

SIDELINING SUBSIDIARITY: UNITED NATIONS SECURITY COUNCIL “LEGISLATION” AND ITS INFRA-LAW

ISOBEL ROELE*

I

INTRODUCTION

The principle of subsidiarity has a logic of legitimacy that strives to allocate responsibility at the national level in order to bring decisionmaking closer to those affected by it. Legitimacy is not the only reason for allocating competence to the national level. In some cases, such as the United Nations Security Council’s (UNSC) schemes to prevent terrorist financing and the proliferation of chemical, biological, and nuclear (CBN) weapons, decisions about where to allocate responsibility are made for reasons of effectiveness. Treating these security threats as “weakest-link goods,”¹ the UNSC has aimed to decenter the administration of collective security away from itself by harnessing individual nation-states so as to create a completely regulated international sphere in which terrorists and proliferators are starved of means and opportunities to perpetrate attacks. In pursuit of this goal, the UNSC has sought to create shared frameworks for action by carving out a new quasi-legislative power. In an attempt to quell criticism of this move, the UNSC reassured states that they will retain national control over the implementation of their obligations, thereby satisfying the principle of subsidiarity. In effect, however, subsidiarity has been sidelined by the UNSC’s strategy of implementation. The UNSC’s strategy employs disciplinary power to generate an infra-law at the level of technical detail and to “normalize” states according to it.² Discipline shares the UNSC’s logic of effectiveness and subsidiarity’s preference for national responsibility, but it operates below the surface of the formal law and out of the reach of subsidiarity. It offers a notion of national responsibility shorn of national control.

The argument proceeds as follows. Subsidiarity’s logic of legitimacy is briefly considered in part II, which concentrates on the logic of effectiveness underlying the UNSC’s schemes. The disparity between the open-textured norms on the face of the UNSC’s quasi-legislative resolutions and the

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* Lecturer, Queen Mary University of London.

1. See *infra* Part I.B.

2. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 222 (A. Sheridan trans., 1995) [hereinafter FOUCAULT, DISCIPLINE AND PUNISH].

disciplinary work of its subsidiary bodies is the focus of part III. The Financial Action Task Force's (FATF) recommendations on money laundering and terrorist financing are shown to constitute disciplinary infra-law of the legislative resolutions in part IV, which also offers an illustration of discipline's negative effect on national control.

A. Logics of Effectiveness and Legitimacy

Whereas the principle of subsidiarity has a logic of legitimacy, the UNSC's approach to the prevention of terrorist financing and CBN proliferation has a logic of effectiveness. These logics are incompatible. The UNSC's reasoning is totalizing; it treats the international realm as a bounded space that transnational threats cannot escape as they can the boundaries of nation-states. If this bounded space can be controlled, then, the logic continues, it may be possible to deprive terrorists and proliferators of the conditions they need to succeed, such as financial support, manpower, open borders, lax import-export controls, and corrupt or incompetent criminal-justice systems. The Council has framed the problem of preventing these threats as a "weakest link good" that makes every gap, deficiency, and malpractice a potential, however remote, impediment to achieving a totally regulated space and thereby preventing international terrorism and CBN proliferation.³

Achieving this in practice is no easy task. The UNSC cannot regulate the international realm on its own, as it is dependent on UN member states to carry out its decisions.⁴ Given this setup and the UNSC's unrepresentative post-World War II composition, it has adopted a strategy of using UN member states as nodes in a decentralized scheme of administering the entire international—not global—space. Total regulation of aspects of this space is needed to deprive terrorists and proliferators of means of operation and opportunities to operate. The success of the schemes depends on the capacity of all states to control their borders, maintain an effective criminal justice system, and institute adequate financial regulation. The UNSC's logic of effectiveness demands the eradication of all weak links, and gaps, in regulation.

The principle of subsidiarity strives to bring decisionmaking closer to those affected, but neither the principle of subsidiarity nor its logic of legitimacy is absolute. The claim that low-level decisionmaking is not ipso facto more legitimate is considered below. The principle of subsidiarity, unlike the concept of sovereignty, is limited because it can be displaced by reasons of effectiveness.⁵ On this reading, subsidiarity is "a rebuttable presumption for the

3. For a good example of this, see S.C. Res. 2199, U.N. Doc. S/RES/2199 (Feb. 12, 2015) (stressing that "terrorism can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all States and international and regional organizations to impede, impair, isolate and incapacitate the terrorist threat").

4. See U.N. Charter art. 25 ("Members of the United Nations agree to accept and carry out the decision of the Security Council in accordance with the . . . Charter.").

5. See Markus Jachtenfuchs & Nico Krisch, *Subsidiarity in Global Governance*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 1, 18–19.

local”⁶ that can be displaced by evidence that action at a higher level is more likely to be effective. This model of subsidiarity is employed by the Treaty on European Union, which holds that “the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States”⁷ because decisions should be taken “as closely as possible to the citizen.”⁸ The notion that the preference for the local can be overridden by considerations of effectiveness can also be found in the Roman-Catholic principle of subsidiarity:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice . . . to assign to a greater and higher association what lesser and subordinate organizations can do.

Like EU subsidiarity, the Catholic version premises the preference for the local on the capacity of entities to accomplish given objectives. As pointed out by the special editors of this issue, the most contentious matter is often where the threshold lies for displacing the preference for the local.¹⁰

For certain collective-action problems, the threshold is fairly low. This is usually the case where collective security is concerned; arguments based on the importance of autonomy in decisionmaking and national diversity lack bite against arguments that coordinated action is required to tackle a common existential threat. The UN Charter reflects this sort of thinking because of the unprecedentedly potent tools with which the UNSC is equipped and the broad discretion it has to interpret and deploy them.¹¹ Exceptionally, the UNSC is empowered to decide to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”¹² as well as “measures not involving the use of armed force” in order “to give effect to its decisions.”¹³ As the formulation in Article 24(1) affirms, the UNSC was built on a principle of effectiveness, and member states conferred on the UNSC its “primary responsibility for the maintenance of international peace and security” “in order to ensure prompt and effective action.”¹⁴ Effectiveness concerns squeeze out legitimacy concerns and the principle of nonintervention “in matters which are essentially within the domestic jurisdiction of any state,”¹⁵

6. *Id.* at 6.

7. Consolidated Version of the Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326) 18.

8. *Id.* pmbl.

9. POPE PIUS XI, QUADRAGESIMO ANNO ¶ 46, (1931). For more on the Catholic principle of subsidiarity, see Nicholas Barber, *The Limited Modesty of Subsidiarity*, 11 EUR. L. J. 308, 310 (2005).

10. Jachtenfuchs & Krisch, *supra* note 5, at 7.

11. See Nico Krisch, *Introduction to Chapter VII: The General Framework*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1239, 1243 (Bruno Simma et al. eds., 3d ed. 2012) (explaining that the powers of the Security Council under Chapter VII of the U.N. Charter are “extremely far-reaching and subject to very few express limitations”).

12. U.N. Charter art. 42.

13. *Id.* art. 41.

14. *Id.* art. 24, ¶ 1.

15. *Id.* art. 1, ¶ 7.

a principle designed to protect members' sovereignty,¹⁶ is expressly made subject to Chapter VII.

The UNSC's inclination for effectiveness over legitimacy is all the more striking given its notorious legitimacy deficit. The UNSC is neither representative nor accountable. As Koskenniemi suggested, "[T]he dominant role of the permanent five [P5], the secrecy of the Council's procedures, the lack of a clearly delimited competence and the absence of what might be called a legal culture within the Council hardly justify enthusiasm about its increased role in world affairs."¹⁷

All states recognized this in 2005 when heads of state agreed that the UNSC must become "more broadly representative, efficient and transparent."¹⁸ A particular issue has been the five permanent members' privileged position in the UNSC. They can effectively veto attempts to interfere with their own jurisdictional autonomy¹⁹ while simultaneously exerting enormous influence over Chapter VII decisions that affect states' control within their domestic spheres.²⁰ This institutional imbalance was the result of a bargain struck when the Charter was drafted in which the great powers of 1945 agreed to guarantee international peace and security in return for institutional privileges.²¹ The Charter allows the permanent members to use their collective might for the collective security of everyone in situations that threaten international peace and security.²² In situations falling short of this threshold, the UNSC's powers to deprive states of national control is much more limited. For example, the consent of the parties is one of the core principles of UN peacekeeping,²³ and although member states are obliged to settle their disputes by peaceful means,²⁴ the UNSC can do no more than make "recommendations" to the parties so long as disputes do not constitute a threat to international peace and security.²⁵ The existence of Article 39 as a limit on national control and UNSC intervention,

16. Georg Nolte, *Article 2(7)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 280, 310 (Bruno Simma et al. eds., 3d ed. 2012).

17. Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 *EUR. J. INT'L L.* 325, 327 (1995).

18. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 153, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

19. See U.N. Charter *supra* note 4, at art. 27, ¶ 3 (providing that Security Council decisions shall be made with concurring votes of the permanent members).

20. See, e.g., Kishore Mahbubani, *The Permanent and Elected Council Members*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 253, 258 (D.M. Malone ed., 2004) (noting the five permanent members' "domination" of the Security Council).

21. See Rep. of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 244, U.N. Doc. A/59/565 (Dec. 2, 2004) (explaining that the permanent members of the Security Council "were given veto rights but were also expected to shoulder an extra burden in promoting global security").

22. U.N. Charter art. 39.

23. U.N. DEP'T OF PEACEKEEPING OPERATIONS AND DEP'T OF FIELD SUPPORT, CIVIL AFFAIRS HANDBOOK, at 13, U.N. Sales No. E.12.VII.2 (2012).

24. U.N. Charter art. 2, ¶ 3.

25. *Id.* art. 38.

albeit a very fluid and indeterminate limit,²⁶ reflects the underlying importance of legitimacy to the effectiveness of UNSC action by circumscribing the conditions in which the logic of effectiveness can completely displace the logic of legitimacy.²⁷

B. Weakest-Link Goods and Transnational Security Challenges

The simple equation described above in which the determination of an Article 39 situation simultaneously decides the question of where responsibility for collective security should lie and, by extension, whether priority is given to effectiveness or legitimacy, does not always work. This is especially evident where transnational threats to collective security, like international terrorism, are concerned because they are seen as posing a challenge that cannot be resolved by coercive enforcement alone. As well as taking relatively targeted measures with respect to material threats, such as the imposition of sanctions against individuals associated with al-Qaeda,²⁸ the UNSC has recently extended its toolkit to include measures designed to prevent international terrorism—particularly nuclear terrorism—from materializing at all. In order to do this, the UNSC has used so-called “legislative”²⁹ resolutions to impose obligations on states to prevent and suppress the financing and support of terrorism³⁰ and to counter the proliferation of nuclear, chemical, and biological weapons and their means of delivery.³¹

This move flummoxes the association of Chapter VII with centralized, top-down action because it uses Chapter VII to institute a decentralized, bottom-up approach to collective security in which each UN member state is a link in an unbroken chain of counterterrorism. This strategy conceives of the prevention of transnational threats to collective security as a “weakest-link” global public good in which each state is conceived of as a link in an aggregate effort response.³² The logic of allocating responsibility to nation-states is not purely a matter of legitimacy. Rather, it is primarily driven by a scheme of administrative

26. See Nico Krisch, *Article 39, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1272, 1274* (Bruno Simma et al. eds., 3d ed. 2012) (describing the Article 39 drafters’ intent to allow the Security Council broad discretion).

27. *A More Secure World: Our Shared Responsibility*, *supra* note 21, at 66.

28. S.C. Res. 1267, ¶ 4, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

29. For analysis of the Security Council’s legislative powers, see generally Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. OF INT’L L. 593 (2003); Luis Miguel Hinojosa-Martínez, *The Legislative Role of the Security Council in its Fight Against Terrorism: Legal, Political and Practical Limits*, 57 INT’L & COMP. L.Q. 333 (2008); Eric Rosand, *The Security Council as ‘Global Legislator’: Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT’L L. J. 542 (2004); Paul Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901 (2002).

30. S.C. Res. 1373, ¶ 1(a), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

31. S.C. Res. 1540, ¶ 1, U.N. Doc. S/Res/1540 (Apr. 28, 2004).

32. See SCOTT BARRETT, *WHY COOPERATE? THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOODS 4* (2007) (distinguishing between global public goods that “can be supplied unilaterally or multilaterally” and global public goods that “depend on the states that contribute the least.” He calls the latter “weakest link” goods and explains that they demand an “aggregate effort” response because the good “depends on the combined efforts of all states.”).

decentralization and has a logic of effectiveness. The coincidence of these two logics masks the way that national responsibility does not guarantee national control even though it may create the impression of doing so and, moreover, may actively diminish states' control over the implementation of their obligations. This sets up the main argument of the article, discussed in parts III and IV: that disciplinary infra-law, which shares the logic of effectiveness with administrative decentralization, is used to control states' implementation efforts on a sublegal level, effectively sidelining subsidiarity.

1. Weakest-Link Goods

Subsidiarity is vulnerable to being sidelined when strategies aimed at securing weakest-link public goods involve administrative decentralization, as is the case in the UN collective-security system. In such cases, subsidiarity's logic of legitimacy and the logic of effectiveness that underwrites administrative decentralization overlap, potentially leading to a situation in which national institutions have responsibility but lack control.

At the global level, administrative decentralization of responsibility from the UN to nation-states seems to be the most practicable way of attaining weakest-link goods because the central UN institutions are underresourced and UN member states jealously guard their sovereignty. As a result of this institution–state dynamic, UN institutions tend to outsource the implementation of their decisions to states and, beyond the scope of the present study, to other global actors.

In some cases, international peace and security can be maintained by authorizing a small number of states to take enforcement action on behalf of the UNSC.³³ However, in some cases the efforts of a small number of powerful states are insufficient. “Some global public goods can only be supplied if every country lends a hand. Should even one country not help, the entire effort may fail.”³⁴ Regarding the eradication of smallpox in 1979, for example, “if even one country had not eliminated smallpox, the entire effort would have failed.”³⁵

The UN has adopted similar reasoning to prevent terrorism. The UN Secretary General's report *Uniting Against Terrorism* emphasized that “[t]errorists exploit weaknesses in both developing and developed States to fund, organize, equip and train their recruits, carry out their attacks, and hide from arrest. Building capacity in all States must therefore be the cornerstone of

33. See generally DAN SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS* (1999) (detailing the legal framework for the delegation by the UNSC of its Chapter VII powers). For critical assessments, see Niels Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'*, 11 EUR. J. INT'L L. 541 (2000); see also John Quigley, *The 'Privatization' of Security Council Enforcement Action: A Threat to Multilateralism*, 17 Mich. J. Int'l L. 249 (1996).

34. BARRETT, *supra* note 32, at 47.

35. *Id.* at 4.

the global counter-terrorism effort.”³⁶ This analysis became “a core element of the global counter-terrorism effort” in the UN’s Global Counter-Terrorism Strategy.³⁷ From this perspective, the project of preventing terrorism is imperiled by the existence of states with porous borders through which CBN matériel might pass into the hands of terrorists; states that do not or cannot regulate financial transactions to prevent funds from reaching terrorists; and domestic port authorities that lack the capacity to monitor and control the containers that pass through their territory. This diagnosis brings international terrorism among the “threats without boundaries” that were emphasized in the UN Secretary General’s High Level Panel on Threats, Challenges and Change’s report *A More Secure World: Our Shared Responsibility*.³⁸

The logic of the UN’s approach to terrorism is further elucidated by the way transnational threats and challenges are conceptualized. Given that they are not neatly bounded within a single state or region, “a threat to one is a threat to all.”³⁹ It follows that all states must take part in the solution to such problems because “where weakest-link goods are concerned, a universal approach will usually be necessary for effective action.”⁴⁰ In a ministerial-level statement the UNSC affirmed that “the active participation and collaboration of all” member states is essential to combating terrorism.⁴¹ In short, weakest-link global public goods seem to demand universal-effort solutions requiring the participation of all states and presupposing a bounded space that can be totally controlled. There is no room for gaps, and “whether the supply of the weakest-link global public goods succeeds or fails depends on the country that does the least.”⁴² It is not enough for the most well-resourced and capable states to level their best efforts at the problem, or even for the majority of states to cooperate to solve the problem. The participation of *every* state becomes crucial to the success of the project.

A second feature of this strategy of prevention is that universal participation alone is not enough; it must be the right sort of participation. If the international space is to be completely regulated so as to prevent terrorism, then individual participants’ efforts must, at a minimum, avoid being counterproductive and, preferably, aim for synergy. The UN’s desire for such a coordinated response is evident from its Global Counter-Terrorism Strategy, which the General Assembly described as “a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional

36. U.N. Secretary-General, *Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy: Rep. of the Secretary-General*, ¶ 74, U.N. Doc. A/60/285 (Apr. 27, 2006).

37. G.A. Res. 60/288, at 7, U.N. Doc. A/RES/60/288 (Sept. 8, 2006).

38. See *A More Secure World: Our Shared Responsibility*, *supra* note 21, ¶¶ 17–23 (“[T]oday, more than ever before, threats are interrelated.”).

39. *Id.* ¶ 17.

40. Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT’L L. 1, 9 (2014).

41. S.C. Res. 1377, at 2, U.N. Doc. S/RES/1377 (Nov. 12, 2001).

42. BARRETT, *supra* note 32, at 72.

and international levels, to counter terrorism.”⁴³ The UNSC’s quasi-legislative Resolutions 1373 (2001)⁴⁴ and 1540 (2004),⁴⁵ the focus of this article, express this strategy using the same formula of “recognizing the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response.”⁴⁶ These resolutions are meant to promote universal participation of UN member states⁴⁷ and to provide a skeleton framework for a coordinated response. The corollary of this approach is the decentralization of the administration of collective security.

The administrative decentralization the UNSC pursues with its approach to prevention has a logic of effectiveness that seems *prima facie* incompatible with subsidiarity to the extent that national authorities are unequal to the task of carrying out their responsibilities. Conceptualization of the problem in terms of weakest links means that incompetent states cannot be left out of the universal effort solution and must be transformed if the international space is to be completely regulated. The UNSC, however, has effectuated this transformation while simultaneously invoking the principle of subsidiarity.

2. Transforming Incompetent States

While the UNSC’s prevention strategy centers on its quasi-legislative resolutions, positive international legal norms alone cannot address the problem of states that are unable or unwilling to carry out their obligations. If a state were to be avowedly unwilling to shoulder its responsibilities and transform its domestic sphere, it is possible that Chapter VII measures could be taken to enforce the UNSC’s decisions.⁴⁸ The UNSC has acknowledged that such a solution would be unsuitable for the more numerous group of states that are merely unable to implement the resolutions. It recognized “that some States may require assistance in implementing the provisions” because they lack “the legal and regulatory infrastructure, implementation experience and/or resources for fulfilling the” provisions.⁴⁹ The emphasis on assistance rather than enforcement seems to have been a response to the wider membership’s fears that the UNSC was attempting to act as a world government in passing quasi-legislation.⁵⁰ UNSC members seemed to accept that an iron-fisted approach to implementation was incompatible with their goals of securing states’ active involvement and avoiding grudging participation and resistance.⁵¹ This attitude

43. G.A. Res. 60/288, at 2, U.N. Doc. A/RES/60/288 (Sept. 8, 2006).

44. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

45. S.C. Res. 1540, U.N. Doc. S/Res/1540 (Apr. 28, 2004).

46. S.C. Res. 1373, ¶ 4, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

47. See U.N. Charter, art. 25; see also *id.* ¶ 1 (stating that U.N. members agree to carry out Security Council decisions).

48. Rosand, *supra* note 29, at 587.

49. S.C. Res. 1540, ¶ 7, U.N. Doc S/Res/1540 (Apr. 28, 2004). A similar statement on terrorist financing was made in S.C. Res. 1377, at 3, U.N. Doc S/Res/1377 (Nov. 12, 2001).

50. See *infra* Part II.A.

51. See Statement of the German representative, UNSC Meeting Record UN Doc. S/PV.4950, 18 (Apr. 22 2004) (explaining that proponents sought to “increase [Resolution 1540’s] acceptance and

accords with an insight of Foucault, who thought that “if you are too violent, you risk provoking revolts.”⁵² Foucault studied the forms of power that replaced this sort of repressive enforcement of the sovereign will. He gave the label “disciplinary power” to the first distinct genre of these power relations that he identified.⁵³

The UNSC’s approach to implementing its quasi-legislative resolutions bears a striking resemblance to the apparatuses Foucault examined in *Discipline and Punish*.⁵⁴ Disciplinary power has various hallmarks that are identifiable in UNSC strategies to promote implementation. In particular, the disciplinary logic of treating individuals as components within a machine resonates with the UNSC’s desire for a universal-effort solution to prevent terrorism.⁵⁵ Individuals become effective components of disciplinary institutions through a process of “normalization” based on “an optimal model that is constructed in terms of a certain result.”⁵⁶ The instrumental value of building this optimal capacity in individuals is manifested in the increased efficacy of the common efforts in which they are engaged. In Foucault’s words, discipline operates by “composing forces in order to obtain an efficient machine.”⁵⁷ In this way, it shares the logic of effectiveness of administrative decentralization and “allows both the characterization of the individual as individual and the ordering of a given multiplicity. It is the first condition for the control and use of an ensemble of distinct elements.”⁵⁸

As discipline brings distinct elements into a coherent whole, it becomes totalizing. That is, “The first action of discipline is in fact to circumscribe a space in which its power and the mechanisms of its power will function fully and without limit.”⁵⁹ In the UNSC’s approach to implementation, this is manifest in its focus on eradicating gaps and remedying deficiencies and in the logical requirement of creating an entirely regulated space in order to prevent terrorism. Furthermore, discipline achieves such momentous transformations by

thereby contribute to its full and global implementation”); *see also* Statements of the French, U.K., and U.S. representatives, UNSC Meeting Record UN Doc. S/PV.4950, 8, 12, 17 (Apr. 22 2004) (stressing that the resolution was not passed under Chapter VII to bring into play the Council’s enforcement powers).

52. Michel Foucault, *The Eye of Power*, in *POWER/KNOWLEDGE* 146, 155 (C. Gordon ed., 1980) [hereinafter Foucault, *Eye of Power*].

53. FOUCAULT, *DISCIPLINE AND PUNISH*, *supra* note 2, at 182.

54. *Id.*

55. *See* S.C. Res. 2199, *supra* note 3.

56. MICHEL FOUCAULT, *SECURITY, TERRITORY AND POPULATION: LECTURES AT THE COLLEGE DE FRANCE 1977–78* 85 (Graham Burchell trans., 2009). While apologizing for the “barbaric” term “normalization,” Foucault used the term to refer to the process of transforming individuals subject to disciplinary power into units within a larger functional whole. In *Discipline and Punish* he discussed this primarily in relation to the prison, but he also suggested that other institutions such as factories, schools, and the army work in a similar way. *Id.* at 57.

57. Foucault, *Eye of Power*, *supra* note 52, at 164.

58. *Id.* at 149.

59. FOUCAULT, *DISCIPLINE AND PUNISH*, *supra* note 2, at 44–45.

carefully avoiding controversy. It employs “minute technical inventions”⁶⁰ that Foucault described as “the other, dark side” of the formal legal framework.⁶¹ They work by “extend[ing] the general forms defined by law to the infinitesimal level” and by “enabl[ing] individuals to become integrated into [the] general demands” of the law.⁶² Foucault’s notion of discipline supplies a useful description of the mechanisms developed to assist states in the implementation of the UNSC’s quasi-legislative resolutions. Disciplinary power relations can help to bring about decentralized administration, but it will become clear that discipline is not at all compatible with the principle of subsidiarity. In order to achieve its objective of normalizing individual states, discipline sidelines subsidiarity.

II

QUASI-LEGISLATION AND INFRA-LAW

As we have seen, the UNSC treats terrorism prevention as a weakest-link good that requires a universal-effort solution that cannot tolerate incapacity or incompetence. Discipline provides a useful way of remedying weak links without appearing to coerce. Its function is to root out inadequacy and to normalize individual states so they become useful components of a given apparatus. In effect, the subsidiary bodies that the UNSC created to oversee implementation of its quasi-legislation, the Counter-Terrorism Committee (CTC) and the 1540 Committee, have developed an approach to assisting states that amounts to disciplinary normalization.⁶³ A former chairman of the CTC explained, “Our aim is to raise the average level of Government performance against terrorism around the globe. This means upgrading the capacity of each nation’s legislation and executive machinery to fight terrorism. Every government holds a responsibility for ensuring that there is no weak part of the chain.”⁶⁴

This statement places the responsibility for implementation firmly on the shoulders of nation-states, a move that echoes disciplinary power’s scrupulous parsimony.⁶⁵ The logic of effectiveness implied by the motive of administrative decentralization provides that responsibility tends to intensify rather than relax discipline’s ability to control individuals’ actions. Conversely, the logic of

60. *Id.* at 220.

61. *Id.* at 222.

62. *Id.*

63. See Isobel Roele, *Disciplinary Power in the UN Counter-Terrorism Committee*, 19 J. CONFLICT & SECURITY L. 49, 54 (2014) (“[N]ormalization occurs when the knowledge garnered through . . . surveillance meets the practices of correction.”).

64. U.N. SCOR, 57th Sess., 4453d mtg. at 4, U.N. Doc. S/PV.4453 (Jan. 18, 2002).

65. See FOUCAULT, *DISCIPLINE AND PUNISH*, *supra* note 2, at 218 (explaining that disciplines have three characteristic features: They attempt to exercise power at the lowest possible cost, maximizing its invisibility and minimizing objections and resistance; they want to maximize the intensity of the effects of this power and extend it without gaps or intervals; and they link the growth of power with the output of the apparatus within which it is exercised).

legitimacy underlying the principle of subsidiarity suggests that national responsibility connotes national control. The nature of discipline as infra-law enables this doublethink by sidelining subsidiarity, which remains applicable at the level of formal law in order to still states' fears that the UNSC is trying to impinge on their jurisdictional autonomy.

A. Open-Textured Quasi-Legislation

The principle of subsidiarity has been implicated in the justification and criticism of UNSC quasi-legislation. This is easiest to see in the context of Resolution 1540 (2004), which imposed obligations on all states to prevent CBN materiel and its means of delivery from falling into the hands of terrorists.⁶⁶ This Resolution did not benefit from the wave of sympathy following 9/11 that Resolution 1373, on terrorist financing, received.⁶⁷ Many states vociferously opposed the UNSC's quasi-legislative practice as an unwanted infringement of their jurisdictional autonomy and a disruption of the balance of competences between the UNSC and the General Assembly.⁶⁸

There were also fears that the obligations could be coercively imposed on states that were unduly creative or tardy in implementing them.⁶⁹ Much of the opposition was phrased in terms of states' national control and the primacy of domestic responsibility for many of the issues under discussion.⁷⁰ These objections make the same species of legitimacy claim underlying the principle of subsidiarity because they assume domestic decisionmaking is more legitimate than centralized decisionmaking by the UNSC. Proponents of the Resolution were compelled to acknowledge the force of these concerns but not because they shared the logic of legitimacy underlying them. Instead, they were moved by a logic of effectiveness that requires the cooperation of all UN members with the quasi-legislation and, therefore, had to address members' concerns in order to "increase [quasi-legislation's] acceptance and thereby contribute to its full and global implementation."⁷¹ The logics of effectiveness and legitimacy support the same result of national responsibility for implementation. The problem is that far from ensuring national control, the principle of subsidiarity helps to diminish it by providing a façade of legitimation.

66. S.C. Res. 1540, ¶ 3, U.N. Doc. S/Res/1540 (Apr. 28, 2004).

67. See Ian Johnstone, *The Security Council as Legislature*, in *THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY* 80, 90 (Bruce Cronin & Ian Hurd eds., 2008) (noting the lack of opposition to resolution 1373 in the wake of 9/11).

68. For opposition from the Non-Aligned Movement, see U.N. SCOR, 62d Sess., 5635th mtg. at 29, U.N. Doc. S/PV.5635 (Feb. 23, 2007). For the statement from India, see U.N. SCOR, 59th Sess., 4950th mtg. at 23, U.N. Doc. S/PV.4956 (Apr. 22, 2004). For the statement from Namibia, see U.N. SCOR, 59th Sess., 4950th mtg. (Resumption1) at 17, U.N. Doc. S/PV.4950 (Apr. 22, 2004).

69. For the Non-Aligned Movement's statement, see U.N. SCOR, 59th Sess., 4950th mtg. (Resumption 1) at 3, U.N. Doc. S/PV.4950 (Apr. 22, 2004).

70. For India's statement, see U.N. SCOR, 66th Sess., 6518th mtg. at 3–4, U.N. Doc. S/PV.6518 (Apr. 20, 2011); for statements from Norway, see U.N. SCOR, 62d Sess., 5635th mtg. (Resumption 1) at 2, U.N. Doc. S/PV.5635 (Feb. 23, 2007); for statement from Brazil, see *id.* at 14.

71. U.N. SCOR, 59th Sess., 4950th mtg. at 18, U.N. Doc. S/PV.4950 (Apr. 22, 2004).

Statements given at the UNSC in support of the resolution by its sponsors include justifications based on both effectiveness and legitimacy. Regarding effectiveness, for instance, the Russian representative explained that a UNSC resolution was necessary “to ensure the coordination of action” and to establish “an operational framework for international cooperation.”⁷² The U.S. representative was in agreement, adding that “it is essential that all States—not just States parties to a specific treaty or supplier regime—maintain adequate controls over their nuclear material, equipment and expertise.”⁷³ Others justified the UNSC’s involvement by downplaying its enforcement capability and stressing its unique ability to promulgate universally binding norms.⁷⁴

As to legitimacy, the sponsors reassured the UN membership that although standards were to be set at the international level, it would be for each state to decide how implementation would take effect. For instance, the Spanish representative stressed that “the draft resolution is not intrusive—because it gives States leeway on how to internally interpret its implementation.”⁷⁵ Similarly, the French representative promised that “the Council is establishing the goals, but it leaves each State free to define the penalties, legal regulations and practical measures to be adopted.”⁷⁶ These are fairly clear promises of national control.

The promises seemed to be borne out by the open-textured language of Resolution 1540. States’ obligations are contained in the first three operative paragraphs. The first decides that states shall refrain from “providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use” CBN weapons and their means of delivery.⁷⁷ The second paragraph decides that states shall “adopt and enforce effective laws which prohibit” nonstate actors from doing these things.⁷⁸ And the third paragraph decides that “all States shall take and enforce effective measures to establish domestic controls to prevent” CBN proliferation.⁷⁹ Operative paragraph three gives a little more detail about what sorts of controls are intended in four sub-paragraphs that require states to develop measures to account for and secure relevant materials, to develop physical-protection measures, to develop border security and law-enforcement capacity to counter the trafficking of relevant materials, and to develop national export and transshipment controls.⁸⁰ None of these prescriptions is fleshed out in the text of

72. U.N. SCOR, 59th Sess., 4956th mtg. at 6, U.N. Doc. S/PV.4956 (Apr. 28, 2004).

73. *Id.* at 5.

74. For statements made by the United Kingdom and Spain, see *id.* at 7. For statements made by France, see *id.* at 8–9.

75. U.N. SCOR, 59th Sess., 4950th mtg. at 7, U.N. Doc. S/PV.4950 (Apr. 22, 2004).

76. *Id.* at 8.

77. S.C. Res. 1540, ¶ 1, U.N. Doc S/Res/1540 (Apr. 28, 2004).

78. *Id.* ¶ 2.

79. *Id.* ¶ 3.

80. *Id.*

Resolution 1540, which specifies only that the measures taken be “effective.”⁸¹ This factor was material to many states’ support for the resolution. For instance, Pakistan stated that its concerns that the UNSC was attempting to “assume the stewardship of global non-proliferation and disarmament issues” were allayed because 1540 “does not seek to prescribe specific legislation, which is left to national action by States.”⁸²

Resolution 1373 is also open textured.⁸³ The three pertinent paragraphs of 1373 are only slightly more detailed than those of 1540. The first obliges states to prevent and suppress the financing of terrorist acts, to criminalize the provision or collection of funds for terrorist activities, to freeze the funds of those who commit or participate in terrorist activities, and to prohibit those over whom they have jurisdiction from making funds or other services available to terrorists directly or indirectly.⁸⁴ The second paragraph lists seven obligations for states: to refrain from providing active or passive support to terrorists, to prevent the commission of terrorist acts, to deny safe haven to supporters of terrorism, to prevent terrorists from using their territories to launch attacks against other states, to ensure that those involved in terrorist activities are brought to justice, to cooperate with other states in criminal investigations and proceedings against terrorists, and to take effective border-control measures to prevent the movement of terrorists.⁸⁵ The third paragraph is not binding but exhorts states to take measures to grease the wheels of cooperation and to respect various international-law norms, including those relating to human-rights and refugee law.⁸⁶

On their face, the provisions of the quasi-legislative resolutions leave states broad interpretive discretion even though positive action is required to implement them. This impression has led some to suggest that the resolutions are commensurate with the principle of subsidiarity because they respect states’ jurisdictional autonomy and strike a proportionate balance between central standard-setting and local implementation. States retain “a meaningful degree of jurisdictional authority because they enjoy flexibility in the way they implement the SC legislation and participate thus in the law-making process together with the Security Council, without, however, deviating from the common goal.”⁸⁷ The principle of subsidiarity, then, has increased the legitimacy of the UNSC’s controversial quasi-legislative practices in the minds of academics as well as states. Formally speaking, states have control over the way

81. *Id.*

82. U.N. SCOR, 59th Sess., 4956th mtg. at 3, U.N. Doc. S/PV.4956 (Apr. 28, 2004).

83. The term “open-textured” alludes to H.L.A. Hart’s work in *The Concept of Law*. See H.L.A. HART, *THE CONCEPT OF LAW* 124–35 (2d ed. 1994).

84. S.C. Res. 1373, ¶ 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

85. *Id.* ¶ 2.

86. *Id.* ¶ 3.

87. Nicholas Tsagourias, *Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity*, 24 LEIDEN J. INT’L L. 539, 555 (2011).

they implement their obligations because of the open-textured nature of the quasi-legislation's legal provisions.

B. Infra-Law

A different picture emerges when looking beneath the surface of the resolutions at the techniques and mechanisms that have been developed to assist states with their implementation efforts. These supportive initiatives do not belong to the world of formal law but instead to what Foucault called "infra law."⁸⁸ Typically, they rely on expert technical knowledge to rescale the broad obligations imposed on UN member states for the operational level of border guards, police units, and financial regulators. These technical efforts to enhance and support states' implementation efforts are disciplinary in nature. They suggest what Foucault called a "code of normalization" rather than a code of law; they are a jurisprudence of "clinical knowledge."⁸⁹ They condition "the underside of law," complementing the hard formal law of the resolutions by seeming "to constitute the same type of law on a different scale, thereby making it more meticulous."⁹⁰ The disciplinary practices just described help to square the UNSC's allocation of competence to the national level with the suggestion that "the supply of subsidiarity will be higher in regimes dealing with issues without international repercussions."⁹¹ Just as one might expect with critically important weakest-link goods, such as the prevention of CBN proliferation and international terrorism, the jurisdictional autonomy of states is more limited than it first appears.

Effectively implementing the UNSC's scheme of administrative decentralization has required many states to take positive measures to comply with its quasi-legislative resolutions, and a large proportion of these states have needed technical and financial assistance in order to do so. The UNSC accepted this early on after the passage of Resolution 1373,⁹² and Resolution 1540 expressly recognized that many states would require implementation assistance.⁹³ The UNSC's strategy for achieving implementation eschews the coercive enforcement of legal norms and replaces it with technical norms and learning processes coordinated by its subsidiary bodies: the CTC and 1540 Committee. Initially, these bodies were charged with monitoring states' implementation to identify any weak links and gaps in implementation. Later they were given a broader mandate to assist states' implementation efforts. Resolution 1977 encouraged "all States to prepare on a voluntary basis national implementation action plans, with the assistance of the 1540 Committee as

88. See *infra* Part II.B.

89. MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE 1975-76 38 (David Macey trans., 2003).

90. See Foucault, *Eye of Power*, *supra* note 52, at 222.

91. Jachtenfuchs & Krisch, *supra* note 5, at 17.

92. See S.C. Res. 1377, at 3, U.N. Doc. S/RES/1377 (Nov. 12, 2001) (inviting states to inform the CTC of areas in which they need support implementing Resolution 1373).

93. S.C. Res. 1540, ¶7, U.N. Doc S/Res/1540 (Apr. 28, 2004).

appropriate, mapping out their priorities and plans for implementing the key provisions of Resolution 1540.”⁹⁴ Similarly, the CTC has been asked by the UNSC to help states and regional organization draft counterterrorism strategies to further the implementation of 1373.⁹⁵ The two functions of monitoring and assistance are complementary; the identification of weak links leads to assistance and not punishment. The subcommittees share an “essentially *corrective*”⁹⁶ approach—characteristic of disciplinary power—which seeks out deficiencies in states’ implementation efforts and remedies them so as to normalize states into effective components of the UNSC’s universal-effort solution.

The subcommittees take on very little of this work themselves.⁹⁷ They outsource the provision of technical assistance to myriad expert and technical agencies within and outside of the UN family, including the FATF. The 1540 Committee was asked to “liaise on the availability of programmes which might facilitate the implementation of resolution,”⁹⁸ instead of passively requesting information from other organizations and states.⁹⁹ The CTC’s instruction was to “facilitate technical assistance, specifically by promoting engagement between providers of capacity-building assistance and recipient.”¹⁰⁰ In carrying out their mandates, the committees act as conduits between the formal legal norms contained in the UNSC resolutions and the technical infra-law produced in the form of best practices, training manuals, legislative models, and other forms of expert guidance.

Just as discipline operates on the basis of an optimal model,¹⁰¹ the committees compose implementation ideals by singling out certain norms and institutions as technically authoritative. This work has been undertaken pursuant to UNSC mandates to “explore with States and international, regional and sub-regional organizations experience-sharing and lessons learned,”¹⁰² and, in 2008, the Council decided that the Committee should undertake such work.¹⁰³ In 2011, this was taken further when the 1540 Committee was provided with a Group of Experts and charged with the task of “identify[ing] effective practices, templates and guidance, with a view to develop[ing] a compilation, as well as to consider preparing a technical reference guide about Resolution 1540 (2004), to

94. S.C. Res. 1977, ¶ 8, U.N. Doc. S/RES/1977 (Apr. 20, 2011).

95. S.C. Res. 2129, ¶ 7, U.N. Doc. S/RES/2129 (Dec. 17, 2013).

96. Foucault, *Eye of Power*, *supra* note 52, at 179.

97. For a study of disciplinary power in the work of the CTC, *see generally* Isobel Roele, *Disciplinary Power in the UN Counter-Terrorism Committee*, 19 J. OF CONFLICT AND SECURITY L. 49 (2014).

98. S.C. Res. 1977, ¶ 10, U.N. Doc. S/RES/1977 (Apr. 20, 2011).

99. *See* S.C. Res. 1810, ¶ 5, 11, U.N. Doc. S/RES/1810 (Apr. 25, 2008).

100. S.C. Res. 2129, ¶ 7, U.N. Doc. S/RES/2129 (Dec. 17, 2013).

101. *See supra* Part I.B.2.

102. S.C. Res. 1673, ¶ 5(b), U.N. Doc. S/RES/1673 (Apr. 27, 2006).

103. *See* S.C. Res. 1810, ¶ 11(d), U.N. Doc. S/RES/1810 (Apr. 25, 2008) (encouraging the 1540 Committee to “engage actively with States and . . . promote the sharing of experience”).

be used by States on a voluntary basis.”¹⁰⁴ The CTC’s process of refining the provisions of 1373 is more sophisticated, as it has had longer to respond to the UNSC’s requests that it “bear in mind all international best-practices, codes and standards”¹⁰⁵ and compile a directory of them.¹⁰⁶ In response, the CTC has produced a strikingly comprehensive and detailed Directory of International Best Practices, Codes and Standards,¹⁰⁷ and a Technical Guide to Implementation structured around the first three operative paragraphs of Resolution 1373.¹⁰⁸ Notably, this Technical Guide forms the basis of the CTC’s detailed implementation surveys that monitor states’ implementation of their 1373 obligations.

The loose coordinating, curating, and orchestrating roles of the CTC and 1540 Committee are commensurate with discipline’s nature as a form of capillary power. Discipline is most easily understood by homing in on one of the myriad capillaries through which it flows. The final part of this article traces disciplinary power into the work of the FATF, which plays a role in the implementation of Resolutions 1373 and 1540. The case study reveals how the apparent jurisdictional autonomy afforded to states in these resolutions is effectively displaced by technical prescriptions. This is made possible by the paralleling of the logics of effectiveness and legitimacy. The disciplinary interventions on the underside of the law, which share the logic of effectiveness of the UNSC’s project of administrative decentralization, are obscured by the principle of subsidiarity at the level of the formal legal norm. For all its persistence at this formal level, subsidiarity has no traction in the nonformal realm of infra-law, and discipline effectively sidelines it.

III

CASE STUDY: THE FINANCIAL ACTION TASK FORCE

The FATF is an inter-governmental body established by the G7 in 1989.¹⁰⁹ Today, its membership has expanded to thirty-four states, the European Commission, and the Gulf Cooperation Council.¹¹⁰ Its initial focus was anti-money laundering (AML), and, in 1990, it produced forty recommendations to address the problem.¹¹¹ In 2001, its remit was expanded to include countering

104. S.C. Res. 1977, ¶ 12, U.N. Doc. S/RES/1977 (Apr. 20, 2011).

105. S.C. Res. 1456, ¶ 4(iii), U.N. Doc. S/RES/1456 (Jan. 20, 2003).

106. S.C. Res. 1566, ¶ 7, U.N. Doc. S/RES/1566 (Nov. 12, 2001).

107. U.N. Security Council Counter-Terrorism Committee, United Nations Security Council Resolution 1373 (2001) Directory of International Best Practices, Codes and Standards (2011), <http://www.un.org/en/sc/ctc/bptable.html>.

108. Counter Terrorism Executive Directorate, Technical Guide to the Implementation of Resolution 1373 (2009), http://www.un.org/en/sc/ctc/docs/technical_guide_2009.pdf.

109. For a short history of the FATF’s creation, see FATF, Who We Are, <http://www.fatf-gafi.org/about/> (last visited May 16, 2016).

110. FATF, Members and Observers, <http://www.fatf-gafi.org/about/membersandobservers/> (last visited May 16, 2016).

111. FATF, History of the FATF, <http://www.fatf-gafi.org/about/historyofthefatf/> (last visited May 16, 2016).

the financing of terrorism (CFT), and it published an additional Nine Special Recommendations on Terrorist Financing.¹¹² The “40+9 Recommendations”¹¹³ are regularly updated and are supported by well-developed disciplinary mechanisms, practices, techniques, and tactics.

Despite the FATF’s narrow membership, its recommendations are intended to have universal effect. Rather than expand its own membership in order to achieve this, over 180 states belong to eight FATF-Style Regional Bodies (FSRBs),¹¹⁴ which monitor and assist states’ implementation of the recommendations. Remarkably, the FATF also holds states that are neither FATF nor FSRB members to its recommendations. Its stated mission is to “identify national-level vulnerabilities” and, to this end, to identify and engage “with high-risk, non-co-operative jurisdictions and those with strategic deficiencies in their national regimes” that pose a threat to the financial system’s integrity.¹¹⁵ The FATF shares the UNSC’s totalizing logic of effectiveness that tolerates no weak links, so it is, perhaps, no surprise that its technical recommendations form part of the infra-law of 1373 and 1540. This has occurred through their incorporation as best practices by the UNSC’s subsidiary bodies. They feature heavily in the CTC’s directory and *Technical Guide to the Implementation of Resolution 1373*.¹¹⁶ The FATF has also been expressly endorsed by the UNSC, which encouraged the CTC to “work closely with the FATF, including in the FATF’s mutual-evaluations process.”¹¹⁷ Since 2007, it has also been active in the area of the financing of CBN proliferation, and, in 2013, it published guidance on the implementation of Resolution 1540.¹¹⁸ The FATF’s work in this area has been noted by the UNSC¹¹⁹ and the body has

112. *Id.*

113. FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (2012), http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf [hereinafter *The FATF Recommendations*].

114. These are: The Asia-Pacific Group, the Caribbean FATF, MONEYVAL (under the auspices of the Council of Europe), the Eurasian Group, the Eastern and Southern Africa AML Group, the Inter-Governmental Action Group of West Africa, the Middle East and North Africa FATF, and the FATF of Latin America. There are currently plans for a ninth FSRB to cover Central Africa, the GABAC. For information on the FSRBs and the list of FATF Associate Members, see FATF, *FATF Members and Observers*, *supra* note 110.

115. FATF, *Financial Action Task Force Mandate (2012–2020)*, art. 3(d) (2012), <http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf> [hereinafter *FATF Mandate*].

116. *See* Counter Terrorism Executive Directorate, *supra* note 108, at 3 (stating that implementation of the measures in 1373 “should be guided by the . . . norms and standards set out in the 40 Recommendations and Nine Special Recommendations of the Financial Action Task Force on Money Laundering (FATF), which has achieved broad recognition as the authoritative international body for the development and adoption of standards relating to money-laundering and terrorist financing”).

117. S.C. Res. 2129, ¶ 17, U.N. Doc. S/RES/2129 (Dec. 17, 2013).

118. FATF, *The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of WMD 3* (2013), <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-UNSCRS-Prolif-WMD.pdf>.

119. *See* S.C. Res. 1977, at 2, U.N. Doc. S/RES/1977 (Apr. 20, 2011) (noting “the guidance of the

been invited to brief the subcommittees on financing issues,¹²⁰ but none of the UNSC resolutions contains a decision that makes the FATF's recommendations formally binding on all states.

The FATF works on the underside of 1540 and 1373 to ensure that all states have the capacity to play their part in protecting "the integrity of the international financial system."¹²¹ Its practices are characteristically disciplinary, employing prescription, monitoring, and correction to normalize states. Apart from publishing and disseminating its recommendations, it produces an abundance of technical guidance for their implementation. In order to see that they are implemented, it uses repeated mutual-evaluation reports, which subject states to constant supervision. Finally, it uses both carrots and sticks to correct any deficiencies it finds by ranking states according to the progress they have made. The cumulative effect of these processes is to radically diminish national control over the implementation of states' obligations while constantly reasserting national responsibility to implement, which then acts as a motor for normalization.

A. Prescriptions

Foucault explained how disciplinary power focuses on the "control of activity"¹²² through the "elaboration of the act."¹²³ Discipline is not satisfied with the open-textured UNSC resolutions because national control over their interpretation is inimical to normalization according to an optimal model. The model serves "as a common standard, a basic principle of comparison"¹²⁴ and is constructed from microprescriptions that leave little room for interpretation. The FATF shares this logic. It seeks to homogenize states' AML and CFT measures, "closing down regulatory arbitrage" so as to prevent actors from exploiting disparities in regulatory standards.¹²⁵ This is achieved by breaking down the legal norms into microprescriptions through multiple tiers of increasingly detailed prescriptions.

The first tier of infra-law is formed by the recommendations themselves, which, since there are forty-nine of them, already remove much of the ambiguity in the open-textured subparagraphs of the quasi-legislative resolutions to which they are relevant. The next tier is made up of technical guidance for implementing the recommendations, which is itself broken down

framework" of the FATF).

120. See Joint Open Briefing of the Chairs of the Security Council Committees and the President of the FATF (Nov. 18, 2013), <http://webtv.un.org/meetings-events/watch/joint-open-briefing-of-the-chairs-of-the-security-council-committees-and-the-president-of-the-fatf/2851464364001#full-text>.

121. FATF Mandate, *supra* note 115, art. 1(2).

122. Foucault, *Eye of Power*, *supra* note 52, at 149.

123. *Id.* at 151.

124. François Ewald, *Norms, Discipline and the Law*, 30 REPRESENTATIONS 138, 148 (1990).

125. Roger Wilkins, Objectives for the Australian Presidency of the FATF XXVI 2014–15 2, <http://www.fatfgafi.org/media/fatf/documents/Objectives%20for%20FATF%20XXVI%202014%202015.pdf>.

into several strata. The first stratum comprises “interpretive notes”¹²⁶ to each recommendation that form part of the FATF standards and are intended to be mandatory except when they use examples that are intended only to give guidance.¹²⁷ The second stratum comprises detailed Guidance and Best Practices papers published on specific recommendations, such as the guidance on transparency and beneficial ownership that corresponds to Recommendations 24 and 25,¹²⁸ as well as guidance on cross-cutting issues, such as the recent rise in prepaid cards, mobile payments, and Internet-based payment services.¹²⁹ The third stratum is constituted by typology reports in the form of research papers on highly specific issues, such as the relevance of the diamond trade to AML and CFT¹³⁰ or of the trafficking of Afghan opiates.¹³¹ None of these documents has binding force as formal law; they are published as technical assistance. Nevertheless, they produce a densely textured optimal model for implementation that reduces national control of implementation.

States’ loss of control over interpretation is compounded because most states have little input into FATF’s processes of norm-creation. Not only are many of the norms classed as technical rather than political, but states’ input is also limited because of the FATF’s club-like composition.¹³² Less than one-fifth of UN member states are members of the FATF, which has a reputation as a particularly exclusive body.¹³³ The criteria for FATF membership exclude most states because members must be “strategically important” both quantitatively, in terms of their gross domestic product and financial sectors, and qualitatively, in terms of their impact on the global financial system and their participation in FSRBs.¹³⁴ India was the last state to meet these criteria, in 2010.¹³⁵ FATF decisions are rolled out to jurisdictions through eight FSRBs in which most, but not all, UN member states participate. Since the FATF’s avowed goal is to protect the integrity of the financial system, there is no opting out of the

126. The FATF Recommendations, *supra* note 113, at 31.

127. *Id.* at 8.

128. FATF, Guidance on Transparency and Beneficial Ownership 3 (2014), <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>.

129. FATF, Guidance for a Risk-Based Approach to Prepaid Cards, Mobile Payments and Internet-Based Payment Services (2013), <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-RBA-NPPS.pdf>.

130. FATF, Money Laundering and Terrorist Financing through Trade in Diamonds (2013), <http://www.fatf-gafi.org/topics/methodsandtrends/documents/ml-tf-through-trade-in-diamonds.html> (last visited May 16, 2016).

131. FATF, Financial Flows Linked to the Production and Trafficking of Afghan Opiates (2014), <http://www.fatf-gafi.org/topics/methodsandtrends/documents/financial-flows-afghan-opiates.html> (last visited May 16, 2016).

132. See Peter Romaniuk, *Institutions as Swords and Shields: Multilateral Counter-Terrorism Since 9/11*, 36 REV. INT’L STUD. 591, 602 (2010) (noting that the FATF operates like a club by developing rules that suit strong states “but involve high adjustment costs for weak states”).

133. See Krisch, *supra* note 40, at 23 (describing the FATF as a “classical club organization”).

134. FATF, Membership Policy (2015), <http://www.fatf-gafi.org/pages/aboutus/membersanobservers/fatfmembershippolicy.html> (last visited May 16, 2016).

135. FATF, Countries: India. <http://www.fatf-gafi.org/countries/#India> (last visited May 16, 2016).

recommendations, and the FATF applies them to states that are not members of FSRBs even though these states have had absolutely no opportunity to participate in the standard-setting processes.

Even states that are members of FSRBs lack control over the standard-setting process when they are not also members of the FATF itself. Non-FATF jurisdictions can participate in FATF decision-making processes only if their FSRBs meet certain criteria. Even if they do, there is little scope for critical voices, as FSRBs “should endorse the FATF Recommendations and mutual evaluation related material as interpreted by the FATF, and support other related FATF material and policies, such as best practice papers, guidance, and policy papers.”¹³⁶ These commitments ensure that the FSRBs channel the various strata of FATF prescriptions down to the regional level with the minimum amount of divergence. Given the FATF’s desire to eradicate regulatory arbitrage, the FSRBs are less about promoting regional pluralism than about diminishing its effect on the implementation of the recommendations. There is a clear pecking order between the FATF and its regional bodies, as reflected in the first principle of High Level Agreement that governs relations between them. The agreement states, “The FATF is the only standard-setting body and the guardian and arbiter of the application of its standard.”¹³⁷ The two-tier system of membership is difficult to square with the principles of global administrative law,¹³⁸ particularly because, at least initially, “non-members were voiceless in the process of crafting the FATF recommendations.”¹³⁹ While the FATF made efforts to consult more widely when the recommendations were revised in 2012, no qualitative changes were made, and the revision was limited to expanding the existing approach to include new and emerging threats to the integrity of the financial system.¹⁴⁰

Another factor that diminishes national control over implementation is the technical, rather than political, character of FATF norms. An integral part of the way the FATF normalizes states is “through the dissemination of knowledge-based technologies of Government.”¹⁴¹ National control is

136. FATF, High-Level Principles & Objectives for FATF and FATF-Style Regional Bodies 4–5 (2012), <http://www.fatf-gafi.org/media/fatf/documents/High-Level%20Principles%20and%20Objectives%20for%20FATF%20and%20FSRBs.pdf>.

137. *Id.* at 1.

138. See Jarred Wessel, *The Financial Action Task Force: A Study in Balancing Sovereignty and Equality in Global Administrative Law*, 13 WIDENER L. REV. 169, 170 (2006) (arguing that “jurisdictions affected by its policies, accept less ‘pure’ forms of sovereignty, deliberative equality, and command-and-control regulation over the civil liberties/security tradeoff”); see also Navin Beekarry, *The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy*, 31 NW. J. INT’L L. & BUS. 137, 189 (2011) (citing Thomas M. Franck when writing that the “fundamental principle underpinning the concept of legitimacy in policy-making is the recognition that subjects of international norms should have an opportunity to participate and influence the development of those norms”).

139. Kenneth S. Blazejewski, *The FATF and its Institutional Partners*, 22 TEMP. INT’L & COMP. L.J. 1, 44 (2008).

140. The FATF Recommendations, *supra* note 113, at 8–9.

141. Yee-Kuang Heng & Ken McDonagh, *The Other War on Terror Revealed*, 34 REV. INT’L STUD.

diminished both by the consequent depoliticization of the norms and by the desire to have up-to-date technical knowledge. The FATF prides itself on keeping its recommendations up-to-date, and its prescriptions are subject to continuous updating and improvement to keep pace with changes in technology, knowledge, and the practices of money launderers and terrorist financiers.¹⁴² As a consequence, the process of normalization is open-ended because its logic of effectiveness demands that it take account of the latest technical developments. The FATF's "typologies" research continually tweaks the optimal model of interpretation in the light of research conducted by experts from FATF member states.¹⁴³ This research also tends to expand the FATF's sphere of competence by seeking out "new trends or methods in misuse of the financial system."¹⁴⁴ As the FATF's remit grows, so national control of implementation diminishes. This effect is exacerbated because the FATF's reliance on research produces a "depoliticised expert orthodoxy."¹⁴⁵ Typology reports are not purely descriptive, and they feed into the process of drafting prescriptive guidance. For instance, a recent report on the risk of terrorist abuse of nonprofit organizations will inform the revision of the guidance on combating the abuse of nonprofits as required by Recommendation Eight.¹⁴⁶ The research-driven nature of changes to the FATF's prescriptions displays a logic of effectiveness operating according to an underlying assumption that technical knowledge is objective and therefore universally applicable. Subsidiarity is sidelined by these prescriptions because such an approach to knowledge is blind to any legitimacy issues.

B. Mutual Evaluation Reports

The FATF's technical, multilayer prescriptions are given normalizing effect by technologies of surveillance. Surveillance is perhaps the most recognizable element of disciplinary power, particularly in the form of Bentham's panopticon, which operated according to a principle of "omni-visibility."¹⁴⁷ Less emblematic, but a just-as-important tool of surveillance, is the examination that

553, 572 (2008).

142. See The FATF Recommendations, *supra* note 113, at 9.

143. See FATF, Annual Report 2013–14, at 14, <http://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/FATF%20Annual%20report%202013-2014.pdf> [hereinafter FATF Annual Report] ("The FATF's work to identify and analyse these risks, trends and methods, or typologies work, ensures that the FATF standards are up to date and that new policy or guidance is developed if and when necessary. Typologies work builds on the experience and knowledge of those operating in such fields, as law enforcement and investigation, as well as financial intelligence.").

144. *Id.*

145. Valsamis Mitsilegas, *The European Union and the Global Governance of Crime, in* GLOBALISATION, CRIMINAL LAW AND CRIMINAL JUSTICE, THEORETICAL, COMPARATIVE AND TRANSNATIONAL PERSPECTIVES 178 (Valsamis Mitsilegas, Peter Alldridge & Leonidas Cheliotis eds., 2015).

146. FATF, Risk of Terrorist Abuse in Non-Profit Organisations 9 (2014), <http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-of-terrorist-abuse-in-non-profit-organisations.pdf>.

147. MICHEL FOUCAULT, PSYCHIATRIC POWER: LECTURES AT THE COLLEGE DE FRANCE 1973–1974 48 (Graham Burchell trans., 2008).

“transformed the economy of visibility into the exercise of power.”¹⁴⁸ The examination measures conformity with the prescribed model in order to identify and remedy deficiency. The FATF makes extensive use of assessments in the form of Mutual Evaluation Reports (MERs). These reports monitor states’ implementation of the recommendations on a rolling basis in order to identify deficiencies that could jeopardize the integrity of the global financial system. MERs are intended to help states to improve their performance by highlighting shortcomings and priority areas of action. The evaluation process is iterative, and subsequent evaluations assess the extent to which a state has made the improvements required as measured against the optimal model constituted by the FATF’s technical microprescriptions.

All members of the FATF and its FSRBs are subject to MERs conducted according to a methodology that measures the effectiveness of implementation as well as basic technical compliance with the recommendations.¹⁴⁹ The FATF takes evaluation very seriously, and no state is immune from findings of noncompliance or ineffectiveness. This reflects the nature of the FATF’s project as a universal-effort solution to the problems of AML and CTF. For example, the MER by the United States for the third round of FATF evaluations in 2006 revealed several shortcomings and ended in a lengthy action plan for improvement before the fourth round in 2016.¹⁵⁰ Of the forty-nine categories, the United States was assessed as “compliant,” meaning no further work was necessary, in only fifteen of them.¹⁵¹ It was found to be noncompliant, indicating major shortcomings, in four categories, including in the beneficial ownership of property and the regulation of casinos and other nonfinancial institutions.¹⁵² One of the findings of noncompliance related to Recommendations Five—on customer due diligence—and ten—on record-keeping—because so-called designated nonfinancial business and professions, such as casinos, accountants, lawyers, dealers in precious metals, and real estate agents are not subject to sufficient customer-identification and record-keeping obligations. In its action plan, the United States was advised that it should “explicitly require casinos to perform enhanced due diligence for higher risk categories of customers” and “extend customer identification, record keeping and account monitoring obligations” to all other designated nonfinancial business and professions.¹⁵³ Thus, even U.S. national control over implementation is affected by the MERs.

The FATF attempts to convert the action plans into concrete improvements by including a follow-up process to ensure that states do not simply ignore

148. Foucault, *Eye of Power*, *supra* note 52, at 187.

149. FATF, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT systems 11–14* (2013), <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf>.

150. FATF, *Third Mutual Evaluation Report on AML and CFT: United States of America 304–09* (June 23, 2006), <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf>.

151. *Id.* at 299–303.

152. *Id.*

153. *Id.*

them. National control is most extensively diminished when a state has failed to progress from the follow-up process designed to ensure the recommended improvements are made. In this formal follow-up process the assessed state reports to the FATF Plenary on the steps it has taken to address its deficiencies. A state can be removed from follow-up only after by submitting a formal application for a finding that it is, at least, largely compliant.¹⁵⁴ As Turkey's experience illustrates, the process of removal is not a mere formality. Instead, states must demonstrate the detailed measures they have taken to rectify the deficiency. In October 2014, the FATF published its fifteenth follow-up report on Turkey's 2007 MER.¹⁵⁵ The aim of the follow-up process is to raise Turkey's level of compliance across the recommendations to a status of largely compliant.

The episode illustrates the tremendous depth the FATF's corrective process reaches. A sticking point in its action plan had been Turkey's criminalization of terrorist financing as required by Resolution 1373 and the FATF Special Recommendation II.¹⁵⁶ Turkey had adopted a terrorist financing law in order to implement its obligations, but the FATF found it to be ineffective and deficient in a number of respects, including in the detailed definition of the *actus reus* and *mens rea* of the offense and of the sanctions available on conviction. The MER found that Turkey's definition of terrorist funding was too narrow, as it dealt only with financial support, and was concerned that the mental element for the offence, "knowing and willing," was too high a threshold. Before it would sign off on compliance, the FATF required assurances about how elements of the offence would be interpreted by Turkish courts.¹⁵⁷ This astonishing interference with Turkey's control over the process of implementation shows that the FATF is not satisfied with compliance on paper. This makes sense if Turkey is seen as part of a decentralized apparatus for regulating the global financial system; its criminal-justice system must be fit for purpose in practice. Moreover, what counts as fit for purpose is determined by the FATF and not the evaluated state.

C. Ranking

Examination makes it possible to rank individuals, and "discipline is an art of rank, a technique for the transformation of arrangements."¹⁵⁸ The FATF ranks states using shades of compliance: not complaint, partially compliant,

154. FATF Annual Report, *supra* note 143, at 11.

155. FATF, 15th Follow-Up Report on the Mutual Evaluation of Turkey (2014), <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/Turkey-FUR-2014.pdf>.

156. Turkey's mutual evaluation pre-dates the revision of the FATF Recommendations in 2012 and is therefore measured against the old 2001 edition of the special recommendations. See FATF, FATF IX Special Recommendations (2001), <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>. For the revised 2012 Recommendations, see The FATF Recommendations, *supra* note 113.

157. FATF Report on the Evaluation of Turkey, *supra* note 155, at 15–17.

158. Foucault, *Eye of Power*, *supra* note 52, at 146.

largely compliant, and compliant. In disciplinary systems, ranking is transformative and is used to correct deficiency “through the mechanics of a training.”¹⁵⁹ Ranking brings with it “a whole micro-economy of privileges and impositions,”¹⁶⁰ which can be seen in the listing practices of the FATF. Ranking is one of the main sources of the FATF’s carrots and sticks and confounds the notion that discipline is a wholly soft power. Although discipline does not enforce its norms in the way that the sovereign enforces the formal law, discipline establishes a small “infra-penalty” to bring the deficient into line.¹⁶¹ Disciplinary coercions, like disciplinary norms, inhabit the obscured underside of law. However, they are also the points at which discipline becomes most visible and, therefore, most vulnerable to critique, as in the case of the FATF’s practice of blacklisting noncompliant states.

The FATF names and shames noncompliant and uncooperative jurisdictions¹⁶² with a view to mending rents in the fabric of the global financial system. The practice, like all disciplinary punishment, is “essentially corrective.”¹⁶³ States failing to show sufficient progress in their implementation of the recommendations are referred to the International Cooperation Review Group (ICRG) as “high risk and non-cooperative” jurisdictions. The ICRG process moves from the soft corrective training of technical assistance to the hard corrective training of ranking. It is notable that “non-cooperative” refers to something more than a total failure to engage; it can also apply to states that do take the MER follow-up process sufficiently seriously.¹⁶⁴ The class comprised of the “high risk and non-cooperative,” like the other “shameful” classes with which Foucault was concerned, “existed only to disappear.”¹⁶⁵ It is a permanent classification of a jurisdiction as second-class. It is a spur to improvement. The FATF explained that “public identification of countries with serious weaknesses in their AML–CFT measures has proven to be a powerful tool for improving global compliance” because “it puts pressure on the countries in question to act on and address these deficiencies in order to maintain their position in the global economy.”¹⁶⁶

The infra-penalty of listing works in several different ways. First, there is a loss of position and prestige when a state is “named and shamed” in the ICRG’s biannual public statements. At the time of writing, the names of thirteen states together with brief descriptions of their deficiencies were listed by the FATF.¹⁶⁷

159. *Id.* at 180.

160. *Id.*

161. *Id.* at 178.

162. See Guy Stessens, *The FATF “Black List” of Non-Cooperative Countries*, 14 LEIDEN J. INT’L. L. 199, 203 (2001) (analyzing the FATF’s process of blacklisting non-cooperative jurisdictions).

163. Foucault, *Eye of Power*, *supra* note 52, at 179.

164. FATF Annual Report, *supra* note 143, at 22.

165. Foucault, *Eye of Power*, *supra* note 52, at 182.

166. FATF Annual Report, *supra* note 143, at 22.

167. The list is regularly updated. For the most recent version, see FATF, High Risk and Non-Cooperative Jurisdictions (2016), <http://www.fatf-gafi.org/countries/#high-risk> (last visited May 16,

Second, the list generates incentives to improve because it contains several subcategories reflecting different shades of noncooperation. At one end are jurisdictions subject to a FATF call for countermeasures, and at the other end are jurisdictions no longer subject to monitoring. It is equally important for the FATF's purposes to advertise states' successes as well as their failures. The publication of the lists therefore includes something of a public ceremony of graduation that records states' progress moving through the shades of noncooperation and improving compliance and, eventually, off the list altogether. Of course, states can regress as well as improve, and at the time of writing LAO PDR has been labelled "a jurisdiction not making sufficient progress," which amounts to a threat to demote it from the improving category.¹⁶⁸ The ICRG process is an excellent example of "this play of quantification, this circulation of plus and minus points, [by which] the disciplinary apparatuses hierarchized the 'good' and 'bad' subjects in relation to one another."¹⁶⁹

A third aspect of the infra-penalty of listing is the FATF's practice of calling for countermeasures as a tangible sanction for noncooperation. Currently, only Iran and North Korea are subject to these.¹⁷⁰ States in the subcategory directly above this nadir are also labelled with a warning that other states should consider the risks arising from their deficiencies.¹⁷¹ At present, the three states on this list—Algeria, Ecuador, and Myanmar—all remain members of FSRBs and have not attempted to opt out of the system entirely, as Iran and North Korea have.¹⁷² All the states on the noncooperative list are affected in a material way because noncooperative equates to a status of "high risk," and potential trading partners are warned that they "could find that they are no longer able to do business with [the listed states] at all."¹⁷³ FATF Recommendation Nineteen requires financial institutions "to apply enhanced due diligence measures" to entities from "higher risk" jurisdictions.¹⁷⁴ According to the interpretive note on this article, these measures might involve: implementing more stringent reporting requirements; prohibiting the establishment of subsidiaries or branches in the country concerned; and, in general, raising the cost of doing business so as to dissuade institutions and businesses from making transactions in the higher-risk jurisdiction.¹⁷⁵

2016).

168. FATF, Public Statement on Improving Global AML/CFT Compliance: On-Going Process (2015), <http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/fatf-compliance-october-2015.html#Uganda>.

169. Foucault, *Eye of Power*, *supra* note 52, at 181.

170. FATF Annual Report, *supra* note 143, at 23.

171. *Id.*

172. *Id.*

173. *Id.* at 22.

174. The FATF Recommendations, *supra* note 113, at 19.

175. *Id.* at 79.

In sum, the FATF converts its technical prescriptions into measurable behavioral changes using mechanisms of surveillance and correction in a way that is characteristic of disciplinary systems. In the FATF system, states are deprived of national control over the implementation of their obligations while the system at the same time emphasizes their responsibility for implementation. The FATF's recommendations, like the UNSC's quasi-legislation to which it has become attached as infra-law, are the product of a logic of effectiveness that seeks to transform states into effective nodes of decentralized administration of the global financial system. The principle of subsidiarity remains present in the open-textured drafting of the quasi-legislative provisions and the lack of enforcement mechanisms, but it has no place on the underside of law and is effectively sidelined by disciplinary tactics of implementation.

IV

CONCLUSION

In global governance the principle of subsidiarity has a logic of legitimacy; responsibility is allocated to the national level in order to bring decisionmaking closer to the human beings it affects. Sometimes, as in cases of weakest-link goods like the prevention of transnational security challenges, a logic of effectiveness drives the allocation of responsibility to the national level. The UNSC concocted a universal-effort solution of decentralized administration that strives, however unlikely in the achievement, to completely regulate specific aspects of the international space in order to prevent terrorists from operating. Pursuing this project led the UNSC to lay down a skeletal framework for a common approach to the regulation of terrorist financing and the proliferation of CBN material and its means of delivery. Concerns about the legitimacy of this quasi-legislation means, given the UNSC's democracy deficit, that the UNSC has had to find ways of ensuring that states implement their obligations without counterproductively alienating or angering them. The logic of effectiveness underlying the UNSC's project is echoed by the logic of effectiveness underpinning its disciplinary power. Along with discipline's under-the-radar modus operandi, the shared logic has rendered discipline an ideal instrument of implementation. The problem is that discipline operates on the underside of law and seeks to immunize itself from critical scrutiny and challenge. The retention of the principle of subsidiarity on the surface of the quasi-legislation tends only to entrench this situation. In effect, discipline pursues national responsibility without national control, effectively sidelining the principle of subsidiarity.