Angola).

⁴⁴ See, for example, SC Res. 217, 20 November 1965 (racist minority regime in Rhodesia); SC Res. 688, 5 April 1991 (Kurdish population in the Northern Iraq).

⁴⁵ See, for example, SC Res. 841, 16 June 1993 (Haiti); SC Res. 1132, 8 October 1997 (Sierra Leone).

⁴⁶ See, for example, SC Res. 808, 22 February 1993 (Former Yugoslavia).

⁴⁷ See, for example, SC Res. 1172, 6 June 1998 (India and Pakistan); SC Res. 1540, 28 April 2004.

peace. The response may also be delayed. In June 1948, the Security Council determined that the situation in Palestine constituted a threat to peace two months after the war had started.^{*48}

In terms of enforcement measures, it is worth mentioning that the Security Council may initiate an anticipatory war against a future breach of the peace or act of aggression, regardless of whether it is imminent or, by contrast, remote and uncertain in time. This is a privilege withheld by the United Nations Charter from states acting individually or collectively.^{*49}

3. Relationship with terrorism

The Security Council was slow in joining the fight against terrorism.^{*50} The first resolution to use the term ‘terrorism’ was adopted only in December 1985.^{*51} However, since the end of the Cold War, the body has gradually become more active in this respect and finally assumed a central role after the events of 11 September 2001. By now, the Security Council has on several occasions designated terrorism as a threat to peace.

3.1. Reaction to different situations

In a number of cases, insufficient action of states against terrorism has been deemed a threat to peace. One such situation was related to Libya’s involvement in the Pan Am Flight 103 bombing over Lockerbie in December 1988.^{*52} The investigation found that the bomb was planted by two Libyans. The United Kingdom and the United States, and later also France in connection with another bombing, demanded their extradition, but Libya refused. Finally, in January 1992, the Security Council intervened by condemning the destruction of a civilian aircraft and denouncing the failure of Libya to co-operate.^{*53} The resolution urged Libya to contribute to the “elimination of international terrorism” and demanded the surrender of the two nationals for trial. Libya ignored the demand, and, in its following resolution^{*54}, the Security Council determined that “the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to [extradite the designated persons] constitute a threat to international peace and security”. So, under specific circumstances, failure to renounce terrorism and to extradite people may result in a threat to peace. A refusal to extradite particular persons could pose a threat to peace in the sense that it may provoke a unilateral military action (in this case, against Libya by the states mentioned above), but also because these persons might commit another terrorist act. Indeed, the United States had previously bombed Libya for its suspected terrorist activities.^{*55} One must keep in mind that the Pan Am Flight 103 bombing was a case of state terrorism^{*56} and potentially a violation of the prohibition to use armed force in international relations.^{*57}

A similar approach was taken when Sudan refused to extradite three persons suspected in connection with an attempt to assassinate the president of Egypt in Addis Ababa, Ethiopia, in June 1995.^{*58} Sudan was enjoined to generally “desist from engaging in activities of assisting, supporting and facilitating terrorist activities and from giving shelter and sanctuaries to terrorist elements” and more specifically to “undertake immediate action to extradite to Ethiopia for prosecution the three suspects sheltering in the Sudan”. Again, the refusal of co-operation was followed by a new resolution, in this case determining that the “non-compliance by the Government of Sudan with the requests [to desist from engaging in terrorism and to extradite the designated persons] constitutes a threat to international peace and security”.^{*59} Unlike in the case of Libya, this situation did not involve state terrorism, as the suspected persons were not agents of Sudan. However, the reasons whereby

⁴⁸ SC Res. 54, 15 July 1948.

⁴⁹ Y. Dinstein (Note 29), pp. 182–187.

⁵⁰ For a long time, the question of terrorism was largely consigned to the General Assembly. See, for example, N. Rostow. Before and After: The Changed UN Response to Terrorism since September 11th. – *Cornell International Law Journal* 2002 (35), pp. 479–481.

⁵¹ SC Res. 579, 18 December 1985.

⁵² H. W. Kushner. *Encyclopedia of Terrorism*. London: Sage Publications 2003, pp. 285–286.

⁵³ SC Res. 731, 21 January 1992.

⁵⁴ SC Res. 748, 31 March 1992.

⁵⁵ See G. F. Intocchia. *American Bombing of Libya: An International Legal Analysis*. – *Case Western Reserve Journal of International Law* 1987 (19), pp. 177–213.

⁵⁶ The first hint that states can commit terrorist acts is found in the resolution ending the First Gulf War and demanding that Iraq “will not commit [...] any act of international terrorism”. SC Res. 687, 3 April 1991.

⁵⁷ United Nations Charter, Article 2 (4). See R. Värk. *The Use of Force in the Modern World: Recent Developments and Legal Regulation of the Use of Force*. – *Baltic Defence Review* 2003 (10) 2, pp. 27–44.

⁵⁸ SC Res. 1044, 31 January 1996.

⁵⁹ SC Res. 1054, 26 April 1996.

the non-compliance constituted a threat to peace were similar. The United States attacked a pharmaceutical factory in Khartoum⁶⁰ and, as a result, itself endangered international peace and security.

The Security Council had been attentive to the situation in Afghanistan for some time already, but the first associated resolution concerning terrorism and a threat to the peace was adopted after the simultaneous attacks on the embassies of the United States in Nairobi, Kenya, and Dar es Salaam, Tanzania, in August 1998.⁶¹ The Taliban regime was required to stop providing sanctuary and training for international terrorists and their organisations as well as to co-operate with efforts to bring indicted terrorists to justice.⁶² Afghanistan was given almost a year before the Security Council determined that the Taliban's failure to meet these demands constituted a threat to international peace and security.⁶³ The case of Afghanistan is different from that of Libya (in which terrorists were agents of the state) and Sudan (where terrorists were not agents of state) in that the relationship between the state and the terrorists was not clear. It is not implausible that the members of Al Qaeda were *de facto* agents of Afghanistan according to the law of state responsibility.⁶⁴ If this was the case, then the situation in Afghanistan was also one of state terrorism and therefore similar to that of Libya. Once again, the engagement in terrorism and non-compliance with the demands of the Security Council led to use of armed force, with the United States and its allies attacking Afghanistan on 7 October 2001.

The events of 11 September 2001 brought about a new approach. The Security Council condemned unequivocally in the strongest terms these horrifying terrorist attacks and regarded "such acts, like **any** act of international terrorism, as a threat to international peace and security".⁶⁵ This determination goes further than previous determinations did, as it was not confined to merely the terrorist attacks in question but extended to all present and future terrorist acts. Moreover, this was not an isolated incident immediately after these unprecedented attacks invoking global solidarity but the beginning for a series of similar resolutions.⁶⁶ Resolution 1373 was the first one enacted specifically under Chapter VII to reconfirm this position.⁶⁷ A little while later, the Security Council declared that "acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century".⁶⁸ Resolutions 1368 and 1373 recognised in their preamble the right to self-defence, hinting that a terrorist attack can be considered an 'armed attack', which is a precondition to exercise of self-defence under Article 51.

3.2. Evaluation of the Security Council's approach

The Security Council's decision to condemn terrorist acts so strongly and decisively was certainly welcomed, but the approach that was adopted brought with it certain problems also. To borrow the words of Judge Kooijmans, the novelty of these resolutions lies in classifying "acts of international terrorism, without any further qualification, a threat to international peace and security [...] without ascribing these acts of terrorism to a particular State".⁶⁹

The first problem is that terrorism was not defined in the resolutions adopted after 11 September 2001.⁷⁰ The lack of definition was deliberate because then there was no consensus on the definition and states did not want to jeopardise the adoption of the resolutions, including the measures therein.⁷¹ To some extent, the Security Council has adopted an approach of 'we know it when we see it'.⁷² The inability to adopt a binding definition of terrorism is certainly contributing to instability and unpredictability in the context of terrorism as well as

⁶⁰ R. Wedgwood. Responding to Terrorism: The Strikes against Bin Laden. – Yale Journal of International Law 1999 (24), pp. 559–576.

⁶¹ H. W. Kushner (Note 52), pp. 113–116. The terrorist bomb attacks were also condemned. SC Res. 1189, 13 August 1998.

⁶² SC Res. 1214, 8 December 1998.

⁶³ SC Res. 1267, 15 October 1999; reaffirmed in SC Res. 1333, 19 December 2000.

⁶⁴ See Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), Article 8; see also R. Värk. State Responsibility for Private Armed Groups in the Context of Terrorism. – *Juridica International* 2006 (11), pp. 188–190.

⁶⁵ SC Res. 1368, 12 September 2001 (emphasis added).

⁶⁶ See, for example, SC Res. 1438, 14 October 2002 (Bali); SC Res. 1440, 24 October 2002 (Moscow); SC Res. 1450, 13 December 2002 (Kikambala); SC Res. 1465, 13 February 2003 (Bogotá); SC Res. 1516, 20 November 2003 (Istanbul); SC Res. 1530, 11 March 2004 (Madrid); SC Res. 1611, 7 July 2005 (London); SC Res. 1618, 4 August 2005 (Iraq).

⁶⁷ SC Res. 1373, 28 September 2001.

⁶⁸ SC Res. 1377, 12 November 2001.

⁶⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports (2004) 136, Separate Opinion of Judge Kooijmans, paragraph 35.

⁷⁰ See, for example, E. Rosand. Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism. – *American Journal of International Law* 2003 (97), pp. 339–340.

⁷¹ L. Bondi. Legitimacy and Legality: Key Issues in the Fight against Terrorism. – *Fund for Peace Report* 2002, p. 25.

⁷² Paraphrasing Judge Potter Stewart who once used the words "I know it when I see it" to define pornography. United States Supreme Court, Judgment, 22 June 1964, *Jacobellis v. Ohio*. – 378 US 184 (1964), p. 197.

undermining the legal validity of the action against terrorism.^{*73} Indeed, how can one determine the existence of a threat to peace when using undefined terms? This ambiguity and the Security Council's demands to take effective measures against terrorism have presented several states with a welcome opportunity to enact broad-reaching anti-terrorism laws directed against the political opposition or other inconvenient persons instead. The Human Rights Committee has criticised numerous states for defining the crime of terrorism and especially the association with terrorism too vaguely^{*74} or for imposing the death penalty for such crimes.^{*75} One should not refrain from trying to define terrorism merely because this definition seems to be an unrealistic task or because someone might find a way around the definition and claim that the conduct in question is therefore legal. Respect for the principle of legality should override the practical conveniences or fears of potential but fixable loopholes.

The second problem concerns the scope of the Security Council's authority to designate a generalised indeterminate phenomenon, not a specific incident, as a threat to peace.^{*76} Moreover, there are neither temporal nor geographic limits here. Even though a determination regarding a specific incident (such as violation of international humanitarian law in the former Yugoslavia) is formally binding for all member states, it is not, however, likely to affect many of them in connection with the matter, on account of, for example, geographic distance. By contrast, in the case of an indeterminate phenomenon having no temporal or geographical limits, all member states are affected and potentially subject to different sanctions. Once again such a situation is open to abuses by individual states both domestically and internationally. The Security Council's determination may serve as a blanket excuse for illegitimate and forceful settlement of other disputes. One should keep in mind that the Security Council is a reaction-oriented organ, not equipped to prevent all possible long-term tensions. Therefore, it is somewhat irresponsible to provide blanket excuses and impose unspecific duties that may, if implemented overzealously, endanger international peace and security. As the threat to peace continues until the Security Council decides otherwise, the latter has placed itself in a very tricky position — a declaration that there is no longer a threat to peace would indicate that the problem of terrorism has been eliminated.

That the Security Council recognised the right to self-defence in the case of the events of 11 September 2001 cannot certainly be taken as general permission to employ armed force in the fight against terrorism. The exercise of self-defence still requires an 'armed attack' against a state^{*77}, and the self-defence must be immediate, proportional, and necessary.^{*78} The importance of the relevant resolution lies elsewhere. The Security Council believed that (1) a 'terrorist attack' may be an 'armed attack' for the purpose of Article 51 and (2) the attacks of 11 September 2001 constituted an 'armed attack' in that sense.^{*79} However, if another terrorist attack is sufficient in gravity and the involvement of a state is sufficient in degree, then the target state may use armed force in the exercise of self-defence.

Although misgivings have been expressed, the new approach is supported by several arguments. Firstly, alongside the traditional threats, terrorism is constantly becoming more topical and is an ever more serious international security threat.^{*80} Terrorist acts can certainly threaten international peace and security, but not every terrorist act does so. Overly broad coverage may lead to abuses wherein the states use their obligations to fight terrorism to repress their political opponents or to enact regulations restricting human rights. Secondly, threat to peace is a dynamic, constantly evolving political concept that has been expanding since the establishment of the United Nations.^{*81} Despite the broad and abstract nature of the determination in the new resolutions, it remains within the realm of negative definition of peace. This follows from the explicit reference to the international dimension of such attacks, combined with the fact that the use of armed force against a state would be inherent to terrorist attacks of any kind. Whilst there are novelties in these resolutions, these novelties do not relate to a de-linking of a threat to peace from the potential outbreak of international armed conflict.^{*82} Thirdly, because the Security Council is entrusted with primary responsibility for the maintenance

⁷³ A non-binding working definition recalls that terrorism in the form of "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, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature". SC Res. 1566, 8 October 2004.

⁷⁴ Concluding observations of the Human Rights Committee: Estonia, UN Doc. CCPR/CO/77/EST (2003), paragraph 8.

⁷⁵ Concluding observations of the Human Rights Committee: Egypt, UN Doc. CCPR/CO/76/EGY (2002), paragraph 16 (a).

⁷⁶ B. Saul. Definition of 'Terrorism' in the UN Security Council: 1985–2004. – Chinese Journal of International Law 2005 (4), p. 158.

⁷⁷ United Nations Charter, Article 51; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits. – ICJ Reports (1986) 14, paragraph 195.

⁷⁸ *Ibid.*, paragraphs 194, 237.

⁷⁹ See R. Värk. Terrorism and the Use of Force: From Defensive Reaction to Pre-emptive Action? – Security and Peace 2004 (22), p. 148.

⁸⁰ A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004), pp. 2, 21–30, 52–54.

⁸¹ S. Talmon. The Security Council as World Legislature. – American Journal of International Law 2005 (99), pp. 179–181.

⁸² E. de Wet (Note 25), p. 172.

of international peace and security but also a right to take anticipatory steps, it should take the problem of terrorism most seriously and adopt appropriate measures in order to fight it.

4. Conclusions

Terrorism has been a menace to mankind for two millennia, but in recent decades it has become a pressing domestic and international security problem. The Security Council as a guardian of world order has the authority to take both non-military and military measures in order to maintain or restore international peace and security, provided that it has first determined a threat to peace, a breach of the peace, or an act of aggression to exist. Since 1992, it has gradually acknowledged that different manifestations of terrorism constitute a threat to peace and therefore justify the use of enforcement measures. A determination that certain manifestations of terrorism constitute a threat to peace is essentially a political decision, even more so because there is no generic definition of terrorism or guidelines for identifying threats to peace. The Security Council has repeatedly determined that providing sanctuary and training for terrorists and their organisations, and refusing extradition or to co-operate with efforts to bring indicted terrorists to justice, are a threat to peace. After the events of 11 September 2001, the Security Council embarked on a somewhat troublesome path, as it has classified all terrorist acts as a threat to international peace and security without any further qualification or ascribing these acts of terrorism to a particular state. Instead, the Security Council should describe its understanding of terrorism more specifically and preferably in a resolution adopted under Chapter VII in order to avoid a disagreement as to whether that description is legally binding. Additionally, it should be more cautious with portraying every act of international terrorism as a threat to international peace and security, because not every terrorist act has such potential. Overly frequent referrals to minor terrorist acts may also downgrade the momentum of major terrorist acts. While it is politically convenient not to assess individually every terrorist act brought to the Security Council's attention but to instead label all as a threat to peace, such an approach endangers numerous fundamental rules and inter-state relations as well as eventually international peace and security.