SANCTIONS AGAINST STATES VERSUS THE ENFORCEMENT OF CRIMINAL LAW AGAINST INDIVIDUALS

A note on UN Security Council Resolutions freezing the assets of alleged terrorists[1]

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ABSTRACT

This article discusses some of the implications of the emerging trend to apply asset freezes, a type of 'economic sanction' recognized by international public law, to non-State actors without a territorial base. The UN Security Council has engaged in this practice since 2000, in the context of a sanctions program started in 1999 which targeted initially the assets of the Taliban regime of Afghanistan and was then extended in 2000 to cover also the assets of Usama bin Laden/Al-Qaida and related individuals.

The application of sanctions against non-State actors without a territorial base follows the same enforcement mechanisms as other sanctions programs;

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namely, in the case of asset freezes, banks and other financial institutions. However, there are key differences in the legal nature of multilateral sanctions against States and what comes close to the enforcement of criminal law against individuals. Against States, asset freezes work as a means of pressure to force a certain behavior, after which they are withdrawn and normal relations resumed. This contrasts sharply with action against suspected criminals, for whom asset freezes are an interim measure leading to confiscation; on the other hand, in the field of criminal law human rights issues come into play, namely the right to have a judicial review of the asset freeze.

The general conclusion of this article is that the manner in which asset freezes have been applied against individuals is highly problematic, given that it amounts to an exercise in criminal law enforcement, but without providing adequate means of legal redress; additionally, it provides an alternative to and somehow circumvents established mechanisms of inter-State legal assistance in criminal matters.

1. Introduction

In the late 1980's, various patrimonial strategies of crime control including the criminalization of money laundering, asset freezing, and confiscation, made their appearance in international law instruments, on the basis of being considered key strategies for combatting such law enforcement priorities as drug trafficking [1], organized crime in general [2], and terrorism, including the financing of terrorism [3]. The application of asset freezes — a form of economic sanction[4]

1 UN *Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (Vienna Convention 1988; in force November 1990), *ILM*, 1989, 493 ff.

2 UN *Convention against Transnational Organized Crime* (not yet in force), adopted by the General Assembly on 15 November 2000 (A/RES/55/25).

3 UN *International Convention for the Suppression of the Financing of Terrorism* (in force April 2002), adopted by the General Assembly on 9 December 1999 (A/RES/54/109). The general point to note is the firm belief that financial issues can play an important role in combatting crime. This explains the enthusiasm with which the control and repression of money laundering has evolved during the 1990's (for an engaged perspective see William Gilmore, *Dirty money. The evolution of money laundering counter-measures*2, Council of Europe, Strasbourg, 1999).

4 The concept of 'sanctions' is not used in the UN Charter, which speaks of non-forcible measures in art. 41 (and military measures in art. 42). Therefore, the commonly employed term 'sanctions' is narrower; e.g., the creation of the ICTY and the ICTR cannot be described as 'sanctions'.

—, to alleged terrorists by the UN Security Council, is a new development that flows from this general trend. It is clear that many of these topics have emerged in the international agenda through US influence [5].

In international pratice, the application of sanctions initially would involve completely isolating a State, and namely its foreign trade. Currently, the trend is towards the use of 'targeted' or 'smart' sanctions, that is, measures directed towards the leadership of the target State and their key interests, leaving aside the general population, which as much as possible should not be affected [6]. The method used relies on the elaboration of 'blacklists', namely as a way to accurately include the target government and also entities associated with it which could be used to evade a sanctions program.

In 1995, a new trend was initiated in the US: the application of sanctions to targets not connected with any particular State, namely terrorists [7], drug traffickers[8] and persons engaged in the spread of weapons of mass destruction [9].

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5 There is a long US tradition of economic and other sanctions. There are two basic pieces of legislation enabling its imposition: the Trading with the Enemy Act (enacted in 1917, six months after the US entered the war) and the International Economic Emergency Powers Act, enacted in the 1970's. These give the US President the power to declare a national emergency and apply sanctions. The US has applied sanctions in numerous occasions, against a large number of targets. As mentioned by an American author: 'economic sanctions became ends in themselves, used to demonstrate that the Government was 'taking action' to achieve diverse policy objectives ranging from combating communism, fighting the international drug trade or terrorism, to protecting democracy and human rights, and limiting the spread of weapons of mass destruction, for example. It is estimated that in the 1990's alone the United States resorted to some form of economic sanctions more than seventy times, affecting forty-two percent of the world's population' (PETER L. FITZGERALD, "If property rights were treated like human rights, they could never get away with this': blacklisting and due process in U.S. economic sanctions programs', *Hastings Law Journal*, 1999, 73 ff., at 89; 7 footnotes omitted).

6 Humanitarian concerns of these nature are on the basis of the 'Interlaken Process'; see SWISS FEDERAL OFFICE FOR FOREIGN ECONOMIC AFFAIRS, *2nd Interlaken Seminar on Targeting United Nations Financial Sanctions*, 11 f.; available online at http://www.smartsanctions.ch/int2_papers.htm).

7 On January 1995 US President Clinton issued sanctions against twelve terrorist groups (Executive Order 12947, *Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process*). On 6 July 1999 President Clinton blocked the assets of the Taliban (Executive Order 13129, *Blocking Property and Prohibiting Transactions with the Taliban*).

8 On October 1995 US President Clinton issued sanctions against Colombian drug traffickers (Executive Order 12978). On December 3, 1999, the same President signed into law the 'Foreign Narcotics Kingpin Designation Act'. This sanctions program specifically provided that the designations are not subject to judicial review. For comprehensive and updated information on all US sanctions programs, see the OFAC web site (http://www.ustreas.gov/offices/enforcement/ofac).

9 In the US, the agency entrusted with the administration of the sanctions programs, OFAC (Office of Foreign Assets Control) makes available the lists of blocked entities, namely on its web site, which then can be used in software blocking programs, of which there is an increasing

Whatever the attitude of the current Bush administration regarding money laundering issues before September 11, 2001 [10], after the attacks the pursuit of the 'money trail' was immediately identified by the US government as a key manner to repress and prevent terrorism: the 'war on terrorism' would have an 'economic war' component [11]. On 23 September 2001, US President George Bush issued an executive order blocking financial resources of alleged terrorists [12], under the International Emergency Economic Powers Act.

2. UN Security Council sanctions

Up to the 1990's, UN sanctions had been imposed only twice, against South Rodesia and South Africa. As a result of the end of the cold war, the application of sanctions became extremely frequent: Iraq, the ex-Yugoslavia (twice), Lybia, Somalia, Haiti, the UNITA movement of Angola, Rwanda, Liberia (twice), Sudan, Sierra Leone and Afghanistan, all became the target of sanctions [13].

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number of vendors. For a detailed analysis and critique of the operation of OFAC, see Peter Fitzgerald, 'Managing 'Smart Sanctions' Against Terrorism Wisely', *New England Law Review*, 2002, 957 ff. For comprehensive and updated information on all US sanctions programs, see the OFAC web site (http://www.ustreas.gov/offices/enforcement/ofac/). See also Fitzgerald, 'If property rights..', *supra* note \h 4, at 96 and 107.

10 There are signs that the new administration did not attach such great importance to financial investigations related to money laundering as the Clinton Administration, given high costs for government and banks (Ken Guggenheim, *Terror Asset Tracking Center Delayed*, Associated Press, Friday, Oct. 26, 2001; *Experts Accuse U.S. Agencies of Footdragging Before Sept. 11th*, Los Angeles Times, 15 October 2001). The 2001 *Money Laundering Strategy* corroborates this conclusion, as it stresses the need to analyse and review existing policies, to see whether it made sense to retain them.

11 On 14 September, the creation of an inter-agency Foreign Terrorist Asset Tracking Center was announced. This was not an entirely new initiative; funding had been approved by Congress in October 2000, but the center had not yet been set up as a result of various practical problems.

12 Executive Order 13224, *Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism* (66 Fed. Reg. 186, 25 Sep. 2001), subsequently amended. As of 13 September 2002, a total of 236 persons and entities had assets frozen (US President, *Periodic report on the national emergency with respect to persons who commit, threaten to commit, or support terrorism*, 22 September 2002, House Document 107–264, p. 3). See, in detail, James J. Savage, 'Executive Use of the International Emergency Economic Powers Act. Evolution through the Terrorist and Taliban Sanctions', 2001, *Currents International Trade Law Journal*, 28 ff.

13 See, in detail, Andreas Paulus, in Bruno Simma (ed.), *The Charter of the United Nations. A commentary*[2], OUP, Oxford, 2002, *sub* art. 29, mn. 36, p. 548; for a critical overview, see David Cortright and George Lopez, *The sanctions decade. Assessing UN strategies in the 1990's*, Lynne Rienner, Boulder/London, 2000.

Sanctions have been imposed for a large variety of reasons, namely to try to reverse an unlawful invasion and occupation, to stop human rights abuses, to force the extradition of alleged terrorists, or to avoid genocide.

Sanctions are approved as a consequence of the Security Council determining the existence of a threat to international peace and security, under article 39 of the UN Charter. Article 41 regulates all non-forcible or non-military measures:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Six brief comments are called for. First, the range of possible sanctions is quite wide, as apparent from the examples [14] given in this provision; the types of sanctions so far used include namely: general trade embargoes, limited embargoes on arms, oil or other commodities, denial of financial assistance, severance or restriction of travel, freezing of funds and assets, prohibition of the provision of financial services, reduction of diplomatic personnel, prohibition on the import of diamonds. Second, although the language used is not extremely clear ('may call upon'), sanctions are compulsory measures, which create binding obligations for UN members (art. 25 UN Charter). Third, despite what the terminology may suggest, sanctions are not meant to punish in a retributive manner (such as in criminal law); rather, in most cases they are intended as non-military coercive measures designed to force or persuade the target to adopt a certain behavior, which, if not forthcoming, may then lead to other measures and ultimately to the use of force. Fourth, sanctions are enacted 'to give effect to [Security Council] decisions', that is, the Security Council takes a certain decision (e.g., directing a State to extradite an alleged terrorist) and, separately, approves sanctions to force the targeted State to comply with such prior decision (e.g., an air embargo).

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14 The adoption of a non-exhaustive enumeration in this provision was the result of the negotiation between the Four Powers at Dumbarton Oaks, where the initial position of the Soviet Union was to have a closed catalogue of sanctions; see Jochen Frowein, in Bruno Simma (ed.), *The Charter of the United Nations*, *supra* note \h 13, *sub* art. 41, 736 ff. The *ad hoc* criminal tribunals for Yugoslavia and Rwanda were established by Resolutions of the Security Council under article 41 as non-military means for the restoration of peace. This issue was addressed by the ICTY itself, which concluded that '...the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41' (*Prosecutor v. Tadic*, ICTY, Case IY-95-1-AR72, Appeals Chamber, 2 October 1995, para. 36).

Fifth, sanctions affect other treaties (e.g., civil aviation or trade agreements), as a result of article 103 UNC, and also affect private legal relations [15]; they also require criminal law regimes to deal with the evasion of sanctions.

Sixth, sanctions are predicated on a threat to international peace and security, which is not necessarily the same as a breach of international law (an 'international wrongful act', in the sense relevant for State responsibility); in other words, the process is primarily political, in all relevant issues. We can say, with LORI FISLER DAMROSCH [16], that:

Procedurally, of course, Security Council decisions under Chapter VII are non-judicial and surely non-criminal in character; they are not governed by anything like the standards of proof that apply to criminal trials in the national courts of the countries seeking surrender of the accused; nor is there any legal obligation for the Council to afford 'due process' to a potential target of Chapter VII sanctions.

This view is confirmed in the Interlaken report, where, contrasting action against money laundering and sanctions, in order to find out how similar to money laundering are the conducts taken for the evasion of sanctions, it is said that:

The basis for action in a sanctions context is a political decision by the UN Security Council, while it is penal law in a money-laundering context. This leads to differences with respect to the nature and scope of measures and procedures applied, and the rights and obligations of the targeted individuals under national laws. For example, international co-operation in a sanctions context will not, in general, take the form of judicial assistance in criminal matters neither the confiscation of assets nor the extradition of persons will not normally apply in a sanctions context [17].

Clearly, Security Council resolutions do not have a nature similar to judicial decisions, the enforcement of which would require legal assistance [18].

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15 E.g., causing the temporary or definitive non-performance of obligations — arising clearly not from fault of the debtor. Sanctions create credit risks.

16 'Enforcing international law through non-forcible measures', *Recueil des Cours de l'Academie de Droit International*, vol. 269, 1997, at 138.

17 See SWISS FEDERAL OFFICE FOR FOREIGN ECONOMIC AFFAIRS, *2nd Interlaken Seminar on Targeting United Nations Financial Sanctions*, 11 f.; available online at http://www.smartsanctions.ch/int2_papers.htm (the site of the so-called *Interlaken process*; last visited 29 October 2001).

18 Indeed, the only cases where, under international law, 'vertical' judicial assistance in criminal matters is to take place is in relation with the *ad hoc* tribunals (ICTR and ICTY) and, in terms

3. The Afghanistan / Taliban UN sanction program

The freezing of assets of individuals was used in the framework of the UN sanctions program targeted at the Taliban, the then rulers of most of Afghanistan (under the Islamic Emirate of Afghanistan, which was generally not recognized by the international community).

This program was initiated by Resolution 1267, of 15 October 1999 [19], in which the Security Council, acting under Chapter VII of the Charter of the United Nations, determined that the failure of the Taliban authorities to comply with Resolution 1214 (8 December 1998) [20] constituted a threat to international peace and security. Additionally, the Security Council demanded from the Taliban the 'turn over' of Usama bin Laden to 'appropriate authorities' so that he could be brought to justice, in connection with the bombing of US embassies in Kenya and Tanzania, where 224 persons were killed [21]. The operating paragraph reads:

> [The Security Council] [d]emands that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice. (para. 2)

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more accommodating to State sovereignty, with the ICC. See Kai Ambos, 'The International Criminal Court and the traditional principles of international cooperation in criminal matters', *Finnish Yearbook of International Law*, 1998, 413 ff. These provide for the protection of the substantive and procedural rights that apply in criminal procedure. For a discussion, see Salvatore Zappalà, *Human rights in international criminal proceedings*, OUP, Oxford, 2003; Luisa Vierucci, *The international criminal tribunal for the former Yugoslavia and the co-operation of states*, European University Institute, Florence, 1998 (PhD thesis).

19 S/RES/1267 (1999); subsequently modified by Resolutions 1333, 1363, 1388 and 1390.

20 Which, *inter alia*, demanded: the end of the hostilities between the Taliban and other Afghan factions; that the Afghan factions put an end to discrimination against girls and women and other violations of human rights; that the Taliban stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice; and that the Taliban, as well as others, halt the cultivation, production and trafficking of drugs.

21 This was not the first case where the Security Council demanded the extradition of suspects; see Security Council Resolutions 748 (1992; Lybia) and 1054 (1996; Sudan). In this regard, the Security Council takes the role of enforcer of the procedural rule *aut dedere aut judicare* and the substantial rule prohibiting State complicity in acts of terrorism.

This Resolution allowed 30 days for compliance, after which Member States were required to impose a flight ban [22] and also to:

Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below [the sanctions committee], and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need. (para. 4 (b))

The financial sanctions consist in a freezing of existing assets and the prohibition of making available further funds ('banking embargo').

In accordance with standard UN practice, a 'sanctions committee' was set up by the same Resolution (para. 6), to manage the application of sanctions and namely to monitor compliance. The Committee has approved the list of individuals and entities targeted, which includes holders of political and diplomatic positions in the then Taliban Government of Afghanistan (including namely: Ministers, Deputy Ministers, Governors, Ambassadors, Consuls and Attachés). This therefore was a case of 'targeted' or 'smart' sanctions, directed at the State and at the political leaders personally, in order to minimize as much as possible the impact on the civilian population [23].

These measures were directed against a movement (a 'faction') which then controlled most of the territory of Afghanistan. Therefore, they were in line with previous practice of targeting States and also other entities controlling part of the territory of a State (such as the UNITA movement in Angola or the Bosnian Serbs).

It is well known that these sanctions failed to achieve their purpose; namely, the Taliban have not surrendered Usama bin Laden or halted the production of opium, the terrorist training camps were not closed, the human rights abuses were not stopped, etc.

As a result, in December 2000, by Resolution 1333 [24], the Security Coun-

22 Which was later terminated by Security Council Resolution 1390 (16 January 2002), after the military defeat of the Taliban.

23 It must be clarified that in order to effectively target States, it is often necessary to also target entities (such as companies) or even individuals acting for the sanctioned State (namely entities trying to evade sanctions).

24 S/RES/1333, 19 December 2000.

cil took two types of additional measures. On one hand, the sanctions program against the Taliban regime was extended so as to include also an arms and military assistance embargo (para 5, a to c), the closure of the offices of the Taliban and Ariana Afghan Airlines in other countries (para. 8, a and b), as well as an embargo on the sale of acetic anhydride (para. 10). On the other, the Security Council also approved a freeze of assets of Usama Bin Laden and the Al-Qaida organization. Formally, this was not a separate sanctions program but simply an extension of the previous Afghanistan/Taliban sanctions, to include other targets. The wording is:

> [...all States shall further take measures] To freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those of the Al-Qaida organization, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaida organization and *requests* the Committee to maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization. (para. 8 (c))

In this case, the targets *are the alleged terrorists themselves*, and no longer a State (Taliban-controlled Afghanistan). The Sanctions Committee was tasked with keeping a list of the individuals and entities associated with Usama bin Laden [25]. The list of targets approved includes many who do not have any territorial connection, and includes nationals and entities from quite a few different countries. All indications are that the committee was not provided with concrete evidence supporting the inclusion of each and every name in the 'blacklist'.

These measures were to remain in force for a period of 12 months [26].

After the military intervention as a result of which the Taliban regime lost the control of power in Afghanistan, the Security Council reacted, in what

25 The list and its updates can be seen on the website of the Taliban Sanctions Committee (http://www.un.org/Docs/sc/committees/AfghanTemplate.htm).

26 S/RES/1333, para. 23.

concerns the sanctions regime, by adopting S/RES/1390 (16 January 2002). The Security Council lifted the flight ban imposed on Ariana Afghan Airlines [27] and *decided* that

all States shall take the following measures with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) to be updated regularly by the Committee established pursuant to resolution 1267 (1999) hereinafter referred to as 'the Committee':

(a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit, by their nationals or by any persons within their territory.

It should be noted that the Taliban are still designated as targets, despite the fact that they have in the meantime lost power. They are presumably henceforth regarded as alleged aiders and abetters of terrorism.

Regarding the asset freeze, this Resolution retouches the language; it implies no substantial amendment to the sanctions regime imposed.

In this Resolution, the Security Council has also imposed a travel ban and prohibited the sale of arms to both the ex-rulers of Afghanistan and the alleged terrorists.

The sanctions committee has continued its work on the list of entities subject to the sanctions, adding and deleting entities and individuals [28].

4. Sanctions against non-State actors?

Prior to these developments, collective sanctions were targeted at States, governments, and non-State actors with a territorial basis, in order to influence their behavior.

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27 Resolution 1388 (15 January 2002).

28 See www.un.org/Docs/sc/committees/AfghanTemplate.htm.

In the normal context of sanctions as collective measures, the freezing of assets is by nature temporary: it is supposed to be withdrawn once the targeted State has complied with the obligations imposed by the Security Council. That was for example the case of the sanctions against Lybia, which were in force for a number of years and were then terminated after Lybia handed the two suspects of the Lockerbie bombing for trial.

The initial freezing order — of assets of the Taliban (Resolution 1267) — followed this logic. It was targeted against what is termed a 'faction' which was, for the most part, governing Afghanistan, in order to force a number of actions, namely to enforce the obligation to surrender an alleged terrorist.

However, the extension of the freezing order to alleged terrorists has broken with this rationale, sending the Security Council into uncharted waters: it is directed not at a government but rather at crime suspects (Usama bin Laden and the Al Qaida organisation) and does not aim at any particular conduct from the targets, as there is no primary obligation, imposed by the Security Council, that they are expected to comply with[29]. The threat to peace is simply the existence and operation of terrorist groups. Targeting terrorist forms part of an open-ended project to fight criminality ('war' on terrorism) which has no clear or visible point at which it terminates.

In this manner, the freezing of assets of alleged criminals is no longer within the Whestphalian realm of inter-State collective sanctions and becomes a form of law enforcement against non-state actors.

This distinction must be made because the purpose of freezing orders is not the same in these two areas. In the context of criminal law and procedure, a freezing order takes place either because the assets are intended to finance a crime or because they represent the proceeds of crime. The usual outcome is for prosecutors to attempt to confiscate the assets in the course of the criminal procedure; and the court will order their confiscation if sufficient evidence is produced. Freezing is here an intermediate step to confiscation and clearly not a means to exert pressure on the crime suspect to adopt any kind of conduct. The ultimate purpose (confiscation) is pursued, in the field of crimes that generate profits, in accordance with the legal rule (as well as moral rule and sound crime prevention policy) according to which 'crime should not pay'. In the field of terrorism, which in principle does not generate profits but rather raises the need for funding, the confiscation of assets works in a purely

29 There is no previous status to which the sanctions purport the alleged terrorists to return to. The freezing of their assets clearly aims to obstruct their capability to operate effectively. In this regard, the Security Council is performing a law enforcement role.

preventive manner, designed to obstruct the work of the criminal entity by cutting its sources of finance.

As mentioned by PETER FITZGERALD:

Typically, when another country's assets are blocked or frozen under one of these [US] sanctions programs, they are simply held as 'bargaining chips' until more normal governmental relations are resumed. The competing claims are then offset (...) and the funds disbursed. However, blocking assets belonging to criminals and terrorists is much more like forfeiture — it is highly unlikely that Osama bin Laden or Al Qaeda will ever resume 'normal' relations with the U.S. and seek to negotiate the recovery of any blocked assets [30].

Under this light, the fact that the Security Council Resolutions 1333 and 1390 applied sanctions to non-State actors is cause for a certain degree of perplexity.

If Usama bin Laden and the Al-Qaida organisation are terrorists, then, in accordance with the law of most countries, they should be sentenced to criminal penalties and their assets should be confiscated. The UN Convention for the Suppression of the Financing of Terrorism states precisely that the financing of terrorism should be criminalized and the funds or assets confiscated (art. 8). The conclusion is unavoidable that the Security Council, by requiring States to apply sanctions to suspected terrorists and terrorist financiers, has left the real of inter-State intercourse and entered that of criminal law and procedure, where the goal is punishment: the application of penalties to guilty persons and the confiscation of their assets; and, as an intermediate step, the freezing of such assets. An asset freeze ordered by the Security Council against private individuals appears to be, substantially, a measure of criminal procedure, indeed an 'indictement' for criminal conduct (in the cases where names are named): the Security Council is effectively stating that the individuals whose funds are to be frozen (in accordance with the lists prepared by the Sanctions Committee) are either members or aiders and abetters of terrorist groups.

5. CHALLENGING FREEZING ORDERS

Can sanctions against non-territorial entities be judicially challenged and possibly quashed? What is the availability of legal safeguards? Should individuals be able to challenge freezing orders, namely on the basis of mistaken identity or lack of factual basis for their application?

30 PETER FITZGERALD, 'Managing 'Smart Sanctions' Against Terrorism Wisely', *supra* note \h 9, 981 f.

If sanctions are directed at individuals and entities not connected with any State, and especially if the sanctions have a criminal law-related nature, issues of fundamental rights come into play. A freezing order may cause any number of practical problems, such as the termination of all business operations (causing the shutdown of a company), or major complications for individuals who do not have other income and may find themselves unable to continue their normal daily lives. A freezing order attacks a fundamental right, the right of property, as it disturbs its free disposition and transfer.

In this light, *de jure condendo* the question on whether legal safeguards should be available has necessarily to be answered in the positive. If a person named on a list has his or her assets frozen but wants to have such funds released, namely on the account that he or she has never financed terrorists nor was planning to do so, there must be judicial mechanisms available for this purpose, given that their inclusion in a 'blacklist' of suspected terrorists amounts implicitly to a criminal indictment. The right to judicial review should not be denied by UN organs; namely, the Security Council action should respect human rights standards, which are part of the broad purposes of the UN (art. 1–3, UN Charter; art. 14 ICCPR). The sanctions Resolutions do not expressly exclude resort to judicial review.

The sanctions committees are not provided with concrete evidence supporting the inclusion in the 'blacklist': they simply approve lists brought forward by some of the Member States, on the basis of intelligence gathered by them. There is no transparency in the process. Identifying the members of e.g. a terrorist group, a secret entity by nature, is certainly prone to errors.

Is there a way in positive law to challenge freezing orders, either under international law or domestic law?

Under international law, it is widely understood that determinations by the UN Security Council of the existence of a threat to international peace and security are not reviewable by the International Court of Justice, as such determinations are eminently political [31]. Additionally, individuals no not have access to the ICJ to challenge decisions of the Security Council; indeed, even for Member States that has so far proved impossible: the ICJ does not have the power to review the legality of Security Council actions, in a direct manner, like a domestic constitutional court. The fact that Security Council decisions may be subject to some legal constraints does not necessarily mean that they are amenable to judicial review. Therefore, there are currently no ways of reviewing 'blacklisting' decisions under international law.

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31 See Schweigman, *The authority of the Security Council under Chapter VII of the UN Charter. Legal limits and the role of the International Court of Justice*, Kluwer, The Hague, 2001, 265 ff.

In connection with the freezing of assets, some States, such as Sweden, have applied pressure to find ways to deal with this problem. In response to this, in August 2002 a 'de-listing' procedure has been agreed [32]. This is a mechanism of diplomatic protection to seek to obtain de-listing; namely, it requires the initiative of the State of nationality of residence and it is subject to veto ('reverse veto', regarding de-listing). Therefore, being simply a political method of consultation and negotiation between the States concerned, it is not a satisfactory judicial safeguard. Individuals are faced with a situation where they are the object of measures enacted by an international organisation but do not have any effective means of redress.

It does not seem possible to review decisions taken by international organizations under domestic law. If a national court was to terminate a freeze, this would inevitably amount to a breach of international law, engaging the international responsibility of the State [33]. However, under the constitutional rules of many States, a denial of judicial review is inadmissible. If the obligation

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32 Press Release SC/7487, AFG/203. The text is the following:

'Without prejudice to available procedures, a petitioner (individual(s), groups, undertakings, and/or entities on the 1267 Committee's [the Committee] consolidated list) may petition the government of residence and/or citizenship to request review of the case. In this regard, the petitioner should provide justification for the de-listing request, offer relevant information and request support for de-listing.

The government to which a petition is submitted ('the petitioned government') should review all relevant information and then approach bilaterally the government(s) originally proposing designation ('the designating government(s)') to seek additional information and to hold consultations on the de-listing request.

The original designating government(s) may also request additional information from the petitioner's country of citizenship or residency. The petitioned and the designating government(s) may, as appropriate, consult with the Chairman of the Committee during the course of any such bilateral consultations.

If, after reviewing any additional information, the petitioned government wishes to pursue a de-listing request, it should seek to persuade the designating government(s) to submit jointly or separately a request for de-listing to the Committee. The petitioned government may, without an accompanying request from the original designating government(s), submit a request for de-listing to the Committee, pursuant to the no-objection procedure.

The Committee will reach decisions by consensus of its members. If consensus cannot be reached on a particular issue, the Chairman will undertake such further consultations as may facilitate agreement. If, after these consultations, consensus still cannot be reached, the matter may be submitted to the Security Council. Given the specific nature of the information, the Chairman may encourage bilateral exchanges between interested Member States in order to clarify the issue prior to a decision.'

33 It does not seem possible to affirm that the Security Council freezing orders, because they emerge from a political process, would be seen only as directed to national administrations and/or prosecutors, so that, in order to safeguard the rule of law, they would not prevent national

arising from Security Council Resolutions is to freeze assets, through administrative action, without a time limit, and without possibility of appeal, the situation may become unsustainable. It is not possible to keep an asset freeze in force indefinitely and without appeal, and this is an instance where clearly there is tension between international law and constitutional domestic systems. This tension has to be solved by UN law in one of two possible ways: either UN law terminates the practice of crime-related asset freezes, or it must provide a proper method for legal review.

6. Legislative action required by the Security Council

Soon after 11 September 2001, the Security Council adopted Resolution 1373 [34], which has imposed a series of obligations upon UN Member States, namely to (para. 1):

a) Prevent and suppress the financing of terrorist acts;

b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

courts from reviewing the inclusion in the 'blacklists', so that national measures implementing freezing orders enacted in accordance with Security Council resolutions would be challengeable in national courts. In this interpretation, the resolutions would not pre-judge and would respectful of future court determinations on the effective association with terrorists of the persons involved; the lifting of a freeze would not be regarded as a breach of international law. The review would not question the Security Council action as a whole, but only the individual acts taken in its execution, as the method mostly used to apply sanctions in domestic legal systems is through executive channels, namely by those in charge of banking supervision (bank account freezes), border controls (travel ban), international trade (trade embargoes), etc. The discussion in national courts would not center on the legality of Security Council action but rather on the appropriateness of the inclusion of particular persons in the blacklist.

In any event, this view would still face a serious practical problem: in court proceedings intended to reverse a freezing order, an affected party would have to prove a negative fact such as the non-involvement in terrorism. Evidence of negative facts is hard to produce. In normal criminal proceedings, it is for the prosecution to show with some probability that a person is involved in criminal activity in order to obtain a freezing order. However, as mentioned, Security Council-mandated asset freezes are executed on the basis of intelligence which is not disclosed because, it is said in a self-referential manner, that would endanger the ability to gather intelligence.

34 S/RES/1373, 28 September 2001.

c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.

This paragraph requires, in general, the adoption of policies against the financing of terrorism and, specifically, legislative measures and an asset freeze and banking embargo [35].

These measures cover any and all terrorists worldwide. There is no specific connection with a particular conflict or terrorist group: the language used is broad and abstract. The Resolution covers all terrorist groups, irrespective of the location of their operations or their political agendas. Additionally, the measures required are of a permanent character, and not temporary. This is, therefore, *legislative* action by the Security Council.

This action by the Security Council replaces the normal method to deal with these cases — treaty-making and legal assistance in criminal matters — with action under Chapter VII. The Security Council took action in a field which had been recently regulated by a treaty, the UN *International Convention for the Suppression of the Financing of Terrorism*, which was adopted by the General Assembly on 9 December 1999. According to this convention, the financing of international terrorism is to be criminalized (art. 2), and State Parties are required namely to 'take appropriate measures, in accordance with [their] domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing [terrorism] as well as the proceeds derived from such offences, for purposes of possible forfeiture' (art. 8-1).

35 A Counter-Terrorism Committee was also established by this Resolution, to which Member States are required to report the measures adopted. Therefore, the model adopted seems to be similar to that of a convention with reporting requirements.

Therefore, the intergovermental method normally used in the field of transnational criminal law was bypassed by binding action of the Security Council, which mandated a criminal policy directed *inter alia* at freezing (and presumably confiscating) the assets of all terrorists worldwide in order to make it more difficult for such terrorist organizations to operate. Resolution 1373 is in fact requiring States to apply measures that assume the existence in their domestic legal systems of laws allowing the criminalization of the funding of terrorism, confiscation and freezing — which would also be required by the ratification of the *Convention for the Suppression of the Financing of Terrorism*. Article 103 of the UN Charter provides that the obligations of the Member States under the Charter prevail under any other international agreement. This is sometimes reaffirmed in certain Resolutions, under a formula that is usually similar: 1267, para. 7; 1333, para. 17. This anticipation of conventional rules through a UN Security Council Resolution, in practice, represents a push to ratification of the convention on the financing of terrorism.

It remains to be seen what the future evolution will be. The ratification of the *Convention for the Suppression of the Financing of Terrorism*[36] should alleviate the problems caused by 'blacklisting' which have been the focus of this article. Standard mechanisms for inter-State legal assistance for the prevention and repression of terrorism can increasingly be relied upon. These mechanisms provide human rights guarantees. It is possible that the use of the parallel and problematic system of freezing of assets ordered by the Security Council may be discontinued.

7. Final remarks

In the present case, a non-State actor (an alleged international terrorist organization) was considered as a threat to international peace and security. On the other hand, a state that allegedly harboured that terrorist organization was also considered as a threat to international peace and security. In the end, non-military and military measures were targeted against both. However, the freezing of assets imposed against them has a different legal nature, despite the fact that the names of targets may all be in the same list. There are diverse practical consequences, the most important of which is that in the field of criminal law considerations of fundamental rights come into play. This does not happen with purely inter-State sanctions. This distinction between sanctions against a State

36 The Convention, at the time of writing, has already attracted 132 signatures and 59 ratifications. For updated information see untreaty.un.org/english/Status/Chapter_xviii/treaty11.asp.

and the enforcement of criminal law against non-State actors became very clear regarding the outcome of the financial sanctions: after the Taliban were removed from power, the inter-State sanctions against Afghanistan were lifted, but the same did not happen with the measures of criminal law against terrorists. In this area, enforcement is continuing, this meaning for example that the sanctions committee will continue to update the lists of suspected terrorism financiers. It thus apear that it makes sense to speak of sanctions only when they are targeted against States. Action against non-State actors is much more like a coordinated law enforcement drive (initiated internationally and executed by national jurisdictions), and not inter-State multilateral sanctions as commonly known.

Initiative was provided by the UN Security Council acting under chapter VII, on the basis of the existence a threat to international peace and security. The Security Council, an international political organ, created law enforcement obligations to UN Member States. This represents an overtaking of the intergovernmental approach of international criminal law treaty-based crimes by the binding commands of the Security Council for restoring peace and security. The pursuit of peace was seen to require the prosecution of a certain criminal policy by Member States. The UN Security Council resolutions show an issue which has always been regarded as a law enforcement problem being considered as a problem of international peace and security; there is a merging of the two perspectives, but the criminal law perspective has not disappeared.

There seems to be a legislate function under chapter VII, as resolutions mandate a concerted international policy against terrorism. On the other hand, there is a certain circumvention of mutual legal assistance arrangements. In normal cases, a State willing to prosecute individuals beyond its territorial jurisdiction has to use standard methods on inter-State legal assistance, which require namely the showing of evidence. The use of the UN Security Council Resolutions jumps over these normal methods. 'Blacklisting' resolutions are legally binding on all UN Member States, prevail over treaties, and do not need to be supported by evidence of criminal conduct.

Regarding the rights of individuals, it appears that criminal law measures should only be undertaken with proper due process guarantees; this is inherently not possible in the context of a political organ. But in this case this is aggravated by the fact that, much like a secret police [37], action is taken on the basis of undisclosed intelligence. The legal and practical difficulties related to the reversal of the 'indictement' in national courts seem unsurmountable: the quashing of an

37 Winfried Hassemer, 'Límites del estado de derecho para el combate contra la criminalidad organizada', *Revista Brasileira de Ciências Criminais*, 1998, no. 23, 25 ff.

asset freeze would be a breach of international law and, besides it would require evidence of a negative fact. Another option — a direct request to the sanctions committee for an amendment of the list — is simply a diplomatic mechanism which does provide adequate guarantees and is not satisfactory. We are witnessing the enforcement of criminal law by a political organ. The enforcement of international criminal law should be undertaken by impartial courts, namely, in certain cases, by international courts and tribunals, and not by a political body which does not function according to rules of due process. The lists of suspects should cause the opening of criminal procedures, in the course of which assets may be frozen, if found, and not just open-ended and unchallengeable asset freezes. Legal assistance may be requested in the context of such criminal proceedings, in accordance with the UN *Convention for the Suppression of the Financing of Terrorism*, national criminal procedure codes and laws, which provide due process guarantees.

Finally, and this is a point that merits an enquiry much beyond the limits of this paper, the reaction of the Security Council shows a strong belief in the efficiency of a strategy to fight terrorism through the financial flank. Reflecting this view, the UN Convention for the Suppression of the Financing of Terrorism states in its preamble that 'the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain'. However, the effectiveness of such follow-the-money strategy for the prevention of terrorism is likely not so high. Presumably, it may produce results regarding the *repression* of terrorist crimes, given that the mechanisms tipically associated with it provide for large-scale data collection and storage which are undoubtedly of use regarding the investigation of crimes already committed, as seen in the investigation into the attacks of September 11, 2001. However, in what concerns *prevention*, such effectiveness must be very low, if any at all, namely because the amounts involved are minuscule when compared with the amounts arising from drug trafficking, which makes them extremely hard to trace.