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ASSESSMENT OF THE DIFFERENCES BETWEEN THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM AND THE UNITED NATIONS SECURITY COUNCIL RESOLUTION 1373

Summary

Terrorism financing is a global phenomenon that not only threatens States' security, but can also undermine economic development and financial market stability. Terrorists require financing to recruit and support members and conduct operations. Thus, preventing terrorists from accessing financial resources is crucial to successfully counter the threat of terrorism. It is therefore of highest importance to stop the flow of funds to terrorists. The article describes the core elements of the main international instruments on the field of the fight against terrorist financing, similarities and differences between these norms.

Key words: *financing terrorism, terrorist financing convention, terrorist acts, criminalization of financing terrorism, Resolution 1373*

Introduction

The terrorist attacks on the United States on September 11, 2001, increased the importance of preventing, detecting and suppressing the financing of terrorism and terrorist acts on the part of the international community. The General Assembly of the United Nations called for international cooperation to prevent and suppress acts of terrorism and to hold accountable the perpetrators and those who shelter or support them. The United Nations Security Council unanimously determined, for the first time ever, any act of international terrorism to be a threat to international peace and security. This determination laid the foundation for Security Council action to bring together the international community under a common set of obligations in the fight to international terrorism.

On September 28, 2001, the Security Council unanimously adopted Resolution 1373 under Chapter VII of the Charter of the United Nations. This historic resolution established a body of legally binding obligations on all UN member states. It defined the common core of the new international campaign to deal with international terrorists, their organizations, and those who support them. [1]

On October 30, 2001 the Financial Action Task Force (FATF) agreed to a set of Special Recommendations at an extraordinary Plenary. At this Plenary it extended its mission on terrorist financing beyond money laundering. The first Special Recommendation consists of two parts. The first part provides that "each country is to take immediate steps to ratify and to implement fully the United Nations Convention for the Suppression of the Financing of Terrorism (1999). The second part of the first Special Recommendation requires each country to implement fully United Nations (UN) Security Council Resolutions dealing with terrorist financing, particularly Security Council Resolution 1373. [2, p IX-1, IX-2]

The Convention for Suppression of Financing of Terrorism is part of a global condemnation of terrorism. The principal aim of the Convention is to define the offence of financing of terrorism. It puts in place a comprehensive set of coherent provisions for matters relating to both suppression and prevention. It does not only allow the punishment of the financing of terrorism but also authorizes the prosecution of any terrorist act and of its financial sponsors.

The 1999 Convention requires parties to penalize conduct by any person who (art. 2, para. 1): "... 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, in order to carry out:

"(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex [meaning the nine treaties predating the Financing of Terrorism Convention which defined terrorist offences]; or

"(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act." [3]

The Convention is concerned with criminalization in which the definition of a terrorist act goes beyond all former conventions. It defines terrorist acts as "treaty offences" – set out in the nine international treaties

listed in the Annex to the Convention and "generic offences" – defined in the generic definition set out at subparagraph (b).

Subparagraph (a) refers to nine treaties, contained in the Annex to the Convention, and makes it an offense to provide or collect funds with the intention or in the knowledge that these funds will be used to carry out an offense defined in one of the listed treaties. The drafters of the Convention recognized that a country may not have become party to all nine treaties listed in the Annex to the Convention at the time it became a party to the Convention. The Convention authorizes states parties to declare, at the time of becoming a party to the Convention, that a treaty to which the country is not a party will be deemed not to be included in the Annex to the Convention, such declaration ceasing to have effect at the time the country becomes a party to the treaty. Conversely, if a state party to the Convention ceases to be a party to one of the treaties, it may by declaration state that the treaty will be deemed not included in the Annex. Countries may include the nine treaties in their definition of "treaty offences" even if they are not parties to all of them. [4, p 21]

Subparagraph (b) sets out a self-contained definition of a terrorist act. The generic offence of financing terrorist acts relies not only on conduct, but also on intent and purpose to define terrorist acts. Under the generic definition set out in the Convention, any act can be a terrorist act, provided its intent to cause death or serious bodily injury to certain persons, and provided its purpose is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing something. A number of countries have added elements to the definition that have the effect of limiting its scope, or expanding it. The limiting language appears to have been motivated by a concern that the generic definition could be used in circumstances where it was not intended. Noteworthy in this respect is the qualification found in the U.K., Canadian, and Australian laws to the effect that the offense only exists "if the action is done or the threat is made with the intention of advancing a political, religious or ideological cause." [5, p 46-47]

Adopted on September 28, 2001, Resolution 1373 is the cornerstone of the United Nations' counterterrorism effort. It declares international terrorism a threat to international peace and security and imposes binding obligations on all UN member states. It urges nations to upgrade the capacity of legislation and executive machinery to fight against terrorism. [6]

Resolution 1373, Article 1 decides that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the willful 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;

(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. [7]

Paragraph 1(b) of the Resolution requires the criminalization of the financing of terrorist acts, using language that is very close to that of the Convention. However, paragraph 1(d) requires something additional to the criminalization of terrorist acts. While both the Convention and paragraph 1(d) of the Resolution deal with the provision of financial assistance directed towards terrorism, there are notable differences between the two. First, while the Convention clearly requires the criminalization of the financing of terrorist acts, paragraph 1(d) of the Resolution rather than requiring that countries criminalize the provision of funds and services to terrorists, it requires them to "prohibit their nationals and entities within their territories" from making financial assistance available to terrorists and terrorist organizations. This language appears deliberate, as it stands in contrast to the language used in paragraph 1 (b) of the Resolution, which requires the criminalization of the financing of terrorist acts. The thrust of paragraph 1 (d) is to stop the flow of funds and financial services to terrorists and terrorist organizations, whether this is accomplished through criminalization or other means. [5, p 43]

The obligation established in paragraph 1 (c) of Resolution 1373 is broader than that in the 1999 Convention. The range of persons and entities that must be prevented from receiving funds or services is defined in the Resolution, but not in the Convention. In the Resolution, the list of such persons includes not only the persons who commit or attempt to commit, or facilitate or participate in acts of terrorism, but also entities owned or controlled, directly or indirectly, by such persons, and entities acting on behalf or at the direction of such persons. The Security Council 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". The Convention defines only terrorist acts, not terrorists or terrorism, and, by implication, any person who commits, or may commit an act of terrorism, would be included. 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. [8, p 2]

Paragraph 1 (d) of Res 1373 requires that States prohibit any person or entity in their territory to provide "any funds or financial assets or economic resources or financial or other related services" to any person or entity related to terrorism. The Convention criminalizes the provision of "funds". Taking into account the broad definition of the term "funds" the difference between these two instruments that is covered not by the Convention but by the Resolution is the provision of "financial or related services".

It should be noted that there is a difference according to the jurisdiction. Article 3 of the Convention declares that: This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction, except that the provisions of articles 12 to 18 shall, as appropriate, apply in those cases. Article 7 refers to those cases in which a State shall (paragraph 1) or may (paragraph 2) establish its jurisdiction over the offences set forth in Article 2. Article 12 and 18 are concerned with mutual legal assistance, extradition, the rights of the accused as well as preventive measures. However, paragraph 1 (a) of the Resolution is not limited to punishing the financing of international terrorism. It extends its power to all terrorist acts, irrespective of any transnational element. [9, p 18]

With regards to the element of punishment both the Convention and the Resolution require to set up an effective system for the punishment of offences. Article 4 of the Convention envisages the criminalizing of offences set forth in Article 2 and punishing them with appropriate penalties. Article 5 requires States to provide the criminal, civil or administrative liability of legal entities. Paragraph 2 (e) requires States to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.

Conclusion

The comparison between the International Convention for the Suppression of the Financing of Terrorism and the UN Security Council Resolution 1373 shows the comprehensive and stringent drafting of Resolution 1373 enables States to enjoy a certain margin of maneuver. The wide scope of the norms in Resolution 1373 exceeds what is required in Convention. Consequently Resolution 1373 shows itself more rigorous than the Convention and fills a vacuum left in the Convention.

References

1. 'USA Report to the Counterterrorism Committee pursuant to paragraph 6 of Security Council Resolution 1373', 2001
2. The World Bank. 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism', 2006
3. 'International Convention for the Suppression of the Financing of Terrorism', 1999
4. UN Office on Drugs and Crime. 'Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols', 2004
5. International Monetary Fund. 'Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting', 2003
6. Eric Rosand. 'Security Council 1373, the Counter-Terrorism Committee, and the Fight against Terrorism', 2003
7. 'United Nations Security Council Resolution 1373', 2001
8. Luis M. Hinojosa-Martinez. 'A critical assessment of the implementation of Security Council Resolution 1373', 2014
9. UN Office on Drugs and Crime. 'Guide for the legislative incorporation and implementation of the universal anti-terrorism instruments', 2006

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