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## 5. Counter-terrorism measures undertaken under UN Security Council auspices

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### I. Introduction

An intensive debate has been carried out since 11 September 2001, within the academic community and in policy-making circles across the globe, about both the depth and the permanence of the changes in national and international policy that have taken place since the attacks. Although much uncertainty surrounds the consequences and future of practices of preventive intervention, and the acceptance of compromises of civil liberties in the pursuit of national security, one area where change has been significant is financial re-regulation. The leading and innovative role which the United Nations has played in the process is often underestimated.

This chapter describes and assesses the implications of the multilateral effort to block the financing of terrorist operations that has been undertaken under the auspices of the UN Security Council and its committees, particularly the Counter-Terrorism Committee (CTC) and the '1267 Sanctions Committee'.<sup>1</sup> First, the chapter considers the UN's general response to the terrorist attacks and the innovative aspects of the CTC process, as well as the division of labour between the CTC and the 1267 Committee. Second, it presents a preliminary assessment of the effectiveness of these UN efforts to combat the financing of global terrorism. Third, it suggests some of the principal issues, problems and challenges that have emerged (or are likely to emerge in the near future) from efforts to regulate terrorist financing—including individual

<sup>1</sup> Both committees are made up of all 15 members of the UN Security Council. The CTC was established by UN Security Council Resolution 1373, 28 Sep. 2001, and is mandated to monitor the implementation of the resolution by all states and to increase the capability of states to fight terrorism. On the CTC see URL <<http://www.un.org/Docs/sc/committees/1373/>>; and on its guidelines URL <<http://www.un.org/Docs/sc/committees/1373/guidelines.htm>>. See also chapter 5 in this volume. The '1267 Sanctions Committee' was established by UN Security Council Resolution 1267, 15 Oct. 1999, and was given an extended mandate in 2000 in Resolution 1333 (see section IV below). See United Nations, 'Security Council committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities', URL <<http://www.un.org/Docs/sc/committees/1267Template.htm>>; and for its guidelines see 'Guidelines of the Committee for the Conduct of its Work', adopted on 7 Nov. 2002 and amended on 10 Apr. 2003, URL <[http://www.un.org/Docs/sc/committees/1267/1267\\_guidelines.pdf](http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf)>.

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human rights issues associated with the UN's process of listing terrorist individuals and organizations, the costs to business of compliance with new regulations, and questions about the changing nature of terrorist financing in response to the re-regulation of formal channels of financial transfer.

## II. The role of the UN Security Council in efforts to counter terrorist financing after 11 September 2001

Before the attacks of 11 September 2001, there was no coordinated, global, multilateral effort to suppress or constrain the financing of acts of terrorism, and 'the existing prescriptions were woefully inadequate in dealing with the multi-dimensional nature of the challenge'.<sup>2</sup> There were efforts under way within the UN system to strengthen the 1999 International Convention for the Suppression of the Financing of Terrorism,<sup>3</sup> but they came in the wake of 25 years of financial market liberalization and financial deregulation across the globe and lacked a broad base of political support.

Immediately after the attacks, the UN Security Council acted decisively. On 12 September 2001 it adopted Resolution 1368,<sup>4</sup> establishing a legal basis for further action against global terrorism. The resolution invoked Article 51 of the UN Charter, recognizing the inherent right of self-defence and essentially legitimating subsequent US military action in Afghanistan against the perpetrators of the 11 September attacks. With the passage of UN Security Council Resolutions 1373 and 1377,<sup>5</sup> the Security Council expressed its clear intention to act to block terrorists' access to financial support. As Jamaican Ambassador Curtis Ward wrote, '[T]here was no lack of political will among Security Council members, and the council achieved unanimity on its chosen course of action'.<sup>6</sup>

Resolution 1373 deals mainly with blocking or suppressing the financing of terrorist groups. It calls for criminalizing active or passive support for terrorists, for the expeditious freezing of funds, for the sharing of operational information by UN member states, and for the provision of technical assistance to enhance multilateral cooperation in this area. This resolution also established an innovative process to implement the terms of the resolutions under the guidance of the CTC. Chairs of UN Security Council committees can be decisive in determining the effectiveness of the committees, and the appointment of UK Permanent Representative to the UN Sir Jeremy Greenstock to head the

<sup>2</sup> Ward, C. A., 'Building capacity to combat international terrorism: the role of the United Nations Security Council', *Journal of Conflict & Security Law*, vol. 8, no. 2 (2003), p. 291.

<sup>3</sup> The convention was adopted by the UN General Assembly in Resolution 54/109 on 9 Dec. 1999; for the full text see URL <<http://www.un.org/Depts/dhl/resguide/r54.htm>>.

<sup>4</sup> For UN Security Council Resolution 1373, 28 Sep. 2001, see URL <<http://www.un.org/Docs/scres/2001/sc2001.htm>>.

<sup>5</sup> For UN Security Council Resolution 1377, 12 Nov. 2001, see URL <<http://www.un.org/Docs/scres/2001/sc2001.htm>>.

<sup>6</sup> Ward (note 2), p. 293.

CTC, combined with genuine political will to act against terrorist financing, contributed greatly to the success of institutional innovation in this area.

Among the most innovative aspects of Resolution 1373 is its reporting process. Paragraph 6 calls upon states to file written reports on the actions they have taken to implement the resolution, following a common set of questions and guidelines established by the CTC. Following review of these reports, UN Permanent Representatives can be called before the committee to clarify key points in their reports, which are addressed in the next instalment of the reporting process. Every country report submitted to the CTC is made publicly available on the UN's Internet site,<sup>7</sup> but not everything in the reports is made available: member states may prevent the disclosure of sensitive information by submitting a confidential annex to their reports.

The CTC process recognizes that many states may require technical and financial assistance in implementing the resolution. Resolution 1377 invites states to seek assistance with implementation when necessary. It calls on member states to assist each other to implement the resolution fully and invites the CTC to explore further ways in which states can be assisted by international, regional and sub-regional organizations. The CTC facilitates the provision of financial support to states lacking administrative capacity by making information available to potential assistance providers about global assistance needs through the Internet-based CTC Directory of Counter-Terrorism Information and Sources of Assistance,<sup>8</sup> through offers of bilateral assistance from member states which are willing to provide help, and through the provision of support to the multilateral donor community.

In June 2003 the Group of Eight industrialized nations (G8) adopted the Action Plan on Capacity Building to support the activities of the CTC and created the Counter-Terrorism Action Group (CTAG).<sup>9</sup> The coordination of multinational support, however, remains a CTC activity.

Finally, Resolutions 1373 and 1377 recommend that states be encouraged to appoint a central contact point on implementation in their capital cities. The Counter-Terrorism Committee has published the CTC Directory of Contact Points, updates it at regular intervals, and encourages all states to make use of the directory for contacts on matters related to implementation of resolutions on terrorist financing (recognizing that the process has costs and the related personnel requirements can often be an inhibiting factor).<sup>10</sup> Thus, with regard to its reporting and monitoring system, offers of assistance, identification of contact points and insistence on transparency, the CTC has provided a model

<sup>7</sup> See the CTC site at URL <[http://www.un.org/Docs/sc/committees/1373/submitted\\_reports.html](http://www.un.org/Docs/sc/committees/1373/submitted_reports.html)>.

<sup>8</sup> For CTC Directory of Counter-Terrorism Information and Sources of Assistance see URL <[http://www.un.org/Docs/sc/committees/1373/ctc\\_da/index.html](http://www.un.org/Docs/sc/committees/1373/ctc_da/index.html)>.

<sup>9</sup> See 'Chair's summary', Evian, France, 3 June 2003, URL <[http://www.mofa.go.jp/policy/economy/summit/2003/c\\_summary.pdf](http://www.mofa.go.jp/policy/economy/summit/2003/c_summary.pdf)>.

<sup>10</sup> For the CTC Directory of Contact Points see 'Letter dated 22 July 2003 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council', UN Security Council document S/2003/786, 31 July 2003, available at URL <[http://www.un.org/Docs/sc/committees/1373/contact\\_points.html](http://www.un.org/Docs/sc/committees/1373/contact_points.html)>.

of institutional innovation for dealing with terrorist financing that is likely to be drawn upon in future UN targeted sanctions efforts. The final report of the Stockholm Process on Implementing Targeted Sanctions suggests that 'important precedents have been established that could be drawn upon in future UN Security Council resolutions targeting sanctions'.<sup>11</sup>

The CTC has focused primarily on the long-term, strategic aspects of the problem of combating the financing of terrorism, dividing its work into three phases. Phase A is directed at legislative action and changes in the legal environment to criminalize financial support for terrorist activities in member states. Phase B is directed towards improvements in administrative capacity, while Phase C will be directed towards improved coordination within states, particularly between the public and private sectors.<sup>12</sup> For the management of the day-to-day operational details—the actual listing of terrorist organizations and individuals who support them—the UN has relied on the 1267 Committee. This committee was originally created to implement the provisions of targeted sanctions directed first against the Taliban regime, and later also against members of the al-Qaeda network who closely supported the Taliban.<sup>13</sup> The 1267 Committee is charged with responsibility for listing, de-listing and providing detailed identifying information about those charged with terrorist activities.

Like the CTC, the 1267 Committee has also developed important new institutional innovations. In response to growing concerns expressed by human rights advocates, it has developed guidelines for both the listing and de-listing of names of terrorist organizations and individuals. The committee requires that proposed additions to the list include, 'to the extent possible, a narrative description of the information that forms the basis or justification for taking action', as well as 'relevant and specific information to facilitate the identification of the persons listed by competent authorities'. For the listing of individuals, this entails the provision of 'name, date of birth, place of birth, nationality, aliases, residence, passport or travel document number'.<sup>14</sup> Like the CTC Committee, the 1267 Committee requires states to submit reports on their progress related to the resolution and posts these reports on its Internet site.<sup>15</sup>

The UN Security Council has not been alone in the effort to develop a global multilateral framework to combat the financing of terrorism. The Financial

<sup>11</sup> Wallensteen, P., Staibano, C. and Eriksson, M. (eds), *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options*, Stockholm Process on Implementing Targeted Sanctions, Final Report (Uppsala University, Department of Peace and Conflict Research: Uppsala, 2003), para. 127, pp. 57–58, available at URL <<http://www.smartsanctions.se/reports/Final%20report%20complete.pdf>>.

<sup>12</sup> For a detailed elaboration of these phases see Eckert, S., 'Application of Resolution 1373 and the Counter-Terrorism Committee to halting illicit resource flows', ed. K. Ballentine, *Peaceful Profits: Approaches to Managing the Resource Dimensions of Armed Conflict* (International Peace Academy: New York, forthcoming 2004).

<sup>13</sup> See UN Security Council Resolutions 1333, 19 Dec. 2000, and 1390, 16 Jan. 2002, available at URL <<http://www.un.org/documents/scres.htm>>.

<sup>14</sup> 'Guidelines of the Committee for the Conduct of its Work' (note 1), pp. 2–3.

<sup>15</sup> See the Internet site of the 1267 Committee at URL <<http://www.un.org/Docs/sc/committees/1267/1267AnnComm.htm>>.

Action Task Force (FATF)—an intergovernmental body established in 1989 under the auspices of the Organisation for Economic Co-operation and Development (OECD) to develop national and international policies to combat money laundering and terrorist financing—has proposed Eight Special Recommendations on terrorist financing as a supplement to its Forty Recommendations on Money Laundering.<sup>16</sup> The World Bank and the International Monetary Fund (IMF) have jointly begun to explore how best to design global standards for anti-money laundering (AML) efforts and for combating the financing of terrorism;<sup>17</sup> and the Wolfsberg Group of leading international banks has issued a statement and guidelines for its members on the suppression of the financing of terrorism.<sup>18</sup>

### III. An assessment of the effectiveness of UN Security Council measures

It is too early to say definitively how effective the UN Security Council's measures directed against the financing of global terrorism have been. However, a research team at the Watson Institute for International Studies of Brown University, Providence, Rhode Island, has been investigating the extent to which countries across the globe are implementing the new sweeping counter-terrorist measures. Its Targeting Terrorist Finances Project<sup>19</sup> is examining the reports of different countries along with other sources of country-specific information; evaluating countries according to the degree of implementation, using markers ranging from 'the policy is under review or consideration' to 'new legislation criminalizing the financing of terrorism has been promulgated', 'assistance with implementation has been requested', 'administrative infrastructure to implement counter-terrorism measures has been identified, established, and given new resources to regulate this area', to 'there is substantial evidence of compliance' (i.e., banks and institutions involved in financial transactions have received notice, have established or modified internal procedures, have begun to use name-recognition software, or terrorist assets have been identified) and 'there is evidence of enforcement' (i.e., assets have been frozen and/or prosecutions pursued and penalties have been imposed for non-compliance).

Based on a preliminary assessment of the available data (primarily from examination of the reports received from countries in Europe, North America,

<sup>16</sup> For the revised (2003) FATF Forty Recommendations see URL <<http://www.oecd.org/fatf>>, and for the Eight Special Recommendations of 31 Oct. 2001 see URL <[http://www1.oecd.org/fatf/pdf/SRecTF\\_en.pdf](http://www1.oecd.org/fatf/pdf/SRecTF_en.pdf)>. See also chapter 4 in this volume.

<sup>17</sup> Development Committee (Joint Ministerial Committee of the Boards of Governors of the Bank and the Fund on the Transfer of Real Resources to Developing Countries), 'Intensified Work on Anti-Money Laundering and Combating Financing of Terrorism (AML/CFT)', 25 Sep. 2002, available on the IMF Internet site at URL <<http://www.imf.org/external/np/mae/aml/2002/eng/041702.htm>>.

<sup>18</sup> For the Wolfsberg Principles and Statement see URL <<http://www.wolfsberg-principles.com/>>.

<sup>19</sup> On the Watson Institute project see URL <[http://www.WatsonInstitute.org/project\\_detail.cfm?ID=51](http://www.WatsonInstitute.org/project_detail.cfm?ID=51)>.

the Middle East and East Asia), there is strong evidence to suggest that the UN process has made significant progress in criminalizing terrorist financing and improving financial administrative capacity in member states. With regard to reporting, all the 191 UN member states have filed reports with the CTC on compliance with counter-terrorist resolutions.<sup>20</sup> This, in itself, is an extraordinary achievement: both Iraq and North Korea submitted reports in 2001 and 2002, and North Korea submitted a report in 2003. Most states have filed more than one report, and the majority of the reports follow the detailed structure laid out by the CTC. In a briefing prepared to evaluate the CTC process, Walter Gehr, a member of the group of experts convened by the UN, observed that 'the overwhelming majority of the reports follow the structure of Resolution 1373'.<sup>21</sup> Similarly, Ambassador Curtis Ward, the CTC's Advisor on Technical Assistance, has concluded that every state has had to adopt new legislation in order to meet all the requirements of Resolution 1373.<sup>22</sup>

There is also evidence that both the quality of reporting and progress on criminalizing terrorist finance have improved over time. In the first round of reports submitted to the CTC, in late 2001 and early 2002, many states claimed that they already had sufficient legal instruments to criminalize the funding of terrorist activity, stating that they were using AML legislation to meet their legal obligations to criminalize terrorist financing. More recently, during the dialogue between states and the CTC prior to the second round of reports, members of the CTC used their meetings and correspondence to bring to member states' attention the critical difference between AML legislation and legislation on terrorist financing. As Gehr argues, 'The difference between money laundering and the financing of terrorism is that moneys used to fund terrorist activities are not necessarily illegal. Assets and profits acquired by legitimate means and even declared to tax authorities can be used to finance terrorist acts, too'.<sup>23</sup> Aninat, Hardy and Johnston have elaborated on this point:

[T]errorist financing differs from money laundering in several ways that affect public policy. It may be much more difficult to detect than money laundering because it is directed mainly at future activity: it is possible that the only offense that has been committed when the financing takes place is conspiracy to commit a terrorist act. Also, the amounts of money needed to finance terrorism are widely believed to be relatively small. The September 11 attacks on the World Trade Center and the Pentagon were believed to have required less than \$1 million—compared to either normal commercial transactions or typical volumes of money being laundered by, say, large drug trafficking operations, which might total several hundred billion dollars a year.<sup>24</sup>

<sup>20</sup> For the reports as made public on the CTC Internet site see URL <[http://www.un.org/Docs/sc/committees/1373/submitted\\_reports.html](http://www.un.org/Docs/sc/committees/1373/submitted_reports.html)>.

<sup>21</sup> Gehr, W., 'Recurrent Issues (briefing for member states on 4 April 2002)', URL <<http://www.un.org/Docs/sc/committees/1373/rc.htm>>.

<sup>22</sup> Ward (note 2), p. 299.

<sup>23</sup> Gehr (note 21), p. 2.

<sup>24</sup> Aninat, E., Hardy, D. and Johnston, R. B., 'Combating money laundering and the financing of terrorism', *Finance and Development*, vol. 39, no. 3 (2002).

Reviews of second-round reports to the CTC (completed on 31 December 2002) suggest that, as the dialogue between member states and the CTC proceeds, states are beginning to move beyond reliance on AML legislation and to promulgate new laws specifically on terrorist financing.

As described above, UN Security Council Resolution 1377 invites states to seek assistance with implementation and calls on member states to assist each other to implement the resolution fully. Ambassador Curtis Ward, Advisor on Technical Assistance to the CTC, wrote that 'over fifty States indicated in their first reports that they needed assistance to implement the resolution'.<sup>25</sup> This number has grown to 91, as more states reach a clearer understanding of what is expected of them. According to Ward, the greatest needs for assistance appear to be in drafting anti-terrorism law and in developing banking and financial legislation and regulations.

Most countries have shown progress either on criminalizing the wilful collection of funds for terrorism and/or on providing a legal basis for the freezing of the funds of terrorist groups and individuals. New legislation has either been adopted or is formally under review in most countries. AML rules have been tightened in Europe and the Middle East (although not to the same extent in Asia) and, as indicated above, additional countries are beginning to recognize—in part owing to the CTC policy dialogues—that AML regulations may not be sufficient to suppress terrorist financing.

Most countries have signed the international conventions on terrorism. A comparison of their first and second reports to the CTC shows that progress has been made in nearly all countries. Many have signed additional international and/or regional conventions on related matters in the two years since the attacks of 11 September 2001. In that month, fewer than a dozen states had signed all 12 international conventions and protocols related to the prevention and suppression of international terrorism.<sup>26</sup> By July 2003, the number had grown to more than 40.

Only the USA and the European Union (EU) have developed their own lists of groups and individuals legally identified as terrorists; most countries rely on the lists provided by the UN.<sup>27</sup>

In its effort to support the establishment of an administrative infrastructure to implement counter-terrorism measures, the CTC has appointed an assistance team to dispatch information about common standards and best practices, and it has published a Directory of Counter-Terrorism Information and Sources of Assistance on its Internet site.<sup>28</sup> It is not clear how many states have utilized this resource to date, but Ward reports that CTC assistance teams, in bilateral consultations with states, evaluate the gaps in administrative capacity

<sup>25</sup> Ward (note 2), p. 302.

<sup>26</sup> For the UN conventions see URL <<http://untreaty.un.org/English/Terrorism.asp>>.

<sup>27</sup> On the US lists see section IV; and for the EU lists of Persons and Groups and Entities see Council Common Position 2003/651/CFSP, 12 Sep. 2003, Annex, in *Official Journal of the European Union*, L 229, vol. 46 (13 Sep. 2003), pp. 42–45.

<sup>28</sup> For this directory see the CTC Internet site at URL <[http://www.un.org/Docs/sc/committees/1373/ctc\\_da/index.html](http://www.un.org/Docs/sc/committees/1373/ctc_da/index.html)>.

and facilitate assistance from willing donors.<sup>29</sup> Most countries have identified an implementing agency or intra-governmental mechanism for administering controls on terrorist financing, and nearly all have identified central contact points for the CTC.

Compliance is a critical indicator, and there is evidence that private-sector banks and financial institutions have been notified about new regulations in most countries, although this trend is less evident in some of the major countries in Asia. Most countries have also imposed new reporting requirements on financial institutions, although formal audits have been used less frequently. EU member states tend to be the most prone to conduct audits and investigations into charitable organizations, and to apply special measures for high-risk centres under their jurisdiction. Until 2002, virtually no nation, with the exception of the United Arab Emirates (UAE), had any measures in place for the regulation of informal money transfer systems, or hawalas.<sup>30</sup> Saudi Arabia claimed that hawalas did not operate in the country and that all its financial institutions were under the administrative mandate of the Saudi Monetary Authority. By October 2003, however, the US Government had registered well over 16 000 money service businesses of this kind which were operating on US territory. Australian officials have pursued similar measures, and Hong Kong has been described by Australian regulators as 'setting the standard' in this area.<sup>31</sup> Pakistan and the UAE have also introduced new legislation on the operations of hawalas.

Finally, with regard to enforcement, there is not much evidence that additional funds have been frozen—beyond the total of \$112.2 million frozen in the first few months after September 2001. Even this figure may be inflated, since it appears to include funds frozen under UN Security Council Resolution 1267 (November 1999). Some states mention investigations being pursued or under way, but few can present new evidence of concrete success. Many still assert that their financial system is not susceptible to misuse by terrorists, while others still maintain that they are complying with Resolution 1373 by virtue of existing AML legislation.

Of the \$134 million in assets of terrorist organizations blocked as of October 2003, \$36 million was frozen by the United States and \$98 million by other countries (including approximately \$24 million by Switzerland, \$11.9 million by the UK, \$5.5 million by Saudi Arabia, and an undisclosed amount by the UAE). Prosecutions have been pursued, especially in the USA, Germany and Indonesia, but few have so far resulted in the freezing of additional funds. The

<sup>29</sup> Ward (note 2), p. 303.

<sup>30</sup> On the hawala system of unregulated international financing see *Terrorist Financing*, Report of an Independent Task Force sponsored by the Council on Foreign Relations, Maurice Greenberg, Chair, William F. Wechsler and Lee S. Wolosky, Project Co-Directors, Oct. 2002, available at URL <[http://www.cfr.org/pdf/Terrorist\\_Financing\\_TF.pdf](http://www.cfr.org/pdf/Terrorist_Financing_TF.pdf)>.

<sup>31</sup> Interview with senior Australian government official by members of the Watson Institute Targeting Terrorist Finances Project, Aug. 2003.

USA has applied the USA Patriot Act of 2001<sup>32</sup> outside the country (actions against correspondent accounts in Belize, India, Israel, Oman and Taiwan) which has allegedly resulted in the seizure of an additional \$2 million, but federal judges have sealed the records of these cases. There is virtually no evidence of the suspension of any banking licences, but there have been convictions in the United States for 'material support'.

In its parallel multilateral effort to monitor implementation, the FATF reported that as of September 2003, 132 countries had participated in its self-assessment exercise to compare their current practices against the FATF standards embodied in its Eight Special Recommendations.<sup>33</sup> It uses these self-assessments to identify countries for priority technical assistance from the World Bank, the IMF and the UN.

In summary, important policy changes have been introduced throughout the world, from Europe and Russia to offshore financial centres such as Bahrain and Hong Kong. There have been important expressions of a global willingness to do something about terrorist financing, even if material progress to date has been relatively modest.

#### IV. Legal issues, problems and challenges

How sustainable are these efforts? Is there a growing acceptance of financial re-regulation by state actors across the globe? There are two principal sets of issues, problems and/or challenges that have emerged from the multilateral effort to freeze terrorist finances: (a) issues surrounding the listing of individuals and organizations accused of supporting terrorists financially; and (b) legal problems and challenges stemming from the lack of parallel implementation of policy in different legal jurisdictions.

##### **Listing**

###### *Who is listed?*

One of the central challenges associated with freezing terrorist finances is deciding whom to list. It is usually possible to identify the core leaders of terrorist organizations but more difficult to find information about their aliases, key financiers, critical support personnel and front organizations. Coordination of intelligence gathering from different national agencies is often difficult, as is agreement on evidentiary standards across different national jurisdictions. Furthermore, commonly used names and the different methods of translitera-

<sup>32</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the USA Patriot Act of 24 Oct. 2001) is available at URL <<http://www.epic.org/privacy/terrorism/hr3162.pdf>>. See also the annex to Part VI in this volume.

<sup>33</sup> FATF, 'Annual Report 2001–2002', 21 June 2002, URL <[http://www1.oecd.org/fatf/pdf/AR2002\\_en.pdf](http://www1.oecd.org/fatf/pdf/AR2002_en.pdf)>, especially Part B, 'The self-assessment of FATF members vis-à-vis the Eight Special Recommendations'. For the status of responses as of 16 Sep. 2003 see URL <[http://www1.oecd.org/fatf/pdf/SATFResponse\\_en.pdf](http://www1.oecd.org/fatf/pdf/SATFResponse_en.pdf)>. On the FATF see also chapter 4.

tion used by different intelligence agencies can lead to errors involving the listing of innocent individuals. It is important for the domestic agencies engaged in international efforts to combat global terrorism to provide as much identifying information as possible about the targets of UN Security Council resolutions and domestic enabling legislation.

The Office of Foreign Assets Control (OFAC) of the US Department of the Treasury maintains a list of specially designated nationals (SDNs), specially designated narcotics traffickers (SDNTs), and specially designated terrorists (SDTs).<sup>34</sup> The November 2003 list of specially designated global terrorists (SDGTs) and foreign terrorist organizations (FTOs) is more detailed and comprehensive, but it still lacks adequate detail about many of the names on the list. Without this level of information, it is difficult for financial institutions to know precisely which accounts and transactions should be investigated.

Providing more identifying information about potential targets requires enhanced multilateral cooperation, including the sharing and coordination of sensitive intelligence information. However, intelligence agencies are reluctant to provide information on all potential targets. For example, the US authorities considered Ali Qaed Sunian al-Harithi<sup>35</sup> (also known as Abu Ali) important enough to assassinate him on 3 November 2002, even though he was not included on any of the official lists of suspected terrorists. The lists are designed to identify who does banking for the terrorist networks. The goal is often to remove a node in the financial network rather than to penalize directly those who commit terrorist acts. The listing process can be used as a preventive mechanism. In some cases the goal is to block potential movements of funds that could support a terrorist act. In other cases, a name may be omitted from the list deliberately in order to be able to follow the movement of funds in and out of a monitored account for subsequent intelligence purposes.

### *Whose list is authoritative?*

In addition to the difficulty of determining which names should be listed, there is the challenge of determining which list is the most authoritative. In the case of UN Security Council resolutions on financial sanctions, the USA has provided most of the intelligence for the UN list. The USA has collected information from its intelligence services, and the OFAC has disseminated its list to US financial institutions. The list was also given to European states, which could choose to delete or add names to it. However, because of the difference in intelligence capacities between the USA and Europe, the listing process is another example of US operational hegemony.

During the later stages of the UN's targeted sanctions against the regime of Slobodan Milosevic in the former Yugoslavia, and especially in the aftermath of targeted financial sanctions against the Taliban and al-Qaeda, the EU

<sup>34</sup> For the OFAC list of specially designated nationals and blocked persons of 10 Nov. 2003 see URL <<http://www.ustreas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf>>.

<sup>35</sup> This name is listed with various spelling, such as Qaed Senyan al-Harhi.

invested more effort in developing its own lists. Nevertheless, the US list continues to be far more extensive and detailed than the EU lists. US domestic legislation permits the United States to maintain a long, consolidated list of terrorists and terrorist organizations to facilitate implementation of measures. This approach differs from that of the EU, which regularly updates its regulations to reflect the numerous additions and deletions of names by different UN committees but did not create a counter-terrorism list of its own until December 2001.

The lists maintained by the UN lie somewhere between the US and EU lists, in both length and level of detail, although recent changes in the listing procedures announced by the 1267 Committee have brought the UN lists closer to those of the USA in terms of level of detail.<sup>36</sup> For most states, the lists maintained by the UN sanctions committees have the most legitimacy, but the fact that there may be only a partial consensus on the list of individuals or organizations across different jurisdictions (US, EU and UN) creates potential enforcement problems.

In the specific case of al-Qaeda, the first targeting of the network was focused on the Taliban regime and was imposed by UN Security Council Resolution 1267. Although there was a delay in developing a list of individuals after the resolution was adopted, the Sanctions Committee eventually issued a list in November 2001.<sup>37</sup> With the adoption of UN Security Council Resolution 1333,<sup>38</sup> the mandate of the 1267 Sanctions Committee was extended beyond the Taliban to include 'Usama bin Laden and individuals or entities associated with him as designated by the Committee, including those in the Al-Qaida organisation'. From that point onward, until 11 September 2001, the work of the 1267 Committee focused on the selection and preparation of a team of monitors to be stationed on Afghanistan's borders, with the aim of improving the effectiveness of the sanctions. That initiative was called off, however, following the attacks. With the adoption of UN Security Council Resolution 1390,<sup>39</sup> the scope of the 1267 Sanctions Committee was broadened once more to include 'Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them'.

### *Wrongly listed individuals or organizations*

Since individuals can be listed erroneously, it is important that procedures be established to enable them to petition for the removal of their names from the

<sup>36</sup> See UN Security Council document S/2003/669/Corr.1, 17 July 2003, for the improvements in the UN consolidated list.

<sup>37</sup> See UN Security Council document S/2002/65, 15 Jan. 2002, para. 35. An addendum to the 26 Nov. list was issued on 26 Dec. 2001.

<sup>38</sup> UN Security Council Resolution 1333, 19 Dec. 2000, para. 8(c), URL <<http://www.un.org/Docs/scres/2000/sc2000.htm>>.

<sup>39</sup> UN Security Council Resolution 1390, 28 Jan. 2002, para. 2, URL <<http://www.un.org/Docs/scres/2002/sc2002.htm>>.

list. This issue was first taken up in the reports of the Interlaken Process on the targeting of UN financial sanctions<sup>40</sup> and in the Bonn–Berlin Working Group on Travel and Aviation-Related Bans.<sup>41</sup> Following the passage of Resolution 1390, the 1267 Committee established a procedure—the first of its kind—for those wrongly listed to petition for removal of their names from the list. The procedure allows petitioners (individuals or groups) to petition the government of their country of citizenship or residence to request a review of their case. It is incumbent upon petitioners to provide justification for their request. The petitioned government is asked to review the information. It may approach the government or governments that originally requested the listing to seek information and hold consultations bilaterally on the case so that member states can resolve the matter between them. Where this is not possible, the 1267 Committee may decide whether to de-list the individual or group, by consensus, in effect operating with a unit veto system. The details of the de-listing procedures are set out in the guidelines of the 1267 Committee.<sup>42</sup>

This issue has important human rights implications, as evidenced by the legal suit filed in the European Court of Justice by Swedish citizens of Somali origin over the listing by the USA and the EU of the Al-Barakat Group of companies.<sup>43</sup> Indeed, the de-listing procedures developed by the 1267 Committee were intended to address this kind of issue. Establishing procedures for appeal and potential removal of the names of individuals and groups wrongly designated as being associated with the financing of terrorism is important for sustaining momentum on the regulation of terrorist financing. As the Council on Foreign Relations Task Force on Terrorist Financing recommended,

Legitimate disquiet in some quarters concerning the potential for due process violations associated with the inaccurate listing of targeted individuals can retard progress in global efforts. Since the full sharing of sensitive intelligence information is unlikely, the establishment of such procedures will take such concerns ‘off of the agenda’ and prevent them from being used as an excuse for ineffective implementation.<sup>44</sup>

<sup>40</sup> Seminars have been held in Interlaken, Switzerland, on targeting UN financial sanctions since Mar. 1998, in cooperation with the Swiss Federal Office for Foreign Economic Affairs. See URL <<http://www.smartsanctions.ch/start.html>>.

<sup>41</sup> See especially Swiss Confederation, in cooperation with the United Nations Secretariat and the Watson Institute for International Studies of Brown University, *Targeted Financial Sanctions: A Manual for Design and Implementation—Contributions from the Interlaken Process* (Thomas J. Watson Institute for International Studies: Providence, R.I., 2001), pp. 28–29; and Brozka, M., Bonn International Center for Conversion (BICC), ‘Design and implementation of arms embargoes and travel and aviation related sanctions: results of the “Bonn–Berlin Process”’, 2001, comment 16, pp. 56–58, URL <[http://www.bicc.de/events/unsanc/2000/pdf/booklet/booklet\\_sanctions.pdf](http://www.bicc.de/events/unsanc/2000/pdf/booklet/booklet_sanctions.pdf)>.

<sup>42</sup> ‘Guidelines of the Committee for the Conduct of its Work’ (note 1), pp. 2–3.

<sup>43</sup> This group is variously listed also as the Al-Barakaat network of financial groups.

<sup>44</sup> *Terrorist Financing* (note 30), p. 32.

## Challenges of parallel implementation

### *Legal frameworks*

Because private-sector financial institutions operate on the front lines of efforts to block terrorist finances, they need to be protected in domestic law from potential claims arising from their compliance with UN Security Council resolutions and other enabling legislation. If they are not provided with this legal protection, the freezing of funds could cause a financial institution to be in violation of its fundamental obligations to its clients and customers. This concern can be addressed by the inclusion of a 'non-liability' provision in enabling resolutions or legislation, calling on states to implement the intent of the resolution, 'notwithstanding the existence of any rights or obligations conferred or imposed by any other international agreement or contract, license, or permit granted before the date of adoption [the coming into effect of the measures contained in] this resolution'.<sup>45</sup>

Ironically, only about 20 states (including the UK and the USA) have legislation in place that automatically enables them to apply national measures to give effect to decisions called for in UN Security Council resolutions. Extending this practice more widely has been a priority of international efforts to coordinate policies on targeted sanctions, both financial sanctions and arms embargoes, as reflected most recently in the final report from the Stockholm Process on Implementing Targeted Sanctions.<sup>46</sup> If some kind of legal protection is absent in legal jurisdictions, harmonized, global implementation will break down and there will be significant loopholes in the system.

### *Different definitions*

Given that terrorism is a global problem and that responses to it require multi-lateral cooperation, clarity and consistency of definition and interpretation across different state legal jurisdictions are vital. Different definitions of what is an 'asset', and efforts to block 'funds' only rather than transactions involving 'income bearing assets', have led to inconsistent implementation of financial sanctions between Europe and the USA in the past. This created loopholes for potential sanctions violators (potential 'sanctions havens') and would provide the same for terrorist organizations. The clarity of the language used in UN Security Council resolutions and in national enabling legislation became a principal focus of two Interlaken conferences, in 1998 and 1999. They produced consensual definitions of terms such as 'funds and other financial resources', 'owned and controlled directly or indirectly', 'to freeze', 'financial services' and 'assets'.<sup>47</sup> These definitions can be utilized in contemporary

<sup>45</sup> Swiss Confederation in cooperation with the United Nations Secretariat and the Watson Institute for International Studies (note 41), p. 41.

<sup>46</sup> *Making Targeted Sanctions Effective* (note 11), especially paras 223–43, pp. 81–86.

<sup>47</sup> Swiss Confederation in cooperation with the United Nations Secretariat and the Watson Institute for International Studies (note 41), pp. 62–70.

efforts to combat global terrorism. The 1999 International Convention for the Suppression of the Financing of Terrorism defines only three terms: 'funds', 'state or governmental facility' and 'proceeds'.<sup>48</sup>

### *Capacity of regulatory institutions*

While broad-based multilateral cooperation is necessary for an effective global effort to combat terrorism, the experience with financial sanctions suggests that most countries lack an adequate administrative capacity to implement UN Security Council resolutions effectively. The international effort to pursue sanctions reform has tried to identify 'best practices' at the national level for both financial sanctions and arms embargoes. Efforts are also under way to utilize sanctions assistance missions, technical assistance at the regional level, financial support for those most directly affected by compliance with sanctions resolutions, mutual evaluations, 'naming and shaming', trans-governmental cooperation, and private-sector initiatives to ensure that there is broad multilateral participation in sanctions efforts. Given the urgency of the threat posed by global terrorist organizations, there is a pressing need for the dissemination of 'best practices' to financial centres and to the countries most likely to be transit points for terrorist funds. Inconsistent (or non-existent) administrative implementation creates potential havens for illicit funds.

### *Capacity of private financial institutions*

The same computer technology that enables terrorist networks to exploit the globalization of financial markets and move funds instantaneously across the globe can also be employed against them. Financial institutions throughout the world can be encouraged to utilize one of the numerous 'name recognition' computer programs widely available on the market. This software could help them to determine—electronically and instantaneously—whether they are holding the accounts of any individuals or organizations identified as terrorists. It is very difficult to search accounts and identify names and aliases without some kind of computer software assistance. Until recently, however, only the largest US-based banks routinely used name-recognition software to identify the targets of UN resolutions. Neither smaller US banks nor most major financial institutions in Europe and Japan have made use of this technology. The first European exceptions have been Deutsche Bank and, more recently, Lloyds Bank of London.

Beyond its utility in identifying transactions involving listed individuals, a new generation of technology could be deployed to identify patterns of suspect transactions that deviate from common norms in the frequency, size or destination of transactions. Indeed, it was an observation of this kind of deviation from normal patterns of transactions that led a Boston-based bank employee to raise questions about suspicious transactions involving the al-Barakat organi-

<sup>48</sup> International Convention for the Suppression of the Financing of Terrorism (note 3), Article 1.

zation in 1999.<sup>49</sup> The use of computerized surveillance technology raises important, and legitimate, concerns about the potential violation of fundamental civil liberties from this new form of electronic intrusion, and new norms will need to be developed to establish limits on the invasion of privacy.

### *Retroactive reporting*

The processes of targeting terrorist finances and financial sanctions are essentially similar. Both efforts entail the identification of names and corporate (or institutional) entities, both require extensive multilateral coordination, and both rely on the cooperation and participation of private-sector financial institutions for effective implementation. Experience with efforts to target financial sanctions suggest that UN Security Council resolutions or national enabling legislation to block or freeze the assets of terrorist organizations should also authorize financial institutions to trace funds retroactively.

Requiring states to report on the movement of funds within their jurisdiction in a parallel manner for a specified period prior to efforts to freeze or block the movement of terrorist funds could generate valuable information about the location and movement of financial assets about to leave a jurisdiction. Thus, even if the funds cannot be blocked, they can be traced and their movement back into the global financial system can be monitored. This could prove vital for intelligence-gathering purposes. The identification of funds in this manner would also facilitate the process of 'naming and shaming' havens for the assets of global terrorist organizations, as the FATF has done with regard to havens for money laundering.<sup>50</sup> Financial institutions across different national jurisdictions need to have parallel authority to report retroactively.

## V. Conclusions

The attacks of 11 September 2001 prompted a virtual sea change in the tolerance of financial re-regulation across the globe. The UN's Counter-Terrorism Committee and 1267 Committee have played a critical role in harmonizing state regulatory policies to advance the global effort to suppress and freeze terrorist finances. While terrorist groups' access to finance can never be halted entirely, it can be disrupted, forced into other channels, and more generally degraded in important respects. The multilateral effort to restrict the sources and to trace the financial flows of funds to terrorist groups can also assist with other forms of intelligence-gathering operations and help illuminate details of the operations of global terrorist networks.

<sup>49</sup> Willman, J., 'Trail of terrorist dollars that spans the world', *Financial Times*, Special Report, 29 Nov. 2001, available at FT.com, URL <<http://specials.ft.com/attackonterrorism/FT3RNR3XMUC.html>>.

<sup>50</sup> See Financial Action Task Force on Money Laundering (FATF), *Annual Review of Non-Cooperative Countries or Territories*, 20 June 2003, URL <[http://www1.oecd.org/fatf/pdf/NCCT2003\\_en.pdf](http://www1.oecd.org/fatf/pdf/NCCT2003_en.pdf)>.

It remains to be seen, however, whether this change can be sustained. As suggested above, it is likely to face continuing legal challenges related to the process of listing terrorist individuals and groups and is also likely to be hampered by sovereign claims for exception that inevitably produce inconsistency in implementation across different jurisdictions. A certain degree of difference across national jurisdictions can be healthy, because it provides a basis for policy experimentation and innovation. Too much variation, however, can undercut the creation of a coordinated global response to the kind of global network that al-Qaeda has benefited from in the past and the threat that it continues to pose. Finally, the costs of compliance for states and for private-sector financial institutions are increasingly beginning to raise questions about the utility of regulatory policies in this area.

The report of the Council on Foreign Relations Task Force on Terrorist Financing concluded in October 2002 that 'US efforts to curtail the financing of terrorism are impeded . . . by a lack of political will among US allies'.<sup>51</sup> This contributed to a vigorous debate about the extent to which key US allies such as Saudi Arabia had complied with efforts to freeze and suppress terrorist financing, particularly after it was discovered in November 2002 that charitable donations from members of the royal family in the Saudi Arabian Embassy at Washington had ended up in the bank accounts of some of the terrorists who committed the attacks of 11 September 2001. This controversy flared up again in the summer of 2003, when the White House classified pages relating to Saudi Arabia from a Joint Congressional Intelligence Committee report.

The global effort to target terrorist finances is part of a larger effort on the part of the George W. Bush Administration to strengthen the capacity of the state to provide a bulwark against the threat from global terrorism. Some analysts have suggested that they have detected a surge of interest on the part of both US and foreign organizations that want to be up to the US standard—from typical banking channels to insurance companies and brokerage firms.<sup>52</sup>

In the final analysis, will the re-regulation of finance to suppress the financing of global terrorism work, and is it worth all the effort? Are the benefits worth the growing costs of compliance? There is strong evidence to suggest that al-Qaeda learned that the formal banking system was unreliable for its purposes, after its financial assets were frozen following the bombings of the US embassies in Nairobi and Dar-es-Salaam in 1998.<sup>53</sup> Accordingly, global terrorists may have moved into informal financial transfer systems, begun to store value in 'conflict diamonds',<sup>54</sup> and relied increasingly on traditional

<sup>51</sup> *Terrorist Financing* (note 30), p. 8.

<sup>52</sup> See, e.g., Silverman, G., 'War on terror helps clean up money-laundering', *Financial Times*, 8 Apr. 2003.

<sup>53</sup> Farah, D., 'The role of conflict diamonds in al Qaeda's financial structure', Paper presented at the Social Science Research Council (SSRC) Conference on International Law, International Relations, and Terrorism, Washington, DC, 14–15 Nov. 2002, available at URL <[http://www.ssrc.org/programs/gsc/gsc\\_activities/farah.page](http://www.ssrc.org/programs/gsc/gsc_activities/farah.page)>.

<sup>54</sup> On conflict diamonds see chapter 11 in this volume.

forms of currency and commodity smuggling. Nevertheless, it is important to continue to monitor and regulate routine financial transactions. There is significant intelligence value in monitoring formal financial movements. The existence of legal prohibitions and the enforcement of new laws criminalizing the wilful contribution to terrorist organizations may prove to be a powerful deterrent to those tempted to support them.

While increased controls potentially pose threats to the free movement of capital and to some civil liberties, they have the potential for creating positive synergies and long-term benefits in related issue areas, from drug trafficking to tax evasion. In August 2003, US Government officials invoked provisions of the USA Patriot Act to investigate and freeze the accounts of Latin American leaders accused of corruption in their home countries.<sup>55</sup> If these trends continue, they could provide the basis for a nascent form of global governance in this critically important arena. In 10 years' time, we may look back on this period as the beginning of a major change in the institutions, operations and procedures of the entire global financial system.

<sup>55</sup> Lichtblau, E., 'US cautiously begins to seize millions in foreign banks', *New York Times*, 30 May 2003.