

## **A CRITICAL ASSESSMENT OF THE IMPLEMENTATION OF SECURITY COUNCIL RESOLUTION 1373**

Luis M. Hinojosa-Martínez<sup>1</sup>

### **I. Preliminary remarks**

When Security Council Resolution 1373 (2001) (hereinafter Res 1373) was adopted it attracted a great deal of attention because of its revolutionary character. For the first time, the Security Council (SC), pressed by the need to answer terrible terrorist attacks, adopted a clear legislative role by establishing general obligations disconnected from any particular conflict for all States. The emotional environment created by the 9/11 events helps to explain this innovative move that aroused the criticism of those who conceived the SC as a mere executive branch. The singular organic structure established to supervise the implementation of the Resolution also offers an interesting testing ground to analyse future trends of global governance to safeguard common universal interests.

This chapter studies the content of Res 1373, its organic and procedural structure, and later explores the path travelled during more than a decade of implementation with its main achievements and shortcomings. The contribution concludes with some reflections on the future of counter-terrorist cooperation in the United Nations (UN) and a proposal to create a UN Counter-Terrorist Agency.

Let me clarify that I will not focus on the issues raised by SC Res 1624 (2005) as there is another chapter of this book more specifically dealing with these questions.

### **II. SC Resolution 1373 and its legislative nature**

#### **2.1. The content of SC Resolution 1373**

Res 1373 divides the obligations that it imposes on States into three sections. The first section of its regulatory part contains a series of compulsory measures against terrorism financing. The second section, also mandatory, spells out different types of measures to fight against terrorism. A third section contains another set of general counter-terrorist measures, but states are just ‘called upon’ to adopt them. The Resolution also created a Counter-Terrorist Committee (CTC) to supervise its implementation. In practice, however, the fact that the CTC has simultaneously encouraged the implementation of all these measures in a cooperative way, and their varied degree of application depending on the economic or political circumstances existing in each country, have resulted in a blurring of the different legal nature of the obligations set out in the above-mentioned three sections. Besides, Res 1373 established reporting obligations on states and expressed the SC’s ‘determination to take all necessary steps in order to ensure the full implementation of this resolution’.

Some of the mandates contained in Res 1373 merely express states’ obligations of general international law previously recognized as such by the GA: a) the obligation to refrain from organizing, facilitating or financing terrorist acts, or to ensure that their territories are not used for the preparation of these acts<sup>2</sup>, b) the provision of information to other States to prevent terrorist acts<sup>3</sup>, c) the denial of safe haven, asylum or refugee

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<sup>1</sup> Professor of International and European Law, University of Granada.

<sup>2</sup> Res 1373 § 2.a and 2.d paraphrasing GA Res 49/60, 17 February 1995, annex § 5.a.

<sup>3</sup> Res 1373 § 2.b and 3.a paraphrasing GA Res 49/60, annex § 5.d.

status to terrorists<sup>4</sup>, and d) the prosecution or extradition of terrorist found on their territory (*aut dedere aut judicare*)<sup>5</sup>. Other obligations are described in a programmatic sense, as an incentive to capacity building and cooperation (i.e. the provision to other States of ‘the greatest measure of assistance’ in criminal investigations or proceedings, or the improvement of border controls, including the adoption of measures against the counterfeiting of identity documents)<sup>6</sup> or are included in section 3 of the Resolution, as appeals made by the SC (the call to ratify international conventions against terrorism)<sup>7</sup>. Therefore, the provisions against terrorism financing, mainly set out in the first section of Res 1373, are its most innovative part both in their nature (legislative and not only declarative) and in content. Certainly, the stipulation in letter a) to ‘prevent and suppress the financing of terrorist acts’ can be considered as having been included in the general statement previously made by the GA that under international law states had to ensure that their territories are not used for the organization of terrorist acts<sup>8</sup>. However, the obligation to ‘criminalize’ the provision or collection of funds with the intention to finance terrorist attacks (Res 1373, section 1.b) was a legal novelty in general international law, above all if it is read in conjunction with section 2.e) which requires States to qualify ‘as serious criminal offences in domestic laws’ not only the perpetration of terrorist acts but also their financing and planning<sup>9</sup>. The SC was thus extending to all States a contractual obligation enshrined in Article 4 of the 1999 UN Convention against terrorism financing.

The obligation established in section 1.c) of Res 1373 is even more surprising because of its wide scope that clearly exceeds what is required by the 1999 Convention. The SC imposes upon States the duty to freeze the funds not only of any person who participates in terrorist acts, but also of entities under his direct or indirect control, and even of ‘associated persons and entities’. Article 8 of the 1999 Convention just envisages the freezing or seizure of funds ‘used or allocated for the purpose’ of committing terrorist crimes. As regards legal persons, Article 5 of the same Convention only requires their liability to be established ‘when a person responsible for the management or control of that legal entity has, in that capacity, committed’ an act of terrorism financing. The comparison with the 1999 Convention shows the comprehensive and stringent drafting of Res 1373, even if States seem to enjoy a certain margin of manoeuvre.

Section 1.d) of Res 1373 requires that States prohibit any person or entity in their territory to provide any funds or financial (or other related) services to any person or entity related to terrorism. Remarkably, this specification of section 1.a) does not appear

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<sup>4</sup> Res 1373 § 2.c and 3.f paraphrasing GA Res 49/60, annex § 5.f.

<sup>5</sup> Res 1373 § 2.e paraphrases GA Res 49/60, annex § 5.b. Although Res 1373 just refers to the obligation to ensure that all terrorists are ‘brought to justice’ in § 2.e, later Res 1566 (2004), 28 October 2004, explicitly ‘called upon’ States to fully apply ‘the principle to extradite or prosecute’, thus somehow confirming the CCT’s interpretation of § 2.e as the *aut dedere aut judicare* obligation (S/2004/70, 26 January 2004, 6). After expressing some caution (its respect for sovereign rights of states in extradition matters) that reflected the reluctance of various States to introduce this principle into their national legislation (see e.g. GA Res 51/210, 16 January 1997, annex § 6-7), the GA has also backed it in more recent Resolutions (GA Res 60/288, 20 September 2006, annex § II.2). On the controversy about the existence of an international consuetudinary norm that obliges States to prosecute or extradite in relation to certain grave crimes, see Zdzislaw Galicki (Special Rapporteur), *Fourth report on the obligation to extradite or prosecute*, ILC, A/CN.4/648, 31 May 2011 § 78-81.

<sup>6</sup> Res 1373 § 2.f) is similar to GA Res 49/60, annex § 5.d and 6.

<sup>7</sup> Res 1373 § 3.c) and 3.d) paraphrasing GA Res 49/60, annex § 5.c. and 5.e).

<sup>8</sup> GA Res 49/60 § 5.a.

<sup>9</sup> Before Res 1373, the GA had limited itself ‘to call upon’ all States ‘to take steps to prevent and counteract, through *appropriate domestic measures*, the financing of terrorists’ (GA Res 51/210 § 3.f, emphasis added).

in the 1999 Convention, which only deals with the intended crime of terrorism financing. The only obligations that the latter establishes for legal persons not directly involved in terrorism financing consist of identifying their customers and reporting transactions suspected of stemming from a criminal activity (see its Article 18.1.b). Thus, Res 1373 shows itself again more rigorous than the 1999 Convention and fills a vacuum left in the conventional norm.

The analysis above demonstrates that Res 1373 does not simply reproduce norms of general international law or rules previously established by the GA. Nor is it correct to assert that Res 1373 just extends to all States some of the obligations enshrined in the 1999 Convention because, as we have seen, it sometimes goes beyond the conventional text or fills lacunae not envisaged in it. Therefore, with this Resolution the SC creates new general obligations for States, not connected to a particular conflict, and imposes on them the duty to adopt a series of legislative and executive measures in their internal legal order. In so doing, the SC enacted a living norm of transnational criminal law and created an organ (the CTC) to supervise and influence the drafting of national legislation. Thus, Res 1373 has a clear legislative nature<sup>10</sup>.

## **2.2. Chapter VII of the Charter as the legal basis of the Security Council's legislative powers**

The SC adopted Res 1373 acting under Chapter VII of the UN Charter. More specifically, it seems clear that the SC relied on Article 41 of the Charter when it decided that all States had to adopt certain measures against terrorism that did not involve the use of force<sup>11</sup>. The use of Chapter VII of the Charter to back up a legislative competence of the SC has been questioned by a good number of commentators that mainly argue that this organ only enjoys executive competences and/or that it can only act to confront specific cases that threaten international peace and security<sup>12</sup>. Other authors, however, point out that there is no provision in the Charter limiting the SC's discretion when it decides on the measures to be taken to counteract a threat to peace except respect for the purposes and principles of the UN<sup>13</sup>. Moreover, they defend a teleological interpretation of the Charter that would allow the attribution of legislative competences to the SC when that is needed to face global challenges to international security such as terrorism<sup>14</sup>.

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<sup>10</sup> Kim Lane Scheppele, 'Global Security Law and the Challenge to Constitutionalism after 9/11' (2011) Public Law 353, at 360-362; Marco Alberto Velásquez-Ruiz, 'In the name of International Peace and Security: Reflections on the UN Security Council's Legislative Action' (2011) 18 *International Law, Revista Colombiana de Derecho Internacional* 13, at 21-24; Pierre Klein, 'Le Conseil de sécurité et la lutte contre le terrorisme : dans l'exercice de pouvoirs toujours plus grands?' (2007) 19 *Revue québécoise de droit international* 133, at 138; José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005) 196-198.

<sup>11</sup> Colombia's representative, a member of the SC when Res 1373 was adopted, expressly cited Article 41 of the Charter as the legal basis of the said Resolution (S/PV.4394 (Resumption 1), 25 Oct. 2001, 7).

<sup>12</sup> Cathleen Powell, 'A Fullerian Analysis of Security Council Legislation' (2011) 8 *IOLR* 205; Velásquez-Ruiz (supra n. 10) at 33-37; Evelyne Lagrange, 'Le Conseil de sécurité des Nations Unies peut-il violer le droit international?' (2004) 37 *RBDI* 577; Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *Leiden Journal of International Law* 600.

<sup>13</sup> Article 24.2 UN Charter.

<sup>14</sup> Guy Mebiama, 'Le pouvoir normative du Conseil de Sécurité de l'ONU : entre nécessité et légitimité' (2010) 85 *Revue internationale de droit africain EDJA* 29; Bryan C. Banks, 'The Security Council as Global Legislator: Using Chapter VII Authority to redefine the United Nations Role in Developing International Legal Norms' in Abdul Ghafur Hamid Khin Maung Sein (ed), *The Theory and Practice of International Law: Responses to a Variety of International Legal Issues* (Serials Publications 2009) at 58-

The International Criminal Court for the Former Yugoslavia (ICTY) suggested in its case-law that the SC enjoyed a legislative capacity, when justifying the legality of its creation through a SC Resolution based on Chapter VII of the Charter<sup>15</sup>. Moreover, the fact that Res 1373 was adopted unanimously and that it has been consistently backed by the Resolutions of the GA<sup>16</sup> could be interpreted as a proof of the general acceptance of this normative capacity by the UN Members, at least in some exceptional circumstances. Furthermore, the ICJ has recognised that in the absence of any specific procedure to clarify the validity of the acts of the UN organs, each of them must determine its own jurisdiction<sup>17</sup>.

Taking into account all these arguments, there are solid reasons to submit that the SC enjoys a legislative capacity to confront specific and imminent threats to international peace and security, although this power is subject to considerable legal, political and practical limits<sup>18</sup>. From a legal point of view, the SC must restrict itself to deal with threats to international peace and security, and has to respect the UN Charter and general international law<sup>19</sup>. In the political sphere, the SC's lack of representation because of its limited membership confines this organ to enact rules that raise overwhelming international consensus. In a practical perspective, when the SC establishes complex or costly obligations they cannot be interpreted as obligations to achieve a result (that would not be realistic at a universal level) but as States' obligations to cooperate in order to improve their capacities to attain a greater degree of compliance (e.g. effective border controls or formalization of the financial system).

### III. The implementation of SC Resolution 1373

#### 3.1. Institutional Architecture

The CTC created by Res 1373 consists of special representatives of the fifteen members of the SC and is in charge of monitoring the implementation of that Res. This includes the evaluation of the implementation reports presented by the Member States, the boosting of the ratification of the relevant international counter-terrorism conventions, and the provision of technical assistance to those countries that need it. The small staff with which the CTC was provided (10 independent experts) soon proved to be clearly insufficient to cope with the gigantic task it had been assigned<sup>20</sup>.

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60; Eric Rosand, 'The Security Council as a "Global Legislator": *Ultra Vires* or Ultra Innovative?' (2005) 28 FILJ 559-560; P. Wallensteen and P. Johansson, 'Security Council Decisions in Perspective', in David M. Malone (ed), *The UN Security Council from the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 17.

<sup>15</sup> *Tadic (Jurisdiction)* ICTY-94-1 (2 October 1995) § 35 and 43-44.

<sup>16</sup> See GA Res 67/99, 14 January 2013, § 10.

<sup>17</sup> *Certain Expenses of the United Nations*, ICJ Reports (1962) 168.

<sup>18</sup> Luis M. Hinojosa Martínez, 'The Legislative Role of the SC in its Fight against Terrorism: Legal, Political and Practical Limits' (2008) 57 ICLQ 333.

<sup>19</sup> 'The preparatory work of Article 1 (1) of the Charter provides sound arguments to maintain that the SC, when it 'adopts efficient collective measures to prevent and eliminate threats to peace' in crisis situations, can disregard the *ius dispositivum* of international law without questioning the validity or binding nature of its decisions. In particular, the purpose was to enable this institution to put an end to hostilities in armed conflicts, without having to decide on the rights of the parties in conflict in accordance with the international legal order. However, apart from exceptional circumstances such as these, no provision of the Charter authorizes the SC to violate international law' (Hinojosa Martínez [n. 18] 345-347).

<sup>20</sup> In particular, the CTC lacked independent expertise to provide technical assistance and was unable to check in the field whether the implementation reports provided by Member States were accurate and realistic.

In 2004 the CTC mandate was reinforced<sup>21</sup> and SC Res 1535 (2004) set up a CTC Executive Directorate (CTED) to assist the work of the CTC and coordinate the monitoring of the implementation of Res 1373. With a staff of around 40 members (mainly legal experts), the CTED has made a substantial contribution to the work of the CTC and its mandate has been successively extended. The CTED is structured in two sections: an Assessment and Technical Assistance Office (ATAO)<sup>22</sup>, which is further divided into three geographical groups, and an Administrative and Information Office (AIO). It also counts on a senior human rights officer. The CTED has visited more than 60 Member States to gather information on the real implementation of Res 1373 and on technical assistance needs. This has allowed the CTC to keep a prominent role as an exchange of information hub and as the main international coordination centre in the fight against terrorism.

The CTC coordinates its work trying to develop synergies with the other SC Committees which deal with terrorist affairs, namely the Al Qaeda Committee (1267 Committee), and the Committee against the proliferation of nuclear, chemical and biological weapons and their use by non-State actors (1540 Committee)<sup>23</sup>. It also cooperates with the UN Office of Drugs and Crime, and more specifically its Terrorism Prevention Branch. Just before the GA's adoption of the Global Counter-Terrorism Strategy in 2006<sup>24</sup> and in view of the proliferation of entities involved in the fight against terrorism within the UN system, the UN Secretary General created a Counter-Terrorism Implementation Task Force (CTITF)<sup>25</sup> to coordinate the UN's counter-terrorism efforts. The CTED is one of the 31 entities participating in the Task Force, and this has helped to incorporate some input from other UN bodies and other international organizations in the activities of the CTED/CTC<sup>26</sup>.

The creation of the CTC/CTED constituted in itself an important legal event. In its Res 1373, the SC was not only legislating (establishing general permanent obligations upon States) but it was also setting up an extra-conventional organ to supervise the States' implementation of these provisions, without ruling out taking 'all necessary steps' to ensure it. However, this revolution has been downplayed by the fact that in practice the CTC/CTED have acted as a channel of communication between the SC and States, focussing on the provision of technical assistance and capacity building on a cooperative basis, thereby obtaining a positive welcome from the generality of States, at least from a formal point of view.

If the creation of the CTITF has eroded the leading role of the CTC in the coordination of international counterterrorist efforts, the recent birth of the Global Counterterrorism Forum (GCTF) in 2011, as an informal antiterrorist entity managed by the main donor countries by funds and expertise, may accentuate the overlapping of activities and the

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<sup>21</sup> S/2004/124, 19 February 2004.

<sup>22</sup> There are also five technical departments on thematic areas in the ATAO that work horizontally across the geographical groups. This helps to unify the criteria on implementation standards and technical assistance among the geographical groups.

<sup>23</sup> The Secretary General was even instructed to co-locate these three groups together to enhance their cooperation (SC Res 1963 (2010), 20 December 2010, § 16).

<sup>24</sup> GA Res 60/288, 20 September 2006.

<sup>25</sup> GA Res 64/235, 14 January 2010, provided for the institutionalization of the CTITF within the UN system. From a material point of view, the mandate of the CTITF is to a great extent coincidental with that of the CTC/CTED (see GA Res 62/272, 15 September 2008, and 64/297, 13 October 2010). A UN Counter-Terrorism Center has also been created within the framework of the CTITF (GA Res 66/10, 7 December 2011) and the CTED is actively involved in its activities.

<sup>26</sup> For instance, the importance of stressing the need to respect human rights in the fight against terrorism and the relevance of promoting interfaith dialogue, community-policing initiatives or prison rehabilitation programs to address the causes of terrorism.

need for a redefinition of the CTC's role. While the express will of the CGTF's founders is to reinforce UN counterterrorist efforts<sup>27</sup>, nevertheless this Forum gives the donor countries a tool to organize their technical assistance with more freedom and without the political and administrative strings inherent in the UN system.

### 3.2. The follow-up

When Res 1373 originally created the CTC, it established its main mission as the evaluation of the national reports that States were asked to present. The creation of the CTED significantly increased the CTC's capacity to evaluate the States' implementation of the Resolution due to its specialized technical departments and its country visits.

The delivery of a first national report<sup>28</sup> was always followed by a (confidential) response from the CTC that usually asked for clarifications or additional data. When the CTC felt that the State did not correctly interpret or apply Res 1373 it suggested legislative reforms. After the legislative phase, the CTC examined the human and technical resources of States to put these norms in practice, and coordinated the provision of technical assistance if needed. In addition, the CTC also encouraged international cooperation and focused on the specific problems of each State,<sup>29</sup> even in areas not covered by Res 1373. All these issues were reviewed in subsequent reports. This exchange led to a constructive dialogue between the CTC and the State in most cases.

Nevertheless, the answers of the CTC were progressively more detailed and stringent, as the weaknesses of the national counter-terrorist architecture were better identified<sup>30</sup>. There was a point at which some States became progressively uncomfortable with the revelation of their differences with the CTC or their defects and it was decided to discontinue the publication of country reports from 2007 to preserve the collaborative spirit in sensitive issues<sup>31</sup>. This decision was taken in the context of the revision of the CTC's working methods, and the organization of the implementation evaluations on the basis of Preliminary Implementation Assessments (PIAs)<sup>32</sup>. A PIA offers the complete country profile in the implementation of Res 1373 and is periodically updated. After having completed in 2012 the initial assessments of all 193 UN Members, the CTED/CTC initiated a second round of evaluations, now called Overview of

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<sup>27</sup> Global Counterterrorism Forum, Terms of Reference, 22 September 2011, section II, available at <http://www.thegctf.org> (last visited in April 2013).

<sup>28</sup> In an unprecedented success of the SC, one year and a half after the adoption of Res 1373 all UN Member States had delivered a first report to the CTC.

<sup>29</sup> Abdoulaye Tine, 'La stratégie antiterroriste du Conseil: esquisse d'un bilan provisoire de la mise en oeuvre des résolutions 1373 et 1540' in Michael J. Glennon and Serge Sur (eds), *Terrorisme et droit international/Terrorism and International Law* (Martinus Nijhoff 2008) 470-471.

<sup>30</sup> A comparison between the first and the last report of each country on the CTC's web page clearly shows this evolution.

<sup>31</sup> Although the CTC communications with the State were not made public, usually one could infer from the State's responses the main suggestions or criticisms of the CTC.

<sup>32</sup> Counter-Terrorism Committee's Updated Working Methods, 17, October 2006, available at <http://www.un.org/en/sc/ctc/docs/workingmethods-2006-10-17.pdf> (last visited in April 2013). A PIA was drafted after reviewing the Member States' reports, contacting their administration and gathering all possible information from web pages, international organizations and any other sources (that had to be referenced in the PIA). It was usually accompanied by a cover note (with a CTED summary of shortfalls in implementation and recommendations or options) and a cover letter (with the Committee's assessment of implementation and a program of the State's obligations to fully implement Res 1373). After the consideration and approval of these documents by the Committee, the factual part of the PIA and the cover letter were sent to the State in question.

Implementation Assessments (OIAs)<sup>33</sup>, with a simplified format to minimize the report fatigue that some States complain about<sup>34</sup>. Each State is free to decide whether its OIA may be shared (in full or in part) with other Member States. In any case, a list on the CTC's website informs of the date in which each State received the documents and the date on which it responded in order to stimulate the States' diligence, as some of them have clearly relaxed after the first cooperation efforts.

Country visits have also become an essential part of the CTED's activities, as they allow its experts to check the accuracy of the data at their disposal, make a more fruitful exchange of information and ideas with Members possible, and give a first-hand experience of counter-terrorist practice in utterly different contexts<sup>35</sup>. Moreover, both formal assessments missions and *ad hoc* visits put additional pressure on States to implement Res 1373.

### 3.3. Thematic areas

The assessment on the implementation of Res 1373 is better understood if we distinguish the main topics it covers.

#### A) The establishment of a legislative framework

Many of the obligations imposed by Res 1373 directly address the need to enact a legislative framework that adequately prosecutes terrorist activities, criminalizing their financing, preparation or perpetration, and ensuring that those involved in these acts are brought to justice and their funds are frozen<sup>36</sup>. This was a priority in the early work of the CTC and most States have substantially improved their legal repertoire against terrorism thanks to this effort, although in some regions a great part of this work is still pending. In spite of the time already lapsed since the adoption of Res 1373, the CTC's work has shown that a great number of obstacles hidden in the criminal justice systems continue to hinder the investigation and prosecution of terrorism-related activities: the admissibility of classified information as evidence, the adequate protection of witnesses, the slowness and complexity on international judicial cooperation, etc. Even when a

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<sup>33</sup> The CTC has updated the rules for the adoption and stocktaking of PIAs/OIAs in 2010 and 2013. An OIA is accompanied by a Detailed Implementation Survey (DIS, drafted by the CTED and circulated to the CTC for information only), a cover letter and a follow-up table of visit recommendations (if applicable). When these documents are adopted by the CTC, they are transmitted to the Member State concerned. Normally, Member States will have a year to respond to their OIA and will be reassessed after 15 months. However, those States that fail to respond to the first PIA have only four or six months to respond. See CTC, Revised procedures for the Counter-Terrorism Committee's stocktaking of Member States' implementation of Security Council Resolutions 1373 (2001) and 1624 (2005), 11 March 2013, available at <http://www.un.org/en/sc/ctc/docs/2013> (last visited April 2013).

<sup>34</sup> See e.g. S/PV.6862, 14 November 2012, 19. To these reporting obligations one has to add those derived from SC Res 1624 (2005) countering the incitement of terrorist acts (see Chapter ?? of this book). When the Global Survey of the Implementation of SC Res 1624 (2005) was published in 2012, only 113 States had fulfilled the obligation established in its paragraph 5 to submit to the CTC a report on their implementation effort (S/2012/16, 9 January 2012, § 4).

<sup>35</sup> At the end of 2012, the CTED had visited 75 countries.

<sup>36</sup> It is meaningful to note as an example that a country as important in the fight against terrorism as Saudi Arabia declared in its second report to the CTC that 'no financial operations with terrorist aims have thus far come to light in the country' and that 'financing of terrorism falls into the category of "spreading evil on earth" (*al-ifsad fi al-ard*) (...) which can sometimes mean the application of the death penalty' thereby showing the vagueness of its counterterrorist legislation (S/2002/869, 1 August 2002, 3-4).

coherent legislative framework is in force, political, legal or security concerns may obstruct the necessary international cooperation<sup>37</sup>.

But the weakest point of this strategy lies in the ineffective implementation of these laws or in the lack of information about the resources effectively assigned to that end. The data gathered by the CTED and the country visits often show in many States the lack of sufficiently specialized resources of the judiciary and the police to adequately tackle this challenge<sup>38</sup>.

#### B) The fight against terrorism financing

The prevention and repression of terrorism financing is one of the central elements of Res 1373. As explained before, the Resolution incorporates a demanding wording that requires the preventative freezing of funds, even of legal origin and when the terrorist acts have not yet taken place, if they are intended to finance such acts. It also prohibits the provision of financial services to persons or entities associated to or directly or indirectly controlled by terrorists. However, the constant evolution of financial markets and services greatly complicates this task: the proliferation of new payment systems and techniques<sup>39</sup>, the misuse of non-governmental organizations, the use of cash couriers, the alternative remittance systems, etc. Moreover, the alliances between terrorism financing and other forms of criminality further facilitate the concealment of terrorist funds within the magma of money laundering techniques.

Aware of the enormosity and technical difficulties of the challenge, the CTED has cooperated closely with the Financial Action Task Force (FATF), the leading international standard setting body on these issues, and has been involved in the development of its 2012 revised Recommendations against money laundering and terrorism financing<sup>40</sup>.

Nevertheless, in spite of the huge effort made, the CTED recognized in its latest Global Implementation Survey that: a) 'a vast majority of States' do not yet implement the freezing of funds as a preventative measure, and rely on criminal procedures to 'seize' funds, b) customer due diligence and anti-money laundering laws are not effective in countries with a high degree of informal economy and where large cash payments are usual, c) there is a lack of technical skill and modern material resources in many countries to control the new payment methods (such as mobile money transfers, pre-paid cards or bearer negotiable instruments), d) lack of political will or poor capacities maintain charitable organizations as a safe cover for terrorist financing worldwide. As a conclusion, the CTED affirmed that 'most States lack sufficient expertise and experience in the investigation and prosecution' of terrorist financing<sup>41</sup>. This assertion is not surprising given the recurring failures of States to fight money laundering, an activity that shares many techniques with terrorism funding.

#### C) The maintenance of effective border controls

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<sup>37</sup> Stephen C. Thaman, 'Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules' (2013) 20 *Ius Gentium: Comparative Perspectives on Law and Justice* 403.

<sup>38</sup> S/2011/463, 1 September 2011, § 227-232.

<sup>39</sup> John Hunt, 'The new frontier of money laundering: how terrorist organizations use cyberlaundering to fund their activities, and how governments are trying to stop them' (2011) 20 *Information & Communications Technology Law* 133.

<sup>40</sup> The 2012 revised FATF Recommendations now fully integrate counter-terrorist financing instruments with anti-money laundering measures (See [www.fatf-gafi.org/recommendations](http://www.fatf-gafi.org/recommendations), last visited April 2013).

<sup>41</sup> S/2011/463, 1 September 2011, § 235-245.



The enforcement of effective border controls is another essential component of Res 1373, as it aims above all to impede terrorist mobility, although it also makes reference to the need to avoid illicit arms-trafficking or terrorists' access to weapons of mass destruction<sup>42</sup>. The problem that the CTC/CTED face to confront this challenge is that it clearly exceeds the counter-terrorist effort, and is related to the control of illegal immigration, to general international criminal cooperation, security in civil aviation and maritime navigation, customs controls, and even military or guerrilla activities. Thus, the CTED has relied on the work of other more specialized international institutions, fostering the acceptance of their standards, rather than providing technical assistance itself<sup>43</sup>.

In any case, the main threat to all this machinery against the improved screening of travellers and their baggage, the counterfeiting of travel documents or the detection of smuggling are the thousands of kilometres of frontiers without control that escape to States' authority. A second factor to take into account when considering the limited success of these efforts is the cost of the human and material resources needed for the (always imperfect) sealing of borders, which is not affordable for many countries. Therefore, the CTC/CTED's role in this matter merely consists of a modest contribution to the coordination of international initiatives to strengthen States' capacity building.

#### D) The protection of human rights

At the beginning, the CTC did not consider that the protection of human rights was part of its mandate and for some years resisted the inclusion of human rights experts in its staff. However, the growing pressure from other UN agencies and some member States gradually changed this approach and embedded a reference to the need of respecting human rights and humanitarian law in the follow-up Resolutions to Res 1373<sup>44</sup> and in the work of CTC/CTED. After its creation, the CTED included human rights experts in its staff and developed a regular relationship with the UN High Commissioner for Human Rights, the Special Rapporteur of the UN Human Rights Council on the promotion and protection of human rights while countering terrorism, and other UN human rights bodies<sup>45</sup>. In May 2006 the CTC adopted policy guidance for CTED in the area of human rights<sup>46</sup> and since 2008 one of the CTED's working groups has been dedicated to human rights issues<sup>47</sup>. These developments have significantly improved the attention to fundamental rights in the evaluation procedures of the CTC/CTED.

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<sup>42</sup> This last objective was more specifically addressed later in SC Res 1540 (2004), 5 November 2004.

<sup>43</sup> E.g. the International Civil Aviation Organization (ICAO) has established international standards on machine readable documents, or conducts a Universal Security Audit Program on airport facilities; the International Maritime Organization issued its ISP Code to evaluate vulnerabilities of ships and ports; the World Customs Organization adopted in 2005 a SAFE Framework of standards to secure the trade supply chain; INTERPOL has created centralized databases to enhance the counterterrorist effort and facilitate information sharing among States.

<sup>44</sup> Since SC Res 1456 (2003), 20 January 2003, all SC Res remind all States expressly of the obligation to respect international human rights, refugee and humanitarian law in their counter-terrorist measures. See e.g. SC Res 1963 (2010) § 10 where counter-terrorism measures and respect for human rights are considered as 'mutually reinforcing'. SC Res 1624 (2005), 14 September 2005, that deals with incitement to terrorism, is particularly detailed when recalling the norms protecting freedom of expression or the right to seek and enjoy asylum.

<sup>45</sup> Conor Gearty, 'Situating International Human Rights Law in an Age of Counter-terrorism' (2008) 10 *CYELS* 167.

<sup>46</sup> S/AC.40/2006/PG.2, 25 May 2006.

<sup>47</sup> SC Res 1805 (2008), 20 March 2008 § 3, endorsing S/2008/80, 8 February 2008 § 15.

At present, the CTED identifies three main areas of concern<sup>48</sup>: a) the abusive application of state of emergency laws to presumed terrorists with the consequent denial of fundamental rights, b) the enactment of special laws for the investigation and prosecution of terrorism that allow for long preventative or military detentions<sup>49</sup>, inaccessibility to secret information for the detainee's lawyers, or grave infringements of the right to privacy, and c) overtly broad definitions of terrorism or of incitement to terrorism in national legislation as an excuse to restrict freedom of expression, conscience and assembly, or to repress political opposition<sup>50</sup>.

In spite of the effort made, the feeling remains that the CTC/CTED consider that reinforcing the efficacy of anti-terrorist measures is their priority. Respect for human rights is described as a wanted complement of counter-terrorist policies rather than as an essential instrument for the ethical defeat of terrorism, and the bulk of the work needed to improve standards applied in Member States is left to more specialized organs within the UN system<sup>51</sup>.

### 3.4 Technical Assistance

The provision and coordination of technical assistance to reinforce the counter-terrorist capabilities of States has become the main task of the CTC/CTED<sup>52</sup>. They identify the needs of each country and promote the sharing of information, the dissemination of good practices<sup>53</sup> and the coordination of donor States. The CTED is also a key actor in the harmonization of efforts and standards of other international organizations and bodies with specialized expertise that can provide useful knowledge and experience in counter-terrorism, and organizes and attends a great number of seminars and workshops around the world fostering States' capacity building in the relevant areas<sup>54</sup>.

The CTED has adopted a thematic and regional approach to this technical assistance effort to better address the different needs of the recipient countries and to maximise

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<sup>48</sup> S/2011/463, § 281-290. See also Katja Samuel, Nigel D. White and Ana Salinas de Frias, Multi-National Counter-Terrorism Expert Network: UN Reform, the Rule of Law, and Counter-Terrorism: How Can Past Lessons Inform Future Responses? (March 30, 2012), available at SSRN: <http://dx.doi.org/10.2139/ssrn.2061867> (last visited April 2013).

<sup>49</sup> Oona Hathaway *et al.*, 'The Power to Detain: Detention of Terrorist Suspects after 9/11' (2012) 38 Yale J. Int'l L.122; Claire Macken, *Counter-terrorism and the detention of suspected terrorists: preventive detention and international human rights law* (Routledge 2011).

<sup>50</sup> For a thorough study of the national definitions of terrorism all over the world, see Kathleen Malley-Morrison, Sherri McCarthy and Denise Hines (eds), *International Handbook of War, Torture, and Terrorism* (Springer 2013) 3-181; Eva Herschinger, 'A Battlefield of Meanings: The Struggle for Identity in the UN Debates on a Definition of International Terrorism' (2013) 25 *Terrorism and Political Violence* 183.

<sup>51</sup> S/2012/465, 21 June, 2012, § 29. For a description of the process of consolidation of the protection of human rights in the work of the CTED see Michael Galchinsky, *A Sea Change in Security: How the 'War on Terror' Strengthened Human Rights* (January 2012) 8-17 (available at [http://works.bepress.com/michael\\_galchinsky/2](http://works.bepress.com/michael_galchinsky/2), last visited April 2013).

<sup>52</sup> SC Res 1963 (2010), § 4-9.

<sup>53</sup> Following the mandate of SC Res 1377 (2001), 12 November 2001, annex, 1456 (2003), 20 January 2003 § 4 (iii), and 1566 (2004), 8 October 2004 § 7, the CTC published a directory of good practices for the implementation of Res 1373 extracted from the leading international bodies in each of the fields of counter-terrorism expertise that was later followed by a second directory of good practices for the application of SC Res 1624 (2005) (see <http://www.un.org/en/sc/ctc/practices.html>, last visited April 2013).

<sup>54</sup> S/2012/465 § 20-22. Workshops allow CTED's experts to interact with States' officials in an informal context that facilitates a better identification of the real problems for Res 1373 implementation (Peter Romaniuk, *Multilateral Counterterrorism. The Global Politics of Cooperation and Contestation* (Routledge 2010) 91).

efficiency in the allocation of resources. As a Security Council body it tries to take the leading role in the provision of technical assistance in those issues more directly linked to the activity of the SC itself, while it delegates or supports the activities of other specialized institutions or donor countries when they enjoy a comparative advantage. There is a working group in the CTED specifically dedicated to the coordination of technical assistance that has created a database to better synchronize available expertise and identified needs of potential recipient countries. The great majority of the assistance requests are satisfactorily solved.

The CTC/CTED are obliged to coordinate their technical assistance (and even its overall activity) with other committees of the Security Council that also deal with counter-terrorist affairs, mainly the Al Qaeda Sanctions Committee<sup>55</sup> and the Committee established by Res 1540 (2004)<sup>56</sup>. The CTED must also coordinate its activity with other UN organs, especially with the CTITF, which was created with the specific mandate to coordinate and give coherence to the counter-terrorism efforts in the UN system<sup>57</sup> and whose primary goal consists of the provision of policy support and technical assistance to the Member States for the implementation of the UN Global Counter-Terrorist Strategy. In practice, the technical assistance provided by the UN Counter-Terrorism Center, the Terrorism Prevention Branch of the UNODOC and the CTED are materially indistinguishable<sup>58</sup>.

Thus, the overlapping of activities seems to be unavoidable with the present organic structure of coincidental competencies and has been recognized by the SC itself<sup>59</sup> and criticized by some Member States<sup>60</sup>. The Secretary-General has proposed the creation of a UN counter-terrorism coordinator to address this problem<sup>61</sup> and the SC has formally welcomed the initiative<sup>62</sup>. S/he would chair the CTITF, but it is not clear what kind of authority s/he could have over a SC organ such as the CTC<sup>63</sup>. While it is true that the SC was the only institution that could put into operation an international counter-terrorist cooperation network at the beginning of this century quickly and stringently, the progressive assumption of counter-terrorist responsibility by other UN organs (in particular with regard to technical assistance) has questioned the SC's role that needs to be redefined.

Another element leading to technical assistance's diversification (and overlapping) derives from the bilateral or multilateral initiatives of donor countries outside the UN system. If some recipient States have complained in the past about the capacity of donor

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<sup>55</sup> This Committee was established by SC Res 1267 (1999), 15 October 1999, although in 2011 the SC split it into two Committees: the Al Qaeda Sanctions Committee and the 1988 Sanctions Committee (separating the sanctions against the Taliban in Afghanistan from the regime of sanctions against Al Qaeda), although both entities cooperate closely. See SC Res 1988 (2011) and 1989 (2011), 17 June 2011.

<sup>56</sup> This Committee was created to control the implementation of SC Res 1540 (2004), 28 April 2004, to prevent access by non-State actors to nuclear, chemical or biological weapons.

<sup>57</sup> The United Nations Global Counter-Terrorist Strategy, A/RES/60/288, 20 September 2006, § III.5.

<sup>58</sup> GA Res 67/99, 14 January 2013, § 20.

<sup>59</sup> S/PRST/2013/1, 5.

<sup>60</sup> S/PV.6900, 15 January 2013, 23.

<sup>61</sup> A/66/762, 4 April 2012, § 123-124, endorsed by GA Res 66/282, 12 July 2012, § 15.

<sup>62</sup> S/PRST/2013/1, 15 January 2013, 5.

<sup>63</sup> The creation of the CTED generated considerable controversy because it could undermine the Secretariat authority by establishing a body only accountable to the SC. The compromise finally situated the CTED under the policy guidance of the CTC but its Executive Director would be appointed by the Secretary General and its staff subject to the general obligations of Article 100 of the UN Charter (Ian Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 AJIL 275, at 285).

countries to orient politically the technical assistance coordinated by the UN organs<sup>64</sup>, it is most likely that this tendency will be strengthened by the creation of instruments like the GCTF<sup>65</sup>.

#### IV. Sanctions for failures to comply?

Until now the implementation of Res 1373 has been based on a promotional strategy, far from the threat of sanctions. The CTC/CTED have worked together with the Member States improving their counter-terrorist capacities, so that they could progressively fulfil the obligations imposed by the Resolution in a way adapted to their legal system and their political and economic circumstances. This constructive methodology has had a general positive effect on the States' attitude as they have cooperated with unprecedented energy with the CTC/CTED's information demands. However, two challenges threaten this relatively successful system: the reporting fatigue caused by many years of concurrent information obligations towards the UN counter-terrorist organs<sup>66</sup>, and the CTC/CTED's change of emphasis from gathering information and fostering the enactment of a legislative framework to the vigilance of the Resolution's effective implementation<sup>67</sup> (a more delicate and difficult task). In such circumstances, some States do not meet the regular reporting requirements of the CTC and the CTED has had to draw up an internal list of late or non-reporting member States.

In Res 1373 the SC asserted 'its determination to take *all necessary steps* in order to ensure [its] full implementation'<sup>68</sup>. This is the expression normally used by the SC to refer to coercive measures when acting on the basis of Chapter VII of the Charter. Therefore, in theory, this is an available option (a potential threat), and one of the main reasons to keep the CTC's tasks within the ambit of the SC is the weight that this relationship may give it to mobilize States will. Although country visits by the CTED or by other expert international organizations are always organized with the consent of the visited country and publicly placed in the context of technical cooperation, they put additional pressure on States as they are singled out in the SC agenda. Nevertheless, besides the traditional reluctance of this institution to adopt coercive measures, the constructive attitude of the CTC/CTED has until now prevented the adoption of sanctions against failures to comply with Res 1373 (both for material breaches or non-fulfilment of reporting requirements) and many indications show that the imposition of these measures is very unlikely in the near future<sup>69</sup>.

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<sup>64</sup> William B. Messmer and Carlos L. Yordán, 'A Partnership to Counter International Terrorism: The UN Security Council and the UN Member States' (2011) 34 *Studies in Conflict & Terrorism* 843, at 848-849.

<sup>65</sup> In the early days of the CTC there was a proposal to create a trust fund to finance technical assistance, but this initiative was vetoed by the US that preferred to put these economic resources in place through bilateral channels (Chantal de Jonge Oudraat, 'The Role of the Security Council' in Jane Boulden and Thomas G. Weiss (eds), *Terrorism and the UN* (Indiana University Press 2004) 163).

<sup>66</sup> David Cortright, George A. Lopez, Alistair Millar, and Linda Gerber-Stellingwerf, 'Global Cooperation against Terrorism. Evaluating the United Nations Counter-Terrorism Committee', in David Cortright and George A. Lopez (eds), *Uniting against Terror. Cooperative Nonmilitary Responses to the Global Terrorist Threat* (MIT Press 2007) 26.

<sup>67</sup> S/2006/989, 18 December 2006, § 12.

<sup>68</sup> Res 1373, § 8 (emphasis added).

<sup>69</sup> In a recent policy document, the CTC considers three options to deal with late or non-reporting Members: a) inviting the Permanent Representative to a meeting, b) preparing a reminder letter, or c) making a recommendation to the CTC to defer the deadline (CTC, Revised procedures for the Counter-Terrorism Committee's stocktaking of Member States' implementation of Security Council Resolutions 1373 (2001) and 1624 (2005), 11 March 2013, § 12, available at <http://www.un.org/en/sc/ctc/docs/2013>

One of the main problems that the adoption of sanctions would pose would be the determination of the threshold of breach that would entail the application of coercive measures. The information gathered by the CTED shows that the full implementation of Res 1373 will take much time. Global harmonization of laws against money laundering or on preventing abuse of the non-profit sector for the purposes of terrorist financing, or the general sealing of frontiers, to mention just a few examples, are objectives almost unattainable even in the medium term. Res 1373 is thus conceived in a programmatic perspective and all States are supposed to follow an ongoing process towards adequate implementation of the Resolution.

Under such circumstances, the evaluation of the measures adopted in each State cannot be made without assuming a great degree of flexibility, always applying standards adapted to the geographical, economic and political situation. The publication of a directory of international best practices for the implementation of Res 1373<sup>70</sup>, or the simplification and standardization of OIAs<sup>71</sup>, represent a considerable effort by the CTC/CTED to objectify their assessment criteria. Nevertheless, in spite of all these initiatives, it has to be acknowledged that the CTC/CTED (and consequently the SC) enjoy a wide margin of discretion. All States have weak points and room to improve. Yet, the adoption of sanctions would create a delicate environment in which any practice suspicious of discrimination would provoke the discredit of the SC's counter-terrorist policies and would severely undermine the legitimacy of the CTC/CTED, which until now have enjoyed a wide international consensus. Thus, in the short term, the adoption of coercive measures for failures to comply with Res 1373 seems neither possible nor convenient<sup>72</sup>, unless a State openly refuses to cooperate with the CTC and develops a deliberate strategy in support of international terrorism that goes well beyond breaching the Resolution's obligations.

In any case, no State can claim the right to unilaterally determine the non-fulfilment of Res 1373, or even more to avail itself of the legitimacy to impose its implementation coercively. In the institutional system established by Res 1373, the verification and declaration of disobedience is the responsibility of the CTC (the organ created for such action by the SC) or of the SC itself, and only the latter may determine the consequences in that case. It cannot be ruled out that a State uses arguments similar to those that accompanied Iraq's occupation in 2003 to justify the unilateral use of force against a State that does not cooperate in the fight against terrorism, even in the absence of SC authorization<sup>73</sup>. However, the nature of the measures envisaged in Res 1373,

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(last visited April 2013)). Besides, the CTC's Chairman has declared that the new reporting system put in practice from 2013 does not intend 'to imply failure by a State to comply with its obligations' and that 'data collected will not be used in any way to name and shame Member States' (Chair's Opening Statement for the briefing on the Committee's revised documents and procedures for assessing Member States' implementation of SC Res 1373 (2001) and 1624 (2005), 2 May 2013), available at [http://www.un.org/en/sc/ctc/docs/2013/2013-05-02-briefing\\_ctc\\_chair.pdf](http://www.un.org/en/sc/ctc/docs/2013/2013-05-02-briefing_ctc_chair.pdf), last visited May 2013).

<sup>70</sup> Supra note 53.

<sup>71</sup> Supra note 33.

<sup>72</sup> A High Level Panel on Threats, Challenges and Change created by the UN Secretary-General published a report in 2004 in which it proposed that the SC 'devise a schedule of predetermined sanctions for State non-compliance' (A More Secure World: Our Shared Responsibility, A/59/565, 2 December 2004, § 156), but this advice was ignored. When the CTC has launched in the past reflections on 'additional ways of addressing the cases of States that do not meet the requirements of Res 1373' it has never proposed the adoption of coercive measures (e.g. S/2012/172, 22 March 2012, § 9; S/2006/276, 4 May 2006, § 7).

<sup>73</sup> In a letter sent to the SC on 11 September 2002, the Russian President V. Putin accused Georgia of a 'glaring violation' of Res 1373 by permitting Chechen terrorists to use its territory and reserved the right to use the inalienable right to self-defence as stipulated in SC Res 1368 (2001) (Chantal de Jonge

which seek the improvement of the legal infrastructure and the material means against terrorism in the medium and long term, moves away from the theoretical foundations of pre-emptive self-defence<sup>74</sup>. It is only possible to imagine a legitimate armed reaction in circumstances where a State develops a direct cooperation with terrorist groups that are performing terrorist acts in other States, as happened in the 9/11 attacks<sup>75</sup>.

The adoption of unilateral countermeasures (that do not imply the use of force) against a State infringing Res 1373 could find some leeway in the ILC Articles on Responsibility of States for International Wrongful Acts, as they leave open the question of whether a third State not directly prejudiced by a violation of an obligation that protects a collective or general interest may adopt countermeasures against the infringing State<sup>76</sup>. Of course, one could argue that Res 1373 establishes obligations that protect collective/general interests, but in the context of the institutional architecture organized by the SC around Res 1373 it is only this institution that can evaluate failures to comply and determine the consequences. Most likely, any unilateral action that sought justification based on Res 1373 would damage its implementation system in a way that would be almost impossible to repair. In such circumstances, it is to be expected that an important number of States would cease to cooperate.

## V. Evaluation of the main achievements and shortcomings of SC Resolution 1373

The activation of political, material and technical resources against terrorism articulated around Res 1373 has substantially improved States' capacity to fight this scourge, above all raising the ability of those that were previously less sensitive to their responsibility in this field. A quick look at the ratification figures of the 16 main international counter-terrorist conventional instruments reveals the impressive progress achieved in the last decade on the normative level<sup>77</sup>. Although the ratification of treaties and the enactment of laws are not always followed by their proper implementation, the widespread articulation of coherent legislative frameworks (where there were none before) has to be qualified as a legal accomplishment and as an unprecedented success in the field of international criminal cooperation.

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Oudraat, 'The Role of the Security Council' in Jane Boulden and Thomas G. Weiss (eds), *Terrorism and the UN* (Indiana University Press 2004) 165.

<sup>74</sup> Yoshiro Matsui, 'Anticipatory or Preemptive Self-Defence and the World Order under the UN Charter', in R. K. Dixit (ed), *International Law: Issues and Challenges* (Hope India Publications 2009), vol. 1, 139; W. M. Reisman/ A. Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense' (2006) 100 *AJIL* 525.

<sup>75</sup> SC Res 1368 (2001), 12 September 2001. See Steven R. Ratner, 'Self-Defense Against Terrorists: The Meaning of Armed Attack', in Larissa van den Herik and Nico Schrijver (eds), *Counter-terrorism Strategies in a Fragmented International Legal Order* (Cambridge University Press 2013).

<sup>76</sup> See the Commentaries on Article 54 of the Draft Articles on Responsibility of States for International Wrongful Acts, A/56/10, 1 October 2001, where it is said that practice on this subject is 'limited and rather embryonic', and that this matter is left 'to the further development of international law'. Also see P. Picone, 'Erga omnes Obligations and the Codification of State Responsibility' (2005) 88 *Rivista di diritto internazionale* 893; Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Oxford University Press 2005).

<sup>77</sup> E.g., whereas in September 2001 only 4 States had become parties to the 1999 Convention for the Suppression of the Financing of Terrorism, in May 2013 this figure had risen to 182 States; whereas in September 2001 only 28 States were parties to the 1997 International Convention for the Suppression of Terrorist Bombings, 165 States were parties in May 2013 (see the figures of other counter-terrorist Conventions at [http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2\\_en.xml](http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml), last visited in May 2013).

However, as has been noted before, the correct and full implementation of these norms is much more difficult to achieve<sup>78</sup>. The lack of political will and/or the scarcity of material resources lead to poor results in the fight against terrorism on many occasions and this should avoid any overoptimistic analysis. From a sectorial perspective, there are three fields in which the situation is far from satisfactory:

a) The full implementation of the *aut dedere aut judicare* principle needs further efforts that will take time. Extradition continues to be a complex procedure that requires some degree of compatibility between the legal systems of the States concerned<sup>79</sup> and still in that case political or trust considerations can easily interfere with it<sup>80</sup>. Even if the principle is enshrined in the national legal system, numerous technical obstacles may impede in practice its application<sup>81</sup>. A certain harmonization of criminal laws, in particular with regard to terrorist offences, and a worldwide proliferation of extradition and judicial cooperation agreements seem necessary before we can envisage significant progress on this matter, as many States tend to be less efficient prosecuting terrorist offences perpetrated abroad when extradition is not possible.

b) Every State desires to control effectively its frontiers for many reasons (to fight smuggling, drugs or arms trade, illegal immigration, endangering endemic species, etc.), but no country has ever managed to seal its borders perfectly and many of them simply do not have presence in ample parts of their frontier perimeter for lack of resources. In this field we can only expect progress to be slow and dependent on the means available.

c) The prevention and prosecution of terrorism financing demands a high degree of technical expertise and material resources that are not easily available or that do not fit with the uses of the informal economy prevailing in many countries. The CTED, together with other international bodies, has organized a great number of workshops both at universal and regional levels, and has made an impressive effort of technical assistance. Nevertheless, while recognising that relevant progress has been made on this subject, the new payment methods, informal transfers, cash payments and the misuse of non-profit organizations still provide numerous channels of funding to terrorists who, besides, do not need great quantities of money to perpetrate their attacks<sup>82</sup>.

d) As explained before, ‘serious human rights concerns in the counterterrorism context persist in all parts of the world’<sup>83</sup>, and despite the integration of human rights and rule of law chapters in the evaluation of the technical assistance needs and in the OIAs it is clear that many counter-terrorism measures adopted in the wave of the internationally

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<sup>78</sup> Andrea Bianchi, ‘Assessing the Effectiveness of UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion’ (2006) 17 Eur J Int Law 881, at 893-900.

<sup>79</sup> Tine (n. 29) at 492.

<sup>80</sup> William Magnuson, ‘The Domestic Politics of International Extradition’, 52 Va.J.Int’l L. 839; Susan Kemp, ‘The Criminal Investigation and its Relationship to Jurisdiction, Extradition, Co-operation and Criminal Policy’, in Jessica Almqvist and Carlos Espósito (eds), *The Role of Courts in Transitional Justice: Voices from Latin America and Spain* (Routledge 2012).

<sup>81</sup> In 2009 the CTC adopted Policy Guidance on International Cooperation (S/AC.40/2010/PG.3) to help States to remove practical and legal obstacles to extradition of accused terrorists.

<sup>82</sup> It suffices to remind that the attacks of 11 September 2001 in the US were financed with less than 500.000 US dollars and those of 11 March 2004 in Madrid with 106.000 euros. See Michael Freeman (ed), *Financing Terrorism: Case Studies* (Ashgate Publishing 2013); Norman Mugarura, ‘An Appraisal of UN and Other Money Laundering and Financing of Terrorism Countermeasures’ (2013) 16 Journal of Money Laundering Control.

<sup>83</sup> S/2011/463, § 281.

supported effort against terrorism violate human rights. Furthermore, some States have taken advantage of the counter-terrorist policies as an excuse to restrict human rights and fundamental freedoms that the CTED itself qualifies as *jus cogens*<sup>84</sup>. The reading of the reports of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism of the UN Human Rights Council<sup>85</sup> offers an adequate perspective of the difficult task ahead.

The passing of time has shown the limitations of the SC legislative activity beyond the doctrinal debate. Reality has imposed its constraints in the implementation of supranational law at the universal level. With the present experience and from a transversal perspective, the main obstacles for the incorporation of Res 1373 into national law and practice can be summarized as follows:

a) Budgetary constraints vis a vis development or other political priorities. The successful implementation of counter-terrorist laws and policies may be very expensive and demand considerable human resources. The policing of internet or the tracking of financial transactions involves a great deal of work of highly skilled personnel and constant and permanent training, while the vigilance of frontiers usually implies the acquisition of costly equipment. A State may report having created a legal and institutional infrastructure against terrorism that formally meets the requirements of Res 1373 and yet fail to enforce the law for lack of funds or expert human resources<sup>86</sup>. This is the case in many countries, and especially in those with pressing needs derived from health or food shortages or suffering an armed conflict.

b) Obstacles to international information sharing. The exchange of information between different jurisdictions has proved to be one of the most useful mechanisms to prevent (and prosecute) terrorist attacks<sup>87</sup>. Therefore, several instruments that facilitate the exchange of data between States have been created, such as the Egmont Group<sup>88</sup>, and several institutions have established common databases to facilitate the inter-State sharing of information (e.g. Europol or Interpol). However, the need to protect the sources of information, or the political mistrust between different governments continue to pose a considerable obstacle to the swift exchange of anti-terrorist information, sometimes even between allied countries<sup>89</sup>.

c) Traditional obstacles to international cooperation in criminal matters. There are close connections between many terrorist groups and transnational organized crime, as the

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<sup>84</sup> Ibid.

<sup>85</sup> Available at <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx> (last visited in May 2013).

<sup>86</sup> Beth Elise Whitaker, 'Compliance among Weak States: Africa and the Counter-terrorism Regime', (2010) 36 *Review of International Studies* 639; Samuel Moki, 'From Blueprint to Implementation: Assessing the Progress of the African Union in the Fight against Terrorism', in John Davies (ed), *Terrorism in Africa: the Evolving Front in the War on Terror* (Lexington Books 2010).

<sup>87</sup> Joachim Wolf, 'Global War or Global Information-Sharing?: Military and Non-Military Means to Fight Transnational Terrorism', in Kazimierz Lankosz and Marcin Marcinko (eds), *Changes of international and European law as result of combating international terrorism: materials of the 11th Polish-German Seminar on Contemporary Problems of International Law: Kraków, 20-23 May 2006* (Institut Multimedialny 2006) 7.

<sup>88</sup> The Egmont Group consists of an informal cluster of Financial Intelligence Units that regularly cooperate in the fight against money laundering and financing of terrorism (see <http://www.egmontgroup.org/> last visited in April 2013).

<sup>89</sup> See e.g. the problematic case of El Motassadeq between Germany and the US in Timo Kost, 'Mounir El Motassadeq - A Missed Chance for Weltinnepolitik', (2007) 8 *German L.J.* 443.



former may obtain financing and material resources (arms, false identity documents, etc.) to commit their attacks in a symbiotic relationship<sup>90</sup>. In fact, international cooperation against terrorism is just a kind of international criminal cooperation<sup>91</sup> and thus suffers from the same technical and political obstacles (e.g., cumbersome extradition procedures, difficulties for international judicial cooperation). In parallel, the concealment of terrorism within the much broader flux of international criminal relationships further complicates its detection.

d) The lack of a worldwide definition of terrorism. Res 1373 did not make a definition of terrorism as this is a contentious issue that divides the international Community and any debate on this matter would have aborted the quick adoption of the Resolution<sup>92</sup>. This disagreement appears as the main obstacle for the elaboration of a comprehensive international convention on international terrorism in the UN<sup>93</sup>. The attempt of the SC to fill this gap with its own definition of terrorism in SC Res 1566 (2004)<sup>94</sup> was ignored because it failed to gain international consensus. Thus, the CTC/CTED have worked to avoid the problem and basically accepted the national definitions of terrorism, in spite of the inconsistencies and disruptions that this discrepancy causes in the international cooperation against terrorism<sup>95</sup>.

e) Lack of political thrust by the SC and the CTC in counter-terrorist cooperation in recent years. Although this may be an intended move to de-politicize cooperation against terrorism in the UN, it may also show that the main countries in the SC feel that political cooperation against terrorism has reached its limit within the UN system. In any case, the truth is that the activity of the CTC has become progressively more diplomatic, with the CTED developing a technocratic leading role in the SC activities<sup>96</sup>. This lowering of political direction may explain the creation in 2011 of the GCTF that lacks the legitimacy, diversity and universal projection of the UN, but that allows donor countries to address their political priorities in counter-terrorist cooperation flexibly and speedily. It cannot be disregarded that initiatives of this kind end up damaging the leadership and credibility of the SC counter-terrorist policy even if this is not their intention.

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<sup>90</sup> Mónica Serrano, 'The Political Economy of Terrorism', in J. Boulden/ T. G. Weiss (eds), *Terrorism and the UN* (Indiana University Press 2004) 199-202.

<sup>91</sup> Defending the need to deal with international counter-terrorism cooperation from the perspective of transnational criminal law and not in the context of the international regulation of armed conflicts, see Jelena Pejic, 'Terrorist Acts and Groups: A Role for International Law?', (2004) 75 BYIL 76-88.

<sup>92</sup> Eric Rosand, 'Resolution 1373 and the CTC: The Security Council's Capacity building' in Giuseppe Nesi (ed), *International Cooperation in Counter-terrorism* (Ashgate 2008) 85.

<sup>93</sup> A/66/37, 11-15 April 2011, § 10-18. See Eva Herschinger, 'A Battlefield of Meanings: The Struggle for Identity in the UN Debates on a Definition of International Terrorism' (2013) 25 *Terrorism and Political Violence* 183; Ben Saul, *Defining Terrorism in International Law* (OUP 2006) 184-190.

<sup>94</sup> SC Res 1566 (2004), 8 October 2004, § 3 defines terrorism as 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism'.

<sup>95</sup> The attempt by the SC to elaborate a universal list of terrorists (other than those designated by the 1267 Committee) in order to adopt sanctions against them was abandoned due to the lack of consensus on the criteria that would determine the inclusion on the list (S/2005/789, 16 December 2005, § 34).

<sup>96</sup> James Cokayne/ Alistair Millar/ Jason Ipe, *An Opportunity for Renewal. Revitalizing the United Nations Counterterrorism Program* (Center on Global Counterterrorism Cooperation 2010) 12.

In view of the precedent analysis, there is a general consensus about the important progress achieved by the CTC/CTED enhancing international cooperation and fostering the capacity-building of States against terrorism. At the same, it is equally clear that the task ahead for the full implementation of Res 1373 is titanic<sup>97</sup> and that these organs are not sufficiently equipped to cope with it. The economic and technical effort needed to continue improving these capacities is huge and will have to be sustained in the long term.

## **VI. Future prospects**

Terrorism is not a new phenomenon. It has a long history behind it and in all probability will continue to strike in the future as long as there are human beings ready to use violence in order to achieve their political aims or to seek revenge for real or imaginary grievances. International cooperation against terrorism has to be designed in the perspective of a permanent effort (and not of exceptionality) that must seek its legitimacy in the respect of the rule of law and the universality of its support. In this context, the UN has a crucial role to play as it possesses a comparative advantage in providing both sources of legitimacy. Furthermore, the SC may give to this international cooperation the potential teeth necessary to press those countries that resist abiding by minimum standards.

However, the present UN counter-terrorist structure is dysfunctional, as it has been constructed in an improvised and scattered way to respond to relatively urgent requests. This model has shown its limitations and needs to be redesigned because the UN risks progressively losing its leadership and credibility in this matter in favor of donor countries' multilateral or bilateral initiatives.

The CTC/CTED is the main counter-terrorist body of the UN and is now focusing on fostering/monitoring law enforcement, a complex task for which it lacks sufficient resources. In this context, its prospects of success are slim. This is so, in the first place, because law enforcement is just a part of the problem. Terrorism usually has deep social roots that connect with problems of injustice or violence that may take generations to solve and that need to be addressed to really eliminate the terrorist threat. Thus, development and social integration with respect for human rights have to be encouraged beyond the security perspective of the CTC/CTED by other institutions<sup>98</sup>. In the second place, many of the instruments used against international terrorism are shared with the fight against criminal groups and this task is inexhaustible. In the third place, it lacks the staff and resources to provide the technical assistance requested by many States and in most cases it delegates the job to other regional or specialized organizations (or donor countries) that are better prepared for these purposes. While this coordinating role should be praised as a way to maximize benefits from an efficient allocation of resources, the proliferation of counter-terrorist bodies questions the leading role of the CTC/CTED in such scenario.

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<sup>97</sup> S/2011/689, 11 November 2011, § 9.

<sup>98</sup> The CTED is aware of this problem and has addressed it by insisting on the development of 'comprehensive and integrated national counterterrorism strategies' that try to solve the factors that lead to terrorist activities (S/2011/463, § 288). However, the search for solutions for the political, economic or social problems that are in the origin of the terrorist activities clearly exceeds the CTED's mandate.

The need for an increased coordination of counter-terrorist bodies is especially pressing within the UN system and the creation of a UN counter terrorism coordinator appears as a flawed solution<sup>99</sup>: one person cannot solve the overlapping of competencies and, as chair of the CTITF, s/he would not be able to control the activities of the SC organs (even if s/he has the right to report to the SC). Therefore, I would suggest that the best solution for these problems would be the creation of a UN Counter-Terrorist Agency that would concentrate all UN efforts against terrorism<sup>100</sup>, bringing together the staff and resources of the CTITF and United Nations Counter-Terrorism Centre, the Terrorism Prevention Branch of UNODOC and even those of the CTED. This Agency could develop secure procedures to select its staff and should be able to open permanent offices in some States where reinforced assistance and close contact are needed in a long term perspective. It may be objected that Res 1373 has to be implemented by a SC committee. However, the basic task of the CTED today consists of the coordination and provision of technical assistance, which is progressively more intertwined with other forms of assistance (development, fight against crime, mediation in conflict resolution) that are typically dealt with by other UN Agencies or by programs and subsidiary bodies that depend on the GA. The relationship with the SC could be preserved by keeping the CTC within its realm and by establishing a system of reporting and cooperation similar to the one existing with the International Atomic Energy Agency, which has allowed the SC to impose sanctions against those countries not complying with their international obligations and threatening international security<sup>101</sup>.

However, this proposal seems far distant from the present view of the main donor countries that have preferred to deviate some their always scarce resources through other multilateral (e.g. CGTF) and bilateral initiatives. While the option for less formal and more effective instruments of counter-terrorist cooperation is understandable and not to be criticized, we should not underestimate the added value that universality provides to the fight against terrorism, as many countries will cooperate only in as much as the international regime does not seem to be imposed by the most powerful countries<sup>102</sup>. International consensus in this common struggle also produces material positive results and the UN is the right forum to generate it.

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<sup>99</sup> A/66/762, 4 April 2012, § 123-124.

<sup>100</sup> This Agency might also supervise the implementation by States of the universal conventions against terrorism. In fact, the CTC/CTED enhance States' counter-terrorist capacities beyond the ambit of Res 1373.

<sup>101</sup> E.g., SC Res 2094 (2013), 7 March 2013, § 4-5; SC Res 1929 (2010), 9 June 2010, § 4; SC Res 1874 (2009), 12 June 2009, § 8; SC Res 1718 (2006), 14 October 2006, § 6.

<sup>102</sup> Johnstone (n. 63) at 308.