

THE UNITED NATIONS SECURITY COUNCIL AND INTERNATIONAL TERRORISM

Lauro L. Baja, Jr.*

INTRODUCTION

The United Nations' view of and reaction to terrorism were forever changed after the attacks in the United States during the fine autumn morning of September 11, 2001. The following day, these acts of terror perpetrated by Usama bin Laden and his cohorts in the Al Qaida organization stood condemned by both the United Nation's General Assembly and its Security Council.¹ Speaking before the General Assembly on November 10, 2001, United States President George W. Bush essentially laid the gauntlet for every country to respond to the menace of terrorism,

* Permanent Representative of the Philippines to the United Nations. President, UN Security Council (June 2004). Chair, Committee 1566 (anti-terrorism), UN Security Council. Senior Undersecretary of Foreign Affairs (1998-2003); Assistant Secretary for Asian and Pacific Affairs (1993-97). Philippine Ambassador to Italy (1997-98) and to Brazil (1986-93). Order of Sikatuna, Rank of Datu (2003). Gawad Mabini Award, Rank of Dakilang Kamanong (1999). Ufficiale nell Ordine "Al Merito Repubblica Italiana" (1998). Ordem de Gran Cruz de Rio Branco (1993). Foreign Service Course, Oxford University (1965). LL.B. (1960), B.S. Jurisprudence (1960) University of the Philippines.

The author will again serve as president of the Security Council for the month of September 2005. The views expressed in this essay are purely his own and does not represent the official position of the Philippine Government. *Cite as* Lauro Baja, Jr., *The United Nations Security Council and International Terrorism*, 79 PHIL. L.J. 905, (page cited) (2005).

¹ The General Assembly was scheduled to open its 56th session on September 11, 2001 but this was postponed until the following day because of the attacks. In its first plenary meeting on September 12, the General Assembly adopted without a vote a resolution condemning the terrorist attacks against the United States. UN Doc. A/Res/56/1 (2001), *available at* <http://www.un.org/documents/ga/docs/56/agresolution.htm>.

On the same day, the Security Council also adopted resolution 1368, which condemned international terrorism as a threat to international peace and security, and recognized the inherent right of individual and collective self-defense under the United Nations Charter in responding to terrorist acts. UN Doc. S/Res/1368, ¶ 1 (2001), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>; <http://www.state.gov/p/io/rls/othr/2001/4899.htm>.

which he said is threatening not just America but the whole of civilization itself.²

Given its vast powers and prerogatives under the United Nations Charter,³ the Security Council has taken center stage in the world body's efforts at combating international terrorism since the day now etched in history simply as 9/11.

This essay will consider both the relevant resolutions adopted by the Security Council in its efforts to combat international terrorism and their impact in the development of international law, particularly the law rooted in the UN Charter. Rather than presenting an in-depth analysis of these resolutions, a survey will be attempted on some of their legal and policy implications. This essay's tone will be generally descriptive, although critical analysis on some of the questions it addresses will be inevitable.

It is hoped that this essay will be helpful in understanding both the Council's current practice and its impact and relevance on Philippine participation as a UN member state. Globalization has tethered the country's future to the world community's interlocking interests and responsibilities. These concerns demand not only that we take advantage of opportunities brought about by the shrinking global village, but also that we confront the challenges and fears of new threats, such as terrorism, that the international community faces today.

I. LEADING THE POST-9/11 RESPONSE AGAINST TERRORISM

Before 9/11, the role played by the Security Council with respect to terrorism was inhibited by its ambivalence regarding the conceptual questions of what constitute the core of terrorism and what the appropriate responses against it are.⁴ Before its present resurgent interest in providing

² See George W. Bush, *The Coalition Against Terrorism: The United Nations' Place in the Fight*, VITAL SPEECHES OF THE DAY, Dec. 1, 2001, at 101.

³ The Security Council is the only international body that has the legal prerogative to use force under the UN Charter. The Charter proscribes the use of force except by the Council when exercising its prerogatives under chapter VII and in instances of individual and collective self-defense under article 51. Further, under article 25, the Council's decisions, unlike those of the other UN bodies, are binding on all member states.

⁴ See Edward Luck, *Tackling Terrorism, in THE SECURITY COUNCIL FROM THE COLD WAR TO THE 21ST CENTURY* 85 (David Malone ed., 2004). Luck posits that the Security Council response to terrorism has been inhibited by three clusters of obstacles: (1)

leadership, the Security Council left the issue to the General Assembly.⁵ If the goal was to create an international legal regime to condemn, criminalize and punish terrorist acts, the same could be achieved through action there, in the UN system's recognized legislative body. Global norms concerning terrorism were thought best developed through the latter's deliberative and, to many, more democratic character.

However, the General Assembly has not experienced smooth sailing in responding to terrorism. UN member states have fundamental differences on what constitutes terrorism,⁶ and this debate has clearly been colored by politics stemming from Middle Eastern conflicts, particularly the Israeli occupation of the Palestinian Gaza and West Bank territories.⁷ Nevertheless, the Assembly and other UN bodies have been able to conclude various terrorism conventions over the years.⁸ These conventions do not have a

Disagreements on the definition, scope and priority that should be accorded terrorism as a threat to international peace and security; (2) Divergent views on the legitimacy, effectiveness and legality of counterterrorist measures carried out by member states singly or in ad hoc coalition, particularly when they involve the problems of the Middle East; and (3) Uncertainties about the UN's capacity and whether a viable multilateral alternative exists for dealing with terrorism.

See also Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism since September 11th*, 35 CORNELL INT'L. L.J. 475 (2002). Rostow argues that the complex dynamics and size of the UN have affected how it acts on terrorism. His critique however is broadly applied to the UN and not just the Security Council.

⁵ Rostow, *supra* note 4, at 479-81.

⁶ *Id.* at 480.

⁷ The Security Council's work concerning the Middle East has provided ample references to terrorism since the 1948 assassination of the UN mediator in Palestine. UN Doc. S/Res/57, preamble (Sep. 18, 1948). "Deeply shocked by the tragic death of the United Nations Mediator in Palestine, Count Folke Bernadotte, as the result of a cowardly act which appears to have been committed by a criminal group of terrorists in Jerusalem while the United Nations representative was fulfilling his peace-seeking mission in the Holy Land...."

⁸ These conventions include: Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sep. 14, 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sep. 23, 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973; International Convention against the Taking of Hostages, Dec. 17, 1979; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety for Civil Aviation, Feb. 24, 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988; Protocol for the Suppression of Unlawful Acts against the

specific definition of terrorism *per se* but have focused mostly on criminalizing specific acts that are deemed terrorist in nature. This creative approach has enabled the General Assembly to more recently adopt two more conventions, one against terrorist bombings, and the other against the financing of terrorism.⁹

The benefits of this approach, however, have now been exhausted. The General Assembly, through its Sixth (Legal) Committee, is deadlocked in negotiations for a comprehensive convention on terrorism (and a convention against nuclear terrorism) hoped to provide the linchpin for all existing conventions on specific terrorist acts. Since this would articulate a comprehensive legal framework criminalizing terrorism without particular reference to specific acts, delegations have attempted to fashion a common definition for it. Their inability to agree on such a definition has led to an impasse in negotiations.

9/11 galvanized the UN response. Shaking off its relative stupor, the Security Council became the decisive and dominant international actor against the threat of terrorism.¹⁰ The more deliberative and consensus-driven approach taken in the General Assembly has given way to the quick action and aggressive stance of the Council. Discussions and negotiations regarding international norms became a secondary priority amidst the action-oriented treatment by the Council.

The Council's newfound vigor is not difficult to understand given that the United States was the victim of the 9/11 attacks and that it remains the most influential and dominant member of that body. No state begrudged the United States' assertive use of the UN's most powerful unit to shape the

Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991. These are archived in the United Nations website's Dag Hammarskjöld Library. *International Terrorism*, at <http://www.un.org/Depts/dhl/resources/terrorism>.

⁹ International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, UN Doc No. A/52/653, annex (1997); International Convention for the Suppression for the Financing of Terrorism, Dec. 9, 1999, *available at* <http://www.un.org/law/cod/finterr.htm>.

¹⁰ Luck describes the Council reaction as a "metamorphosis" while Rostow thought the Council "took charge" after 9/11. Luck, *supra* note 4, at 85; Rostow, *supra* note 4, at 481.

world body's assertive response against terrorism, and the support for this was in fact global.¹¹

II. RESOLUTION 1368 AND ITS IMPLICATIONS FOR INTERNATIONAL LAW

On September 12, 2001, immediately after the 9/11 attacks, the Security Council adopted Resolution 1368. This resolution unequivocally reflects the body's transformed attitude towards international terrorism, naming it "a threat to international peace and security."¹² While it did not expressly state that the Council was invoking its vast prerogatives under chapter VII of the Charter,¹³ the Council clearly believed that terrorism, posing such a threat, should be subject to these awesome coercive powers.¹⁴ Further, although the attacks' perpetrator was uncertain at the time the resolution was adopted, the Council condemned these as "horrifying terrorist attacks," called "on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks," stressed "that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable," and called "on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions."¹⁵

Finally, aside from ensuring that the Council could resort to coercive measures, even those amounting to the use of force, in its efforts to stanch terrorism, Resolution 1368 also recognizes the "inherent right of individual

¹¹ General Assembly Resolution 56/1 and Security Council Resolution 1368 both received the support of the respective body's members. However, such consensus did not mean that these actions, particularly those of the Security Council and the American reaction to 9/11, did not have their share of critics. See, e.g., Georges Abi Saab, *The Proper Role of International Law in Combating Terrorism*, 1 CHINESE J. INT'L L. 305 (2002).

¹² UN Doc. S/Res/1368, ¶ 1 (2001).

¹³ All but one of the succeeding Council resolutions on international terrorism expressly indicated that the Council was "Acting under Chapter VII of the Charter" in adopting the document. UN Doc. S/Res/1373 (2001); S/Res/1390 (2002); S/Res/1452 (2002); S/Res/1455 (2003); S/Res/1526 (2004); S/Res/1540 (2004); S/Res/1566 (2004). The sole exception is Resolution 1535 in 2004, which established the Counter Terrorism Executive Directorate to help revitalize the work of the Security Council Counter Terrorism Committee established under Resolution 1373.

¹⁴ Charter of the United Nations, Jun. 26, 1945, art. 41-42, available at <http://www.un.org/aboutun/charter/chapter7.htm> (hereinafter "UN Charter").

¹⁵ UN Doc. S/Res/1368, ¶¶ 1, 3-4 (2001).

or collective self-defense in accordance with the Charter.”¹⁶ The clear intent was to leave the United States unencumbered in its response against those responsible for the attacks, persons later proven to be Usama bin Laden and the Al Qaida.¹⁷

Resolution 1368 was the direct response to 9/11’s traumatic events. In a single broad sweep, it declared terrorism as a threat to international peace and security, whose preservation is conferred upon the Council as a primary responsibility under the UN Charter.¹⁸ The debates on a common definition of terrorism that bedeviled the General Assembly for years became irrelevant, “or, if not, irrelevant, [was considered nothing but] a symptom of political disagreement all could understand.”¹⁹ Questions as to who the terrorists are and what acts constitute terrorism are left as ambiguities that the Council will determine as it acts.²⁰ The lack of resolution to the question, “What is terrorism?” also means “every country is left to define terrorism for itself.”²¹

The Council has thus left many questions unresolved. For instance, is terrorism an act of “war,” as it is commonly referred to in the United States,²² and within the context of the traditional understanding of “armed attack” or “international conflict?” Resolution 1368 seems to suggest so, as terrorism has been declared by the Council as a threat to international peace and security, and the right of states to invoke self-defense under article 51 of the Charter in responding to terrorist acts has been recognized.

¹⁶ *Id.*, preamble.

¹⁷ NATIONAL COMM’N ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf>; <http://www.fas.org/irp/offdocs/911commission.pdf>.

¹⁸ UN Charter, art. 24(1).

¹⁹ Rostow, *supra* note 4, at 481.

²⁰ Presentation by Ambassador Jeremy Greenstock, first Chairman of the Security Council Counter-Terrorism Committee (CTC) at the Symposium: “Combating International Terrorism: The Contribution of the United Nations,” Vienna, 3-4 June 2002, ¶¶ 30-31, at <http://www.un.org/Docs/sc/committees/1373/ViennaNotes.htm> (last visited Dec. 20, 2004). Abi Saab asks quite correctly, “Without a universally shared definition of the crime, how can there be a coherent and permanent regime for its prevention and suppression?” Abi Saab, *supra* note 11, at 311.

²¹ Rostow, *supra* note 4, at 484.

²² George W. Bush, *President Discusses War on Terrorism*, Address to the Nation from Atlanta, Georgia (8:03 PM EST, Nov. 8, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011108-13.html>.

The implications of characterizing terrorism as an "act of war" are serious and far-reaching. First, designating terrorism as war will recognize that "armed conflict" in the formal legal sense can now be conducted between states and non-state groups, such as Al Qaida.²³

Second, such treatment brings the laws of war into play, particularly the wide-ranging conventional and customary rules of *jus en bello*. Will terrorists thus be accorded the rights and privileges of combatants under international humanitarian law?

Third, terrorism, which is generally accepted as a rogue and criminal activity, will be conferred a level of dignity in international law and a status as an armed conflict, bringing the customary rules of *jus ad bellum* into play.²⁴ Ironically, these results are the exact opposite of those sought to be achieved by depicting the gravity of terrorism in graphic terms (by referring the response to it as "war") and to demonize terrorism, as it should be, in the public's mind.²⁵ It is hard to imagine that the Council will countenance the legitimization of terrorism as a "war" despite the language of resolution 1368. These ambiguities also present a dilemma on the permissible action by the Security Council against terrorism.

The Charter's chapter VII provides the locus of the Council's power to respond to threats to international peace and security. While the use of force by member states is restricted to self-defense,²⁶ chapter VII preserves to the Council the prerogative to resort to coercive measures.²⁷ This most

²³ Could it also imply that a "war" can be declared against an individual, such as Usama bin Laden? The proposition may seem farfetched, but the demonization of Al Qaida and Bin Laden, as they should be, may provide a slippery slope for such a sweeping conclusion.

²⁴ Cherif Bassiouni argues, in fact, that Al Qaida's attacks on 9/11 "are subject to the strictures of international humanitarian law, regardless of the legitimacy of their perpetrators' cause." Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 100 (2002).

²⁵ Abi Saab objects to designating terrorism as war for its possible deleterious implications on the applicability of international humanitarian law and the international legal system as a whole. In fact, he believes that the Council, despite the language of Resolutions 1368 and 1373 recognizing the right of self-defense, did not necessarily adhere to the view that terrorism is an "armed attack" in the legal sense of the phrase. His view is that the reference to the right of self-defense was "merely a without prejudice clause, in case the conditions of exercising self-defense were subsequently revealed to be fulfilled." Abi Saab, *supra* note 11, at 307-09.

²⁶ UN Charter, art. 2(4), 51.

²⁷ Art. 41-42.

serious Council prerogative has been understood to be directed against "armed attacks" emanating from a state or a group of states, or a subject of international law. Terrorism sponsored by a state or group of states is arguably within the rubric of "armed attack" envisaged under chapter VII. This was the case with Afghanistan under Taliban rule, as it offered a base of operations for Bin Laden and Al Qaida. It is also arguable that the subsequent invasion of Afghanistan and the toppling of the Taliban government by American-led forces was a justified exercise of the right of self-defense.²⁸ It would likewise have been justified if, instead of the American-led invasion, the Council, by virtue of chapter VII, declared Afghanistan²⁹ in breach of the peace and mandated the use of force to expunge the threat emanating from its territory.³⁰ Despite terrorist groups' activities, the level of play remained at the level of state actors and indubitably within the Security Council's jurisdiction under the Charter.

However, in the absence of state actors, coercive measures will be hard to implement against terrorist groups solely on the basis of chapter VII. If terrorists operate from an innocent state unwilling to allow the use of force by other countries within its territory, will it be reasonable for the Council to employ coercive measures or will the operation against the terrorists be transformed to mere police action³¹ to respect the state's sovereignty? Thus, cooperation from states affected by possible Council authorization of the use of force would be essential. Without the consent of these states, any use of force within their territory – assuming they are not themselves culpable in any way – would arguably be a case of interference in their internal affairs and a serious violation of their territorial integrity and political independence.

The exercise of the right of self-defense against terrorist groups would likewise be problematic as such a right is conceived to be invoked only against a state or another subject of international law. Its context is the "repelling of [an] attack [by states and other subjects of international law] and the prevention of [the] continuation [of the attack], if it has a

²⁸ See, e.g., Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539 (2002); Jack Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559 (2002).

²⁹ Al Qaida attacks against the United States did not solely emanate from Afghanistan. Other Al Qaida actions included past attacks against embassies in Kenya and Tanzania, and against the warship *USS Cole* in Yemen.

³⁰ For a different view on the invasion of Afghanistan, see Bassiouni, *supra* note 24.

³¹ See Abi Saab, *supra* note 11, at 307-08.

continuous character.”³² The context of the exercise of the right of self-defense cannot be invoked if the objective is only to suppress or punish terrorist groups in general; it is circumscribed to a specific event: an “armed attack” by a state or another subject of international law.³³

The Security Council has thus far dodged conundrums of implication with respect to the laws of war. Its reference in the Resolution 1368 and subsequent resolutions to terrorism as a threat to international peace and security and recognizing the right of self-defense against this threat has left a lot of uncertainties on the status of terrorism and terrorists under international law, in particular international humanitarian law. The Council ensured that a strong response against the 9/11 attacks could be attained. However, it did not determine the parameters by which states, particularly the strong ones, should pursue the use of force against terrorists and still remain within the legal regime of the Charter and the laws of war.³⁴

III. AN INNOVATIVE APPROACH: CRIMINALIZING THE FINANCING OF TERRORIST ACTIVITIES

Two weeks after adopting Resolution 1368, the Security Council continued its post-9/11 activism by adopting an innovative approach contained in Resolution 1373.³⁵ This resolution also condemns the 9/11 attacks and, reiterating Resolution 1368, reaffirms that “any act of international terrorism constitutes a threat to international peace and security.”³⁶ It again recognizes the inherent right of individual or collective self-defense against terrorist acts.

Recognizing that terrorists rely on the free movement of their funds to achieve their macabre goals, Resolution 1373 introduced the innovative requirement for member states to refrain from providing any form of support to terrorism and deny them funds, safe haven, movement and other material support. Member states are also called upon to cooperate with one another and with regional and international organizations to strengthen global efforts in suppressing terrorism. They are also required to readjust

³² *Id.* at 309.

³³ Jonathan Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L. 835, 835 (2001).

³⁴ Luck, *supra* note 4, at 95.

³⁵ UN Doc. S/Res/1373 (2001). This resolution was adopted unanimously on September 28.

³⁶ *Id.*, preamble.

their domestic legislation to comply with the resolution, and report on their implementation of the resolution to the Counter Terrorism Committee ("CTC"), which the resolution established as a subsidiary body of the Security Council.³⁷ The resolution does not include any reference to sanctions, coercion or censure by the Security Council should states fail to implement its requirements. The CTC's *ad hoc* nature and its perceived flaws have led some to doubt its viability as the Council's counter-terrorism tool.³⁸ But the CTC operates actively to this day. The Council even sought to revitalize the CTC in early 2004 by establishing the Counter Terrorism Executive Directorate ("CTED") to provide robust secretariat support to the CTC.³⁹

Despite such structural criticisms, the intent of Resolution 1373, which is to criminalize terrorist financing all over the world, remains both clear and significant. Its very first operative paragraph cannot be any clearer. Subparagraph (b) stated that the Council "*Decides* that all States shall... 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."

There are two important things to note in this provision. First, the Council emphasizes the peremptory character of the mandate to member states by using the word "*decides*." Second, the decision imposed on member states requires them to "*criminalize*" the financing of terrorism thereby extending the mandatory norm to reach the legislative departments of member states.

A. RESOLUTION 1373: A BINDING DECISION

As state parties to the UN Charter, member states are bound by the Security Council's decisions.⁴⁰ In fact, their obligations under the Charter are

³⁷ The CTC is composed of all the present members of the Security Council. For a comprehensive description of the activities and concept of operation of the CTC, see Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333 (2003).

³⁸ See, e.g., Abi Saab, *supra* note 11, at 310-11; Bassiouni, *supra* note 24, at 93. Rosand also recognizes various challenges to the long-term effectiveness of the CTC, *supra* note 37.

³⁹ UN Doc. S/Res/1535 (2004).

⁴⁰ UN Charter, art. 25. "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

given priority over all their other obligations in case of conflict.⁴¹ Further, the Council is the only UN body accorded with vast prerogatives to enact measures to ensure the effective discharge of its functions under chapters VI, VII, VIII and XII of the Charter. Member states are expected to comply with Council resolutions and decisions or risk being sanctioned or becoming the object of coercive measures by the Council.

The Council employs various terms to gradate its resolve on specific issues. It invariably "calls" on member states to a task or behavior. Sometimes it "expresses" a certain view of a state of affairs, or "declares" an interpretation of events or even the applicable law for a certain situation. All these, while backed by the powers conferred on the Council by the Charter, are not necessarily characterized by a peremptory character that would bind member states with legal obligations. In most cases Council resolutions are not self-executing, but would require another specific decision by the Council to fulfill their mandates.

But when the Council expresses a clear decision on a certain matter or on a specific course of action, member states, by virtue of article 25 of the Charter, must comply with the decision as a matter of law. The language of Resolution 1373's first operative paragraph leaves no room for doubt that the Council intends the undertakings contained there to have a peremptory character for all member states. Noncompliance will be a breach of a member state's obligations under article 25. To further enunciate the seriousness of its decision, the Council framed resolution 1373 as an action "under Chapter VII of the United Nations." This reference indicates that non-compliance will not only be a breach, but will also be a ground for sanctions.⁴²

B. MAKING INTERNATIONAL LAW

The first operative paragraph of Resolution 1373 underscores the priority given by the Council to hamstringing financial support for terrorism. Terrorists do not operate in a vacuum and require supporters that will provide them with cash to pursue their activities. Their global operations – which proved to be deadly efficient and effective on 9/11 – receive financial support from all over the world from wealthy benefactors and small

⁴¹ Art. 103.

⁴² It should be apparent that the binding nature of decisions by the Security Council is derived from article 25 of the UN Charter and not chapter VII. The latter's role is to provide the Council with powers to discharge its functions and enforce its decisions.

contributors alike who are believers in their causes.⁴³ Terrorist funds are transferred around the world through an extensive network of formal and informal channels. If the movement of these funds is curtailed, terrorist activities will be greatly hampered and reduced in scale. The spigot of terrorist funding will have to be shut off by member states for the international community to defeat terrorism.

The first order of business that the Council recognizes under Resolution 1373 is to require member states to strengthen their financial controls and legislation to hamper the financing of terrorism. The Council requires member states to freeze funds that belong to terrorists, terrorist groups and their associates, and to adjust their legislation to ensure that activities relating to the financing of terrorism are criminalized in their penal codes. The Council is imposing on every member state to establish executive mechanisms and legislative controls against terrorist financing. The end result is to place terrorism, both its perpetrators and supporters, under universal jurisdiction for criminal prosecution and punishment by all member states.

In the past, the Council has imposed obligations on governments but has left them to determine how to comply with these obligations through their respective national procedures. Resolution 1373 has specifically mandated member states to adjust their legislation and make the support of terrorism, particularly by providing funds to terrorists, a criminal act.

The primary responsibility of the Council for the maintenance of international peace and security⁴⁴ pertains to a specific "threat to the peace, breach of the peace or act of aggression."⁴⁵ Council actions under chapter VII have been traditionally understood to operate within the limited context of disciplining a member state for disturbing the international order by its misbehavior. In other words, chapter VII is employed to restore that order by removing the threat posed by a member state.

As an action purportedly taken under chapter VII, Resolution 1373 is not specifically intended to restore a broken order but to restructure the

⁴³ Terrorist financing is a complex enterprise. It is not at all certain that the sources of funds used by terrorist groups are all intended for terrorism. Many funds for purely religious and non-terrorist purposes, such as contributions to religious education, are schemed off from their intended beneficiaries and diverted to terrorism.

⁴⁴ UN Charter, art. 24.

⁴⁵ Art. 39.

landscape of national laws to preempt any further disturbance of the international order by terrorism. Rather than responding to a state of emergency, the Council is declaring one.⁴⁶

At the core of this effort is the requirement for every member state to criminalize terrorism and its financing. Naturally, for member states to "criminalize" the "provision or collection"⁴⁷ of funds for terrorists, legislative action would be required. It is in this area that the Council broke new grounds in instituting a legal mandate to member states. By asking member states to criminalize terrorism and terrorist financing, it purported to dictate international law on them. It has been understood that intergovernmental organizations, such as the UN, cannot create "hard" international law. Only states, by ratification of treaties, acceptance of a general principle of international law, or the development of customary law through general practice supported by *opinio juris*, create "hard," binding international law.⁴⁸ Under Resolution 1373, member states are constrained in the exercise of their sovereign prerogative to determine what international law should be. The Council itself has created international law where no derogation by member states is envisaged.

The far-reaching nature of the attempt by the Council at lawmaking is also demonstrated by the fact that subparagraph (b) of Resolution 1373's first operative paragraph is the mirror image of the chapeau of article 2 of the Convention Against Terrorist Financing.⁴⁹ The financing convention is a treaty whose application to member states requires their ratification and consent to be bound by its provisions. The Council essentially oversteps the process of ratification by member states of the financing convention by requiring them to comply with its provision on criminalizing terrorism and terrorist financing. Member states, which have not attained a national consensus through internal procedures to ratify the convention, do not have any option but to adopt one of the convention's provisions through Council

⁴⁶ Abi Saab, *supra* note 11, at 310.

⁴⁷ UN Doc. S/Res/1373 (2001), ¶ 1(b).

⁴⁸ Paul Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 901 (2002).

⁴⁹ The chapeau reads: "Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part..." for terrorism.. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999 *available at* <http://untreaty.un.org/English/Terrorism/Conv12.pdf>.

fiat.⁵⁰ Non-compliance with this edict is theoretically subject to coercive measures by the Council under its chapter VII powers.

CONCLUSION

International terrorism is a scourge that demands strong, decisive measures to expunge. The Security Council is the best instrument to lead and harness international efforts and cooperation in the fight against terrorism. Terrorism presents a new challenge as a threat to international peace and security because, unlike states in the context of traditional conflicts and "armed attacks," terrorists do not have a home address. In many instances, their bases of operations are unwilling states, which may be victims of terrorism themselves. Moreover, terrorism is not a type of conflict that fits in the traditional patterns of open warfare. Terrorists do not wear uniforms, are afraid to be identified, and carry out attacks shrouded in stealth.

How does the international community fight this conflict? The Security Council seeks to build a network of robust laws to curtail the lifeblood of terrorism by cutting off its funding and declaring its support as a crime. It builds the capacities of member states to wage their own "war" against terrorism. And for those member states that may have different ideas about terrorism, they are left with no elbow room and must adhere to the Council's developing concepts and ideas regarding what terrorism is and who terrorists are.

Along the way in this effort, the Council has ventured into paths that it has not treaded nor the international community has witnessed. It has stretched the application of its powers and prerogatives under the UN Charter in its efforts to rout terrorism. It is left to be seen whether this has all altered the international legal system and whether member states will accept and tolerate a more powerful Council beyond their original intention under the Charter to fight a new form of threat that has transformed into a global menace.

⁵⁰ In fact, in a seminar on Resolution 1373, the Legal Adviser of one of the resolution's sponsors categorically stated that those member states that have not ratified the convention should forthwith consider themselves state parties by virtue of resolution 1373.