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THE UNITED NATIONS SECURITY COUNCIL'S QUEST FOR EFFECTIVENESS

*Emilio J. Cárdenas**

The terrorist attacks of September 11, 2001, on New York's World Trade Center Towers and Washington's Pentagon, instantly refocused the United Nations' attention on the issue of international terrorism. The Security Council (Council) responded immediately: first, on September 12, 2001, with an unequivocal condemnation of the attacks, contained in Resolution 1368 (2001),¹ and second, on September 28, 2001, with the enactment of Resolution 1373 (2001), which, under Chapter VII of the Charter, mandated that all Member States take specific actions to combat international terrorism.² Terrorism was rightly understood to be "a threat to international peace and security."³

Resolution 1373 rapidly became a landmark. It "broke new ground" by using, for the first time ever, the Council's Chapter VII powers to direct all Member States to take steps to do or refrain from doing what it mandates, in a general context not directly related to disciplining any individual country or particular non-state actor.⁴

When they discipline individual countries or non-state actors, the Council's resolutions are enforceable because of the tie existing between the specific resolution and the possibility of suffering sanctions for non-compliance. By contrast, resolutions of a general scope or nature, to be effective, must be seen, both by Member States and by non-state actors, as enforceable. When legislating in a general manner, unless the Security Council shows, from the outset, its determination to enforce such resolutions, the possibility of violators being confronted with sanctions may look remote. As we will see, the Security Council seems to be aware of this difference.

Resolution 1373, through which the Council assumed a general legislative capacity, was, under Articles 25 and 48 of the UN Charter, directly binding on each and every one of the Member States.⁵ In

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1. S.C. Res. 1368, U.N. SCOR, U.N. Doc. S/RES/1368 (2001).

2. S.C. Res. 1373, U.N. SCOR, U.N. Doc. S/RES/1373 (2001).

3. *Id.* 3rd intro. para.

4. Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 901 (2002). The author points out that the Security Council has increasingly adopted decisions related to conflicts in general on issues like the protection of children and civilians or the role of women.

5. *See id.* at 905.

addition, it reflected the prevailing view of the international community.⁶ The Council's general legislative power was used here in an indirect manner by establishing, *inter alia*, that all Member States must criminalize in their respective domestic environments, the financing, planning, preparation, and perpetration of terrorist acts, as well as the support of terrorist actions, so that the punishment duly reflects the seriousness of the respective acts.⁷ The result of this decision, lacking proper monitoring of its implementation by individual Member States, may not only be a rainbow of individual and diversified national legislative responses, but a variety of eventual hurdles generated by a multitude of different approaches. This strategy, probably adopted in light of the failed experiences at the General Assembly level to agree on a unified general convention on terrorism, and particularly on its definition, is the main problem relating to the Council having elected a diversified, country by country approach to the criminalization of international terrorism.

The Council's decision was certainly in line with most United Nations conventions and protocols dealing with international terrorism, which require Member States to criminalize the acts covered by them, making such acts "punishable by appropriate penalties which (should) take into account the grave nature of those offences."⁸ Resolution 1373 was considered to be "far reaching," since it imposed obligations on Member States which are normally contained in treaties entered into through the traditional treaty-making process.⁹ It has been called "the cornerstone of the United Nations' counterterrorism efforts, creating the Counter-Terrorism Committee (CTC) as a subsidiary organ of the Council, to monitor its implementation."¹⁰

As is customary, the CTC has, up to now, relied almost exclusively on written reports, although it has been correctly pointed out that "effective monitoring" of the implementation of Resolution 1373 "may (at

6. See G.A. Res. 56/1, U.N. GAOR, 9/18/2001, U.N. Doc. A/RES/56/1 (condemning the Sept. 11th attacks); see also TASK FORCE ON INTERNATIONAL TERRORISM, INTERNATIONAL BAR ASSOCIATION, INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES 29 (Transnational Publishers 2003) [hereinafter IBA Report].

7. Hale E. Sheppard, *U.S. Actions to Freeze Assets of Terrorism: Manifest and Latent Implications for Latin America*, 17 AM. U. INT'L L. REV. 625, 629-30 (2002).

8. Jennifer Trahan, *Terrorism Conventions: Existing Gaps and Different Approaches*, 8 NEW ENG. INT'L & COMP. L. ANN. 215, 220-21 (2002) (quoting International Convention Against the Taking of Hostages, art. 2, adopted Dec. 17, 1979, 1316 U.N.T.S. 205).

9. Nicholas Rostow, *Before and After: The Changed U.N. Response to Terrorism since September 11th*, 35 CORNELL INT'L L. J. 475, 482-83 (2002); see generally Malvina Halberstam, *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed*, 41 COLUM. J. TRANSNAT'L L. 573 (2003).

10. Eric Rosand, *Security Council Resolution 1373, the Counterterrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 333 (2003).

some point) require site visits to capitals, something that the CTC has so far shied away from supporting.”¹¹ A structural inability to proactively seek effective means of enforcement forces the CTC to rely only on “paper” truths, as opposed to “ground” truths. In fact, Resolution 1373 does not explicitly authorize the CTC to undertake such “on site” visits.

In view of this shortcoming, several members of the CTC took the position that today’s CTC is simply not legally authorized to hold face to face conversations with Member States other than, eventually, at the United Nations’ New York headquarters. This is part of what has been defined as the “implementation gap” at the national level,¹² which has always confronted the Council.

The Council’s recent unanimous enactment of Resolution 1535, in 2004,¹³ may change that perception.¹⁴ With this new resolution, the Council decided to revitalize and restructure the CTC. For this purpose, it endorsed the report on this subject previously submitted by the CTC itself.¹⁵ It created the Counter-Terrorism Committee Executive Directorate (CTED), as part of the CTC. The CTED will be able to visit individual Member States, provided they consent to such visits. In addition, the CTED will report regularly, at least once a month, on (i) the progress of States in their implementation of Resolution 1373, and (ii) their participation in international conventions and protocols related to terrorism.¹⁶

A. Several Steps Forward on the Afghan Front May Change the Picture

On October 15, 1999, again in connection with international terrorism, the Council, acting under Chapter VII of the Charter, passed Resolution 1267.¹⁷ Under Paragraph 4(b), all UN Member States had to (1) freeze funds and other financial resources including funds derived or generated from property owned or controlled directly or indirectly by the Taliban or by any undertaking owned or controlled by the Taliban, and

11. *Id.* at 339–40.

12. JAKE SHERMAN, *POLICIES AND PRACTICES FOR REGULATING RESOURCE FLOWS TO ARMED CONFLICT* 8 (International Peace Academy 2002).

13. S.C. Res. 1535, U.N. SCOR, U.N. Doc. S/RES/1535 (2004).

14. U.N. Security Council Press Release SC/8041, Security Council Restructures Counter-Terrorism Committee, March 26, 2004 (announcing unanimous enactment of Res. 1535).

15. S.C. Res. 1535, *supra* note 13, at ¶ 1 (endorsing committee’s report); Proposal for the Revitalisation of the Counter-Terrorism Committee, Annex to Letter dated 19 February 2004 from the Chairman of the CTC, U.N. Doc. S/2004/124 (2004).

16. Proposal for the Revitalisation of the Counter-Terrorism Committee, *supra* note 15, at §§ 15 (i), (k), (n).

17. S.C. Res. 1267, U.N. SCOR, U.N. Doc. S/RES/1267 (1999).

(2) ensure that neither those funds nor any other funds or financial resources so designated could be made available by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled directly or indirectly by the Taliban, except as authorized by the Sanctions Committee created by Resolution 1373.¹⁸

The Sanctions Committee was supposed to, *inter alia*, (1) seek from all Member States further information regarding the actions taken by them, with a view to effectively implementing the freezing orders; (2) consider information brought to its attention by Member States on violations of the freezing measures, and recommend appropriate measures in response thereto; (3) make periodic reports to the Council on the impact, including the respective humanitarian implications, of the measures enacted by Resolution 1373 and on alleged violations of them, identifying possible violators; and (4) consider requests for exemptions from the freezing measures imposed by Resolution 1373. In turn, all Member States were asked to report to the Sanctions Committee, within 30 days of the coming into force of the measures imposed, on the steps taken with a view to effectively implementing such measures.¹⁹

On December 19, 2000, by Resolution 1333,²⁰ the then ongoing freezing measures were extended to include Al-Qaida, Osama Bin Laden, and individuals and entities associated with them. The Sanctions Committee, since it is made-up of diplomats, was asked to appoint a "Committee of Experts" to report on the implementation of the measures established by Resolution 1267.²¹ For this purpose, the "Committee of Experts" was expressly authorized to consult with all relevant Member States.²² The Sanctions Committee was further mandated, for the purposes of the freezing of funds and assets, to establish and maintain "updated lists" (including the "list") based on information provided by the Member States and regional organizations, of individuals and entities associated with Osama Bin Laden.²³

Up to now, no legal safeguards have been built in reference to the freezing of funds and assets. The possibility that innocent persons could timely and effectively challenge the freezing is in fact very restricted, because those who suffer the freezing have no information as to the factual basis for their inclusion on the list, nor seem to have available an established procedure to request its review. A recent International Bar

18. S.C. Res. 1373, *supra* note 2, at ¶ 6.

19. S.C. Res. 1267, *supra* note 13, at ¶ 10.

20. S.C. Res. 1333, U.N. SCOR, ¶ 8(c), U.N. Doc. S/RES/1333 (2000).

21. *Id.* at ¶ 15(a).

22. *Id.* at ¶ 15(b).

23. *Id.* at ¶ 16(a).

Association (“IBA”) report on this subject concluded that it is necessary to (1) allow judicial supervision of such procedure; (2) respect all due process guarantees; and (3) establish financial provisions for living expenses if necessary, to be provided from frozen funds.²⁴ The Sanctions Committee was further requested to consider, when and where appropriate, visiting countries near Afghanistan, and such other countries as may be required to enhance the full and effective implementation of the freezing measures of Resolutions 1267 and 1333.²⁵ Once again, Member States were also required to report to the Sanctions Committee, within 30 days of the resolution’s entry into force, detailing all steps taken to implement it effectively.²⁶

On July 30, 2001, still before the tragic terrorist attacks, the Security Council passed Resolution 1363.²⁷ Under this resolution, the Council, acting under Chapter VII, and clearly concerned with effectiveness, requested the Secretary General to establish, in consultation with the Sanctions Committee, a mechanism to monitor the implementation of the measures imposed by Resolutions 1267 and 1333, and report back to the Council with recommendations on how to handle violations of those resolutions.²⁸ This monitoring mechanism was comprised of both a “Monitoring Group” of experts, based in New York, and a “Sanctions Enforcement Team,” staffed by up to fifteen members, located in the states bordering the territory of Afghanistan under the Taliban’s control.²⁹ The results of the combined efforts of both teams were to be reported to the Council through the Sanctions Committee,³⁰ whose means and resources were clearly upgraded. In addition, the Council urged all Member States to enforce and strengthen the freezing measures under their respective national legislation and reiterated the Member States’ obligation to inform the Council of all measures adopted with respect to Resolutions 1267 and 1333.³¹ The enactment of this third resolution³² suggests that the Council was, indeed, deeply concerned that financial flows to the Taliban and Al-Qaida, notwithstanding previous Council resolutions, seemed to continue.

On January 16, 2002 (subsequent to the enactment of Resolution 1373), the Council enacted Resolution 1390.³³ Under this resolution, it

24. IBA Report, *supra* note 6, at 127.

25. S.C. Res. 1333, U.N. SCOR, ¶ 16(f), U.N. Doc. S/RES/1333 (2000).

26. *Id.* at ¶ 20.

27. S.C. Res. 1363, U.N. SCOR, U.N. Doc. S/RES/1363 (2001).

28. *Id.* at ¶ 3.

29. *Id.* at ¶ 4.

30. *Id.* at ¶ 6.

31. *Id.* at ¶ 8.

32. S.C. Res. 1373, *supra* note 27.

33. S.C. Res. 1390, U.N. SCOR, U.N. Doc. S/RES/1390 (2002).

was decided that the freezing of funds, assets and resources of the Taliban, Al-Qaida, and Osama Bin Laden had to be complemented by Member States' ensuring that no funds were made directly or indirectly available for such persons' benefit.³⁴ Furthermore, the resolution requested the Sanctions Committee regularly to update the "list" created pursuant to Resolutions 1267 and 1333, and make it available to the public through the appropriate media.³⁵ Notwithstanding these efforts, the Council's saga with some of the Members States' uncooperative reaction (or simply non-reaction) *vis-à-vis* its resolutions on Afghanistan, continued.

On January 17, 2003, the Council enacted another resolution on the subject, Resolution 1455.³⁶ Through this resolution, the Council decided, for the first time, to "improve" the implementation of the freezing measures of Resolutions 1267, 1333, and 1390, and anticipated the need for a second "improvement" of the freezing regime to be completed twelve months down the road or sooner.

For such a purpose, the Council requested better coordination and increased exchange of information between the Sanctions Committee and the CTC.³⁷ It also instructed the Sanctions Committee to communicate to all Member States the text of the "list" at least every three months,³⁸ and also called upon Member States to submit an updated national report to the Sanctions Committee not later than ninety days from the adoption of the resolution, detailing steps taken to implement the previous freezing orders *vis-à-vis* the Taliban, Al-Qaida, and Osama Bin Laden.³⁹

Finally, on January 30, 2004, the Council, actively seized of the matter and acting under Chapter VII of the Charter, enacted Resolution 1526.⁴⁰ This recent resolution contains the anticipated second "improvement" of the freezing measures related to the Taliban, Al-Qaida, and Osama Bin Laden, which was announced in Resolution 1455. Under it, the Council strengthened the Sanctions Committee's role by expanding its mandate to go beyond oversight of the Member States' implementation of the previous freezing measures, giving it some additional roles, including: (1) assessing information for the Security Council's review on the implementation of the freezing measures; and (2) recommending improvements

34. *Id.* at ¶ 2(a).

35. *Id.* at ¶ 5.

36. S.C. Res. 1455, U.N. SCOR, U.N. Doc. S/RES/1455 (2003).

37. *Id.* at ¶ 3.

38. *Id.* at ¶ 4.

39. *Id.* at ¶ 6.

40. S.C. Res. 1526, U.N. SCOR, U.N. Doc. S/RES/1526 (2004).

to the existing set of measures.⁴¹ It also established an “Analytical Support and Sanctions Monitoring Team” to professionally assist the Sanctions Committee. This particular monitoring team must now present three bi-annual reports to the Council on Member States’ implementation of all the different freezing measures.

In addition, it requested that the Sanctions Committee (1) visit selected countries to enhance the full and effective implementation of the freezing measures, with a view to encouraging them to comply fully with all Council resolutions on this issue;⁴² (2) follow up, via oral and written communications, the effective implementation of the freezing measures, and provide Member States with an opportunity, at the request of the Sanctions Committee, to send representatives to meet with it for “more in-depth discussions;”⁴³ (3) report to the Council, on a quarterly basis and in some detail, on the work of the Sanctions Committee, including a summary on the individual Member States progress in submitting the report previously requested by Resolution 1455;⁴⁴ and (4) circulate an analytical assessment of the implementation of the freezing measures, including both successes and failures, with a view to recommending further measures,⁴⁵ which would eventually lead, for the first time, to “naming and shaming.”

Finally, visibly hardening its normal style, the Council decided to request all Member States that had not submitted the updated reports to do so, and to explain, in writing, their reasons for not having complied.⁴⁶ The Council will also receive from the Sanctions Committee a second “list,” one that will include the names of those countries that have not submitted the reports requested by the Council, with an analytical summary of the reasons put forward by them for not reporting. This means that “naming and shaming,” itself a mild sanction, could well soon be available.

B. Back to the CTC

The evolution of the sanction regime against the Taliban, Al-Qaida, and Osama Bin Laden suggests that similar powers could soon be granted to the CTC itself. Should this happen, as one can probably anticipate, the CTC will have at its disposal the instruments required to make sure that the criminalization of terrorist activities at the national level is homogenized. To reduce the existing risk of “definitional

41. *Id.* at ¶ 2.

42. *Id.* at ¶ 10.

43. *Id.* at ¶ 11.

44. *Id.* at ¶ 12.

45. *Id.* at ¶ 13.

46. *Id.* at ¶ 22.

fragmentation,” this could be done by a combination of “soft” suggestions and eventually some real “hard” jawboning by the officers of the CTC, when individual country definitions are either soft or ineffective.

A minimum legal common denominator in the criminalization of international terrorism could be achieved by insisting on Member States’ individual criminal legislation’s complying with some basic minimum standards, thus reducing the fragmentation impact arising from the substantive or procedural hurdles that the co-existence of different and unrelated individual legal systems may cause. The fight against international terrorism will thus achieve a healthy minimum degree of normative unity. For this to occur, the “hands-on” precedents we have just reviewed in relation to the resolutions specifically dealing with the Taliban, Al-Qaida, and Osama Bin Laden, may have to be used to further strengthen the hands of the CTC. The time for that type of attitude seems to be approaching.

Rapidly changing events are bringing down the walls of past cultures. As Benjamin N. Cardozo once said, “[t]he inn that shelters for the night is not the end of the journey. The law, like the traveler, must be ready for the morrow.”⁴⁷

47. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 20 (Yale University Press 1924).