# Counter-Terrorism — A New Approach

## The International Convention for the Suppression of the Financing of Terrorism

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On 10 January 2000 at United Nations Headquarters in New York the *International Convention for the Suppression of the Financing of Terrorism*[2] was opened for signature. It had been negotiated in two two-week sessions in New York in 1999. This was particularly remarkable since, unlike the previous nine counter-terrorism conventions[3] the new

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1 Author of *Modern Treaty Law and Practice*, 2000 and "Lockerbie: the other case", *ICLQ* 49 (2000), 278 et seq. about how the two accused of the Lockerbie crime were brought to trial before a Scottish court sitting in the Netherlands. The views expressed are personal, not those of the United Kingdom Government.

2 *ILM* 39 (2000), 270 et seq.; A/RES/54/109 of 9 December 1999.

3 Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (UNTS Vol. 860 No.12325; UKTS (1972) 39); Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (UNTS Vol. 974 No. 14118; UKTS (1974) 10); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973 (UNTS Vol. 1035 No. 15410; UKTS (1980) 3); International Convention against the Taking of Hostages 1979 (UNTS Vol. 1316 No. 21931; *ILM* 18 (1979), 1460 et seq.; UKTS (1983) 81); Convention on the Physical Protection of Nuclear Material 1980 (*ILM* 18 (1979), 1419 et seq.; UKTS (1995) 61); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention, 1988 (*ILM* 27 (1988), 627 et seq.); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 and Protocol for the Sup-



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one is quite different in nature in that it is not concerned with terrorist crimes, like planting a bomb on board a civil aircraft, but with the financing of such crimes. Although financing aids the commission of terrorist crimes, because it is not itself a terrorist act the drafters of the new convention encountered some unusual problems. The two main ones were, first, the precise scope of the new offence, in particular how to define the terrorist acts the financing of which would be criminalised; and, secondly, how to deal with corporate bodies involved in terrorist financing. There were other problems of a lesser order which will also be discussed.

## I. The Negotiations

The new convention was a French initiative. The initial draft was first considered at meetings in Brussels of European Union Member States and at meetings in London and Paris of the G8.[4] Most of the work was done by government legal experts. The draft went through several versions before it was tabled at the United Nations.[5] It was then considered at a meeting of an *ad hoc* Committee from 15 to 26 March 1999.[6] The work was continued by a Working Group of the Sixth Committee

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pression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf 1988 (UNTS Vol. 1678 No. 29004); International Convention for the Suppression of Terrorist Bombings 1997 (*ILM* 36 (1997), 251 et seq.). On the present status of the conventions, see Doc. A/55/179, 14–23.

Negotiations for an International Convention for the Suppression of Acts of Nuclear Terrorism (originally proposed by Russia to fill lacunae in the 1980 Convention), were concluded in 1998, except for, in particular, the question whether to exclude from the scope of the convention the activities of armed forces. At the time of writing (December 2000) the negotiations on that question have still not been concluded (see Doc. A/55/37). For the 55th Sess. of the General Assembly in 2000 India tabled a draft Comprehensive Convention on Terrorism: see Docs A/C.6/55/1(draft) and A/C.6/55/L.2 (Working Group Report).

4 The Group of Seven, plus the Russian Federation.

5 Doc. A/C.6/53/L.4.

6 The Committee was established by A/RES/51/210 of 17 December 1996 as an inter-sessional committee, originally to consider the draft convention on terrorist bombings and, subsequently the drafts on nuclear terrorism and terrorist financing. For its report on the latter, see Doc. A/54/37.

which met from 27 September to 8 October 1999.[7] Given the subject, Liechtenstein, Luxembourg and Switzerland[8] naturally played a rather bigger role than usual. The meetings of the *ad hoc* Committee and the Working Group were chaired by Philippe Kirsch of Canada, ably assisted by Sylvia Fernandez of Argentina in the Working Group's informal negotiations on key article 2. After an insubstantial discussion as is usual on such occasions,[9] the Sixth Committee recommended, by 116 votes for, none against and three abstentions,[10] that the General Assembly adopt the text of the Convention,[11] and on 9 December 1999 it did so without a vote. The Convention will enter into force thirty days after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession.[12]

Most of the draft followed precedent, in particular the *International Convention for the Suppression of Terrorist Bombings 1997* (Terrorist Bombings Convention), which has become the benchmark for new UN counter-terrorism conventions. However, as will be explained, the nature of the offence to be created by the new convention required creative thinking to overcome some new problems.

## II. Definitions

Article 1 contains only three definitions. The first, "Funds", is drawn deliberately wide:

> ...assets of every kind, whether tangible [e.g. cash] or intangible [e.g. a bank account], movable [e.g. diamonds] or immovable [e.g. land], however acquired [i.e. legally or illegally], and legal documents or

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7 For its report to the Sixth Committee, see Doc. A/C.6/54/L.2.

8 Although Switzerland is not a member of the United Nations, the mandates of the *ad hoc* Committee and the Working Group allowed it to participate as a full member at their meetings, not merely as an observer, though for some years the distinction has in practice not been particularly important in such subsidiary bodies.

9 A/C.6./54/SR. 31-2, 34, 35 and 37.

10 Benin, Lebanon and Syria.

11 Doc. A/54/615.

12 Doc. A/54/PV. 76; A/RES/54/109 of 9 December 1999. The Convention was opened for signature from 10 January 2000 to 31 December 2001. It can be acceded to at any time. By 1 December 2000 it had been signed by 35 states, of whom two had ratified.

instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.

The first half of the definition is based largely on article 1 (g) of the *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (Vienna Drugs Convention).[13] The list at the end is only illustrative. The second definition, "State or government facility" is drawn word for word from the Terrorist Bombings Convention.[14] It is also taken from the Vienna Drugs Convention, article 1 (p). The last definition, "Proceeds", is relevant only to article 8.[15]

## III. Defining the New Offence

An unexpected threshold issue was raised by representatives of certain Western European states. They questioned whether there was need for a new convention, since, in their view, the financier of a terrorist act would commit the ancillary offence of being an accomplice, and existing counter-terrorism conventions provide for the offence of being an accomplice. They also had difficulty with the concept that financing a terrorist act is as serious a crime as committing the terrorist act itself, though the whole point of the new convention is to tackle the difficult problem of financial "godfathers", without whom most terrorist crimes would not be possible. Their reluctance may, however, have had more to do with perceived domestic problems in enacting the necessary implementing legislation. Other Western European states, and states from other regions, saw no problem in creating a new *principal* offence. They considered that the provisions on accomplices in existing conventions were not enough, and that those who finance terrorist crimes should be treated as severely as those who commit the crimes.[16]

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13 *ILM* 28 (1989), 493 et seq.; UKTS (1992) 11.

14 Since it is relevant only to article 7 para. 2 (b) it would have been more practical to have located it there. See *Modern Treaty Law*, see note 1, 343.

15 And should have been placed there.

16 See the Report of the *ad hoc* Committee (Doc. A/54/37), Annex IV. B, para. 84.

The United Nations has for the last thirty years been much concerned with the problem of terrorism,[17] yet the resolutions of the General Assembly and the Security Council from 1969 refer either to specific types of terrorist crimes, such as hijacking, or to particular incidents, or to terrorism generally. They do not contain any general definition of terrorism; and there is still no universally agreed definition, although many states have defined terrorism for the purposes of their domestic law:

Section 1(1) of the (UK)Terrorism Act 2000 defines terrorism as:

(1) the use or threat of action where-

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it-

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system [e.g. a computer network].

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section-

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

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17 See the Hague Academy lectures by G. Guillaume, "Terrorisme et Droit International", *RdC* 215 (1989), 287 et seq.

(d) "the government" means the government of the United Kingdom, or of a Part of the United Kingdom [e.g. Scotland] or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

It should be noted, however, that this is a definition for the purposes of the Act; it is not the definition of a criminal offence. The Act does not create an offence of terrorism as such, since terrorist activities generally involve the commission of "ordinary" criminal acts, but the Act makes it easier for the police to investigate and frustrate terrorist acts.[18]

Reaching an internationally agreed definition has proved elusive.[19] The main obstacle now is the insistence of a few states that violent acts done for the purposes of national liberation movements should be excluded.[20] The vast majority of states regard indiscriminate acts of violence done for the purpose of intimidating ordinary people as deserving of punishment whatever the motive, and are therefore unwilling to accept any such exception. The impasse is illustrated by the series of resolutions of the General Assembly on the general subject of terrorism, beginning in 1972 after the attack by Black September at the Munich Olympic Games.[21] Each one was the subject of lengthy, and often acrimonious, informal negotiations. The Resolution of 9 December

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18 The definition is particularly relevant to the much expanded provisions of Section 3 enabling the Government to add to the list of organisations which are proscribed because they are concerned in terrorism. Foreign terrorist organisations operating from the United Kingdom can now be proscribed. In addition, there are some specific terrorist offences in the Act, for example in Part III in relation to the property of terrorists, which are of particular relevance to the Convention. The further legislation to enable the United Kingdom to ratify the Convention is in Section 63 of the Act.

19 See J. Lambert, *Terrorism and Hostages in International Law*, 1990, 29–45.

20 See note 28 for example.

21 A/RES/3034(XXVII) of 18 December 1972; A/RES/31/102 of 15 December 1976; A/RES/32/147 of 16 December 1977; A/RES/34/145 of 17 December 1979; A/RES/36/109 of 10 December 1981; A/RES/38/130 of 19 December 1983; A/RES/40/61 of 9 December 1985; A/RES/42/159 of 7 December 1987; A/RES/44/29 of 4 December 1989; A/RES/46/51 of 9 December 1991; A/RES/49/60 of 9 December 1994; A/RES/51/210 of 17 December 1996; A/RES/53/108 of 8 December 1998; A/RES/54/110 of 9 December 1999.

1994,[22] adopted by consensus, was the first which, by avoiding any language about the underlying causes of terrorism, shut the door to any argument that the United Nations implicitly recognised that some terrorist acts could be justified by the aims of the perpetrators. The *Declaration on Measures to Eliminate International Terrorism*, annexed to the resolution, contains a general description of terrorism in its solemn reaffirmation by the members of the United Nations of their:

> "unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever (*sic*) committed" and that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious, or any other nature that may be invoked to justify them."

These formulas have been repeated in subsequent resolutions, and were recalled in the preamble to the new convention.

None of the previous counter-terrorism conventions had attempted to define terrorism. Instead, they follow a "segmental", "sectoral" or "piecemeal" approach. Each deals with a specific terrorist act, such as hijacking, hostage-taking or aircraft sabotage. The problem facing the drafters of the new convention was that, unlike previous conventions, they would not be able simply to define the new offence by reference to a specific category of act. Instead they would have to define an offence of financing terrorism. Some thought that one might be able to define the new offence simply by including a list of the specific terrorist offences defined in the nine existing conventions and any further ones. This approach was similar to that adopted in the *European Convention on the Suppression of Terrorism 1977*,[23] which lists a number of serious offences and provides that, for the purposes of extradition, they are not be regarded as political. From the beginning of the negotiation of the new convention the listing approach was acceptable to all, although there were certain technical problems which will be discussed later. But other states wanted to go further and include also what would be, in effect, a mini-definition of terrorism. The proponents of this argued that there was a lacuna in the existing conventions since they did not cover terrorist acts such as murder done by shooting, bludgeoning,

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22 A/RES/49/60 of 9 December 1994.

23 UNTS Vol. 1137 No. 17828; *ILM* 15 (1976) 255 et seq.; UKTS (1978) 93.

stabbing, strangulation, suffocating, poisoning, drowning and suchlike. It was said the lacuna could represent as much as 30 per cent of terrorist crimes and so had to be filled. But it was pointed out by others that the new convention would not "internationalise" such crimes, only the *financing* of them; it was therefore rather illogical to make it an "international offence" to finance an act which would be unlikely to be such an offence for the foreseeable future. Those advocating the mini-definition seemed sometimes to forget the limitations of the immediate exercise, though, as it turned out, they were right to persist.[24]

But the main argument against trying to include a mini-definition was that it would inevitably reopen the dormant debate on what is terrorism, and thereby complicate and delay, perhaps even prevent, the adoption of an important new convention. As it turned out we were wrong. The inclusion of a mini-definition was achieved without too much difficulty. At the meeting of the *ad hoc* Committee a few states spoke of the need to distinguish between "legitimate national liberation movements" and terrorist groups.[25] At the Working Group there was little pressure to omit the mini-definition.[26] When the draft convention was considered by the Sixth Committee[27] certain states mentioned the need to "differentiate between acts of terrorism committed by individuals, groups or states, and the legitimate acts of resistance undertaken by peoples subjected to colonial rule, oppression and foreign occupation with a view to regaining their legitimate rights".[28]

The first three paragraphs of article 2 read as follows:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, 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:

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24 The Indian proposal for a comprehensive convention on terrorism is much more ambitious (see the end of note 3).

25 Report of the *ad hoc* Committee (Doc. A/54/37, para. 38).

26 Report of the Working Group (Doc. A/C. 6/54/L.2, Annex III, paras 2 and 81).

27 Doc. A/C.6./54/SR.31-2, 34, 35 and 37.

28 UAE statement. Others who made a similar point were Cuba, Iraq, Lebanon, Libya, Oman, Qatar, Pakistan and Syria. At the 55th Sess. of the General Assembly in 2000, the terrorism resolution (A/RES/55/158 of 12 December 2000) was, for the first time for some years, put to the vote. There were no negative votes, but Lebanon and Syria abstained.

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; 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 organisation to do or to abstain from doing any act.

2. (a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph *(a)*.[29] The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;

(b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.

3. For an act to constitute an offence set forth in paragraph 1 [i.e. financing terrorism], it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs *(a)* or *(b)*.[30]

The reports of the *ad hoc* Committee, containing as they do the texts of all the many drafting proposals, well illustrate the complex business of negotiating even a relatively short multilateral treaty. A blow-by-blow account of the tortuous path leading to the final text of article 2 might

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29 This identification of the Annex should have been made earlier in the subparagraph. The mistake was not corrected by the depositary. There are few multilateral treaties today which do not contain (mainly drafting) errors, large and small: see *Modern Treaty Law*, see note 1, 270-273.

30 As used in the other articles, the references to "offences *set forth* in article 2" relate to the *new* offences of financing terrorism; and references to "offences *referred to* in article 2, paragraph 1, subparagraphs (a) or (b)" relate to offences under the existing conventions or acts coming within the mini-definition of terrorism. What these references mean does not exactly leap off the page, but they were preferred to a suggestion for more intelligible and concise formulations, such as "financing offences" and "terrorist offences".

be interesting to some, but will not be attempted. Instead, only the most difficult or contentious issues will be discussed.

Paragraph 1

"any person"

As in existing counter-terrorism conventions, this phrase encompasses anyone, whether private individuals or public or government officials. Because of the particular nature of the new offence, article 5 extends the scope of the Convention to legal entities, such as companies (see below).

"by any means, directly or indirectly"

This comprehensive phrase was adopted so as to prevent a loophole. Thus, it does not matter *how* funds get to a terrorist so long as the person supplying the funds — whether as originator or intermediary — has the necessary intention or knowledge (see below).

"unlawfully and wilfully"

There were lengthy discussions as to whether "unlawfully" should be included. Some said that, since providing or collecting funds for the purposes of terrorism constituted the offence, it was tautological to qualify it by "unlawfully". Such a qualification had certainly been needed when defining offences in the earlier conventions. In the Terrorist Bombings Convention it had been necessary because there could be cases where law enforcement authorities might have to cause explosions in a public place. Although such cases would be exceptional, it had to be made clear that they were outside the scope of the offence. On the other hand, others pointed out that law enforcement agencies might wish to provide funds to a terrorist organisation as part of a plan to infiltrate it and trap its members, or money might be paid as a ransom (though in the latter case the purpose of the payment would seem to take it out of the scope of the offence). Others favoured retention of "unlawfully" so as not to criminalise unintentionally lawful acts of financing which might have the unintended result of aiding the commission of terrorist offences, such as giving money to a national liberation movement when only part of the movement is believed to be involved in terrorism (Hamas was often quoted). Given the nature of their activities, the International Committee of the Red Cross and the United

Nations High Commissioner for Refugees had similar concerns.[31] It was therefore decided that, rather than rely solely on any prosecutorial discretion (which does not exist in all legal systems), it should be made absolutely clear that in such cases no financing offence would be committed. For similar reasons "wilfully" was added to emphasise that the financing had to be done deliberately, not accidentally or negligently, though the following elements of intention or knowledge are probably sufficient.

"provides or collects funds"

Various formulations were suggested for this element of the offence. Of special concern to some was the possibility (perhaps probability) that a person could *receive* funds which he might know are likely to be used, at least in part, for terrorism. Once again the example of national liberation movements was given. Although the elements of intention or knowledge might be sufficient protection, it was thought that the more active concept of *providing or collecting* funds would better protect the innocent receiver of funds. Some had wanted to include the *receiving* of funds, even though it is the providing of funds, either as a principal or an intermediary, which is the main concern. Suggestions that the text should specify types of fund-raising were not adopted as they could have created a loophole.

"with the intention that they should be used or in the knowledge that they are to be used"

The United Kingdom had proposed, on the basis of its existing legislation,[32] that it should be sufficient for the purposes of the offence if a

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31 See Docs A/AC.252/1999/INF/2(ICRC) and A/C.6/54/WG.1/INF/1 (UNHCR).

32 *Prevention of Terrorism (Temporary Provisions) Act 1989*, Section 9. See now the Terrorism Act 2000, Section 57 (1) and (2):

(1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(2) It is a defence for the person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.

person provides funds in circumstances where there is a reasonable suspicion that they will be used for terrorist purposes, unless the person can prove otherwise. This was opposed by those who felt that it shifted the burden of proof on to the accused contrary to fundamental human rights principles. However, in many of today's serious crimes (e.g. drug trafficking) such a reverse burden of proof is sometimes essential; the prosecution still has to establish certain facts (such as the possession of bomb-making equipment), before the accused is required to convince the court or the jury that he had no reason to believe they would be used for terrorist attacks.[33] And the prosecution still has to prove all other elements of the offence "beyond reasonable doubt". But for the new convention the two alternatives (intention or knowledge) were felt to be as far as one should go.

Paragraph 3

It is convenient to deal with this paragraph now since it is related to the last point. To say, as the paragraph does, that in order to prove the offence the funds in question do not in fact have to be used to carry out a terrorist offence (for that is what the somewhat opaque wording means), may seem strange. But it was readily accepted that the elements of *intention*, that the funds should be used for — perhaps unspecified — terrorist purposes, or the *knowledge* that they are to be so used, are what is important for constituting the offence. Whereas it can be possible to trace the supplier of a physical object used in an terrorist attack, such as a gun, given the secrecy with which attacks are planned it would be virtually impossible to prove that a *particular* sum of money had

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During the Parliamentary debates on the draft of the Act the above provisions were criticised, albeit wrongly, for shifting the burden of proof of the crime on to the accused. Therefore, in relation to Section 57 and certain other provisions, Section 118 provides (though not in the most pellucid prose) that where the prosecution has established an *evidential* presumption regarding a certain matter, if the accused produces evidence which is sufficient to raise an issue with respect to that matter, the court or jury shall assume that the defence has rebutted the presumption, unless the *prosecution* disproves beyond reasonable doubt that it has not.

33 Article 6 para. 2 of the European Convention on Human Rights (UNTS Vol. 213 No. 2889; UKTS (1953) 71) does not prohibit presumptions of fact that may operate against the accused: see D. Harris/ M. O'Boyle/ C. Warbrick, *Law of the European Convention on Human Rights*, 1995, 243-244, and the judgment of the English Court of Appeal (Criminal Division) of 31 July 2000 in: R. v. Lambert, *London Times* of 5 September 2000.

been used to finance a *particular* attack or even a *particular category* of terrorist act. Thus para. 3 avoids the need to prove that the accused knew the precise destination of the funds or that they would be used to finance a particular terrorist act (e.g. the planting of a bomb in a particular airport on a particular day) or even a specific category of terrorist act. It therefore removes what might have been a serious obstacle to proving the new offence. An early draft included the financing of preparations for the commission of terrorist acts, since most of the money given to terrorists is naturally spent on preparations. Although this was deleted, it is clear from the design of paras 1 and 3 that the new offence covers preparations.

We can now go back to subparas 1 (a) and (b).

Subparagraph 1 (a)

This refers to an act which constitutes an offence within the scope of, and as defined in, one of the treaties listed in the Annex to the Convention. The Annex lists the nine existing counter-terrorism conventions. Three explanations are called for. First, the *Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft 1963*[34] is not included, though it is sometimes thought of as the first of the conventions. However, it is primarily concerned with offences "against the penal law" (i.e. "ordinary" offences) or acts, whether or not they are offences, which could jeopardise the safety of the aircraft or good order and discipline on board, like being extremely drunk. Hijacking is referred only in one short article concerned with ending such incidents. Secondly, the *Convention on the Physical Protection of Nuclear Material 1980* is listed since it includes offences relating to the unlawful taking or use of nuclear material. Thirdly, the offences referred to are not only the principal offences under the listed treaties; all the ancillary offences, such as attempts and complicity, are included. Some thought this was unnecessary, but in the end it was generally felt that there would be no harm in including them, and possibly some danger in not doing so. There was a great and continuing fear of loopholes.

Subparagraph 1 (b)

The substance of this mini-definition of terrorism is more or less the same as in the first draft tabled by France,[35] except that it emphasises

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34 UNTS Vol. 704 No. 10106; *ILM* 2 (1963) 1042 et seq.; UKTS (1969) 126.

35 See the Report of the *ad hoc* Committee (Doc. A/54/37), Annex II.

more clearly the purpose of the terrorist act. This was necessary so as to distinguish such acts from "ordinary" crimes of violence.

It also excludes acts against a person "taking an active part in the hostilities in a situation of armed conflict". This is a simpler form of the so-called "military carve-out". This transatlantic term has been coined for a clause which excepts from the definition of a terrorist offence acts performed by members of armed forces during an armed conflict, and for which international humanitarian law (i.e. the laws of armed conflict) already makes provision. Such an exception was included in article 19 para. 2 of the Terrorist Bombings Convention, since some of the acts which would amount to an offence for the purposes of that convention could well be committed legitimately by members of armed forces. There was no need for such an elaborate clause in the new convention.

Although described in this article as a *mini*-definition of terrorism, the scope of subpara.1 (b) is potentially quite wide ("*Any other act* intended to cause death or serious bodily injury"), and would cover any means of attack, including acts which constitute offences under some of the earlier conventions, such the Terrorist Bombings Convention.

The criteria for judging the purpose of the act is objective. This is made clear by the references to the "nature" of the act and its "context". Some acts make their purpose only too clear, such as the murder of the Israeli athletes at the Munich Olympics. If the nature of the act is not a clear indication of its purpose, the context in which it was done may be. These criteria have to be read with the closing words which limit the purpose of the act to intimidating a population or compelling a government or an international organisation to do or to abstain from doing any act. This is in a sense narrower than in the *International Convention Against the Taking of Hostages 1979* (Hostages Convention), where the purpose is expressed to be to compel a third party, namely a state, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act, but broader in that it is wide enough to cover acts which have no political or ideological rationale, in other words, what could be seen as "ordinary" crimes. However, like the other earlier conventions, the Hostages Convention did not provide that hostage-taking shall not be regarded as a political offence for the purposes of mutual legal assistance or extradition, whereas article 14 of the new convention and article 11 of the Terrorist Bombings Convention do so provide.

But it must be remembered that although the definition of terrorism in the new convention is not comprehensive, it was devised only for that convention, and solely for the purpose of defining the new offence

of financing terrorism. Whether it will be used as the basis of an internationally accepted definition of terrorism remains to be seen. The Sixth Committee has now before it an Indian proposal for a Comprehensive Convention on International Terrorism.[36] Its proposed general definition of terrorism is intended to fill the lacuna in the complex of the existing counter-terrorism conventions by covering terrorist acts such as murder by shooting.

Before we leave the dissection of the definition of the new offence, we need to look briefly at two other matters concerning the Annex.

Paragraph 2

Discussion of this paragraph took an inordinate length of time. Not all states which wish to become parties to the new convention will necessarily be parties to all the previous conventions. But becoming a party to the new convention would, of course, not make them parties to a convention listed in the Annex if they are not already a party to it. The conventions are listed for the sole purpose of *defining* the offence of financing terrorism. Nevertheless, some states were concerned that they should not be required to accept a definition of terrorism which referred to offences specified in treaties to which they are not parties. Their concern was not lessened by the fact that by becoming party of the new convention they would not become bound by such treaties, or that the offences embodied in existing conventions may already be offences under their own domestic law. Their problem seemed to be more political. Although they well understood these points, their representatives may have been concerned that their parliamentarians might not; and negotiating parliamentary obstacles can be every bit as exhausting as negotiating a multilateral treaty. Therefore, the paragraph gives a state, when consenting to be bound by the new convention, the option of making a declaration to exclude in the application to it of the Annex any treaties to which it is not a party. If it subsequently becomes bound by any of those treaties the declaration lapses automatically. If it later ceases to be a party to one of the treaties, it can opt to exclude it from the Annex in its application to itself. The provisions may seem rather clumsy, but they are technically correct and were unavoidable politically.

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36 See the end of note 3.

When states come to consider whether to become parties to the new convention many who are not parties to all the previous conventions may conclude that they have no problem with defining the offence by reference to conventions to which they are not yet bound, and that they therefore can ratify the new convention without making a declaration. Hopefully, they may also decide to become party to those conventions as well.

Amendment of the Annex

In view of the importance of the Annex, an efficient means was needed for adding new treaties to the list. Article 23 thus provides that "relevant" treaties may be added if they are open to participation by all states (i.e. are universal), have entered into force, and have been adhered to by at least twenty-two States parties to the Convention. A State party must propose the addition of a new treaty by writing to the depositary, who will circulate the proposal the other States parties and seek their views. The proposal is deemed to have been adopted unless one-third of the States parties object in writing within 180 days. The amendment to the Annex will then come into force thirty days after the deposit of the twenty-second instrument of ratification etc. For other States parties it will come into force thirty days after deposit of their instruments.

Paragraphs 4 and 5

These paragraphs contain the — by now fairly usual — provisions regarding attempts (para. 4), accomplices (para. 5 (a)), organising and directing others to commit the offence (para. 5 (b)) and conspiracies (para. 5 (c)). All but para. 5 (c) follow closely article 2 para. 3 of the Terrorist Bombings Convention. Although a provision on conspiracies had been devised and adopted for that Convention by the United Nations as recently as two years before, some civil law states questioned the inclusion of it since, so they argued, their law did not recognise the concept of conspiracy. However, it became clear in discussion that many civil law states did have a similar concept. They included states as diverse as Algeria, China, Cuba, Ecuador, France, Germany, Russia and Turkey. But the negotiators were eventually reminded, by Canada, that the provision in the Terrorist Bombings Convention had been copied, but improved upon, in article 25 para. 3 (d) of the Rome Statute of the Inter-

national Criminal Court 1998.[37] The new convention therefore contains that formulation, which makes it clear that there is an option between subparas (a) and (b). The first subparagraph reflects the civil law concept of *association malfaiteur*; the second the common law concept of conspiracy.

Most of the other articles of the new convention will be familiar to the connoisseur of counter-terrorism conventions, and follow largely provisions of the Terrorist Bombings Convention. Only those provisions which are specific to the new convention will therefore be discussed.

## IV. Liability of Legal Entities

Article 5 is an important complement to article 2, and is unique for a counter-terrorism convention:

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organised under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.
2. Such liability is incurred without prejudice to the criminal liability of individuals who have committed the offences.
3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

There had been no need for such a provision in previous counter-terrorism conventions, since the acts they were concerned with were of such a tangible nature as to be liable to be committed only by individuals. In contrast, the financing of terrorism, although it will usually involve some handling of cash or other physical assets, is essentially intangible in nature. Moreover, when large amounts of money are involved it is likely that at some stage a legal entity, such as a bank or trust, will be the means by which the money is made available, directly or indirectly, to the terrorists. When that has been done with the help of a person responsible for the management or control of the entity, it is

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[37] *ILM* 37 (1998) 1002 et seq., (1016).

important that the entity itself should be held accountable. Of course, in all this the purpose is primarily to deter such activities, in this case by giving a clear warning to those in charge of banks and suchlike that they must ensure that they are not being used, with the active involvement or knowledge of persons in management or control of them, to transmit funds to terrorists. But such a provision was viewed warily.

The first main problem was to gain acceptance of the concept that, although the legal entity cannot itself commit the offence of financing, it can nevertheless be held *vicariously* liable if a person who is responsible for the management or control of the entity commits the offence. This is the position in various legal systems, although expressed in different ways. In English law the criminal liability of corporations is still developing.[38] Their liability is vicarious, since they can act only through a director or employee. The acts of controlling officers of a corporation, such as a director or manager who are the embodiment of the corporation, and done in the course of the business, as well as their state of mind, are regarded as those of the corporation for which it can be made liable. When a statute makes it an offence for "a person" to do or to omit to do anything, a corporation can commit the offence (e.g. conspiracy to defraud involving a managing director), unless a contrary intention appears from the statute. A contrary intention can be inferred where the nature of the act could not be committed by controlling officers in the course of business, bigamy being an obvious example. If a statute imposes strict liability (i.e. no *mens rea*), it is sufficient for the act to be done by an employee or agent. For a corporation to be criminally liable, the offence must be subject to a fine. Therefore it cannot be guilty of murder, for which the only sentence is life imprisonment, but it can be guilty of manslaughter.[39] Many other countries, including Canada, the Netherlands and the United States, have similar provisions.

Although French law has been slower to recognise that corporations could be criminally liable, the *Nouveau Code Pénal 1994* made a notable innovation in the criminal law. Articles 121–122 provide that corporate bodies can be criminally liable if it is so specified by statute or decree for offences committed on their behalf by their organs or representatives. Organs include the general meeting of the corporation, the board of directors or the governing board. The representatives include the managing director. The offence must, however, be committed for the benefit of the corporation. Nevertheless, and subject to those cave-

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38 See J. Smith/ B. Hogan, *Criminal Law*, 1999, 179-187.

39 See Meridian Global Funds (1995) 2 AC 500.

ats, offences such as genocide, involuntary homicide, wounding, drug trafficking, money laundering, theft, fraud, treason, espionage, currency and environmental offences and price-fixing can all be committed by corporations.[40]

The other main problem was that the law of some states still does not enable legal entities to be prosecuted for a criminal offence. This was overcome fairly easily by providing that each State party has a discretion to apply criminal, civil or administrative liability, according to its own legal principles.

For the purposes of the new convention it is not necessary that the entity should have benefited from the transaction, but the offence must be committed by a "senior" person, not just any employee, such as a clerk in the back office. There is one other safeguard. A legal entity will only be liable if the person in management or control committed the offence in that capacity. In other words, if a bank manager merely uses his access to the bank's computer system in order to transfer funds to terrorists, that will not make the bank liable if the manager did it in a private capacity. Determining whether it was a private or official act may not be easy. There would seem, however, to be at least an evidential presumption that if a manager makes use of the bank he works for to commit the offence, he is doing it by virtue of his official position since he would not have access to the computer as a private person. The position would be different if a bank messenger without authorised access to the computer system used it to commit the offence.

## V. Seizure of Funds

Article 8 provides that each State party shall, for the purpose of forfeiture, take appropriate measures, "in accordance with its domestic legal principles", to identify, detect and freeze, or seize, any funds used or allocated for the purpose of financing terrorist offences. This applies also to any proceeds deriving from terrorist financing. It also envisages States parties entering into bilateral agreements on the sharing of funds derived from forfeitures, either on a regular basis or case-by-case. State parties are encouraged to consider establishing mechanisms whereby such funds are used to compensate the victims of terrorist offences. The

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40 See, F. Desportes/ F. Le Gunehec, *Le nouveau droit penal*, 5th edition 1998, Vol. 1, paras 569–626; J. Bell/ S. Boyron/ S. Whittaker, *Principles of French Law*, 1998, 239-41.

rights of third parties acting in good faith are protected. Thus, if assets derived from the financing of terrorism have been transferred to an innocent third party they could not be forfeited.

## VI. Bank Secrecy

Article 12 para. 2 prohibits the refusal of a request for mutual legal assistance on the ground of bank secrecy. Criminals increasingly abuse bank secrecy, by which is meant all aspects of the confidentiality of customers' accounts, not just secret or numbered bank accounts. More and more exceptions are being made for those cases, such as drug-trafficking and money-laundering, where the serious nature of the crimes outweighs the otherwise legitimate interest of an individual in keeping his financial affairs private. Article 12 para. 2 was taken from article 7 para. 5 of the Vienna Drugs Convention 1988.[41]

## VII. New Offences Are Not Fiscal Offences

Article 13 provides that the new offences of financing terrorism shall, for the purposes of extradition or mutual legal assistance, not be regarded as fiscal offences; and a request for extradition or mutual legal assistance may not be refused on the sole ground that it concerns a fiscal offence. In this context "fiscal" means relating to money or public revenue. Tax evasion is a typical fiscal offence, for which a person cannot usually be extradited or be the subject of mutual legal assistance. The provision was drawn from article 1 of the Additional Protocol to the Council of Europe's Convention on Mutual Assistance in Criminal Matters 1978.[42] After some initial resistance by certain Western European states, it was accepted that financing terrorism should not be a fiscal offence, and that it was desirable that there shall be no doubt on the matter.

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41 *ILM* 28 (1989), 493 et seq.; UKTS (1992) 26.

42 UKTS (1992) 24; *ILM* 17 (1978), 801 et seq.

## VIII. International Cooperation

Article 18 contains detailed provisions intended to enhance further practical cooperation between the States parties to prevent and counter preparations for terrorist financing, whether inside or outside their territory. Although several states already have the necessary legislation, those which do not may need to consider adapting theirs. The measures include identification by financial institutions of their usual or "occasional" customers; paying special attention to unusual or suspicious transactions; and reporting transactions suspected of stemming from crime. Based on "The Forty Recommendations" of the Financial Action Task Force on Money Laundering (FATF) of the OECD,[43] the States parties are required to consider:

> prohibiting the opening of accounts if the holders are "unidentified or unidentifiable", and requiring financial institutions to verify the identity of the "real owners", in particular of legal entities;[44]
>
> requiring financial institutions to report promptly "all complex, unusually large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose"; and
>
> "requiring financial institutions to keep records of transactions, both domestic and international, for at least five years".[45]

The States parties are also required to cooperate further by "considering":

> supervisory measures, such as the licensing, of all money-transmission agencies (including *bureaux de change*);
>
> measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments;
>
> exchanging accurate and verified information concerning all aspects of terrorist financing; and

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43 See http://oecd.org/fatf/40Recs_en.htm

44 FATF is very stringent. In May 2000 it severely criticised Austrian plans for the future of anonymous bank accounts, going so far as to say that if the plans were not tightened up by 20 May, Austria would be expelled from FATF as early as 15 June. Austria revised its plans that May.

45 For members of the European Union these measures are already required by the Directive of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering (91/308/EEC).

conducting inquiries with respect to terrorist financing concerning the identity, whereabouts and activities of suspected persons and the movement of funds involved.

For these purposes information may be exchanged through the International Criminal Police Organisation (INTERPOL).

## IX. Conclusion

Some draft resolutions are promoted in the UN General Assembly for domestic or regional political reasons, rather than because they answer to a truly international need. Yet it is not easy to prevent them being adopted, albeit in an emasculated form. This fact of international life also applies, though fortunately less so, to multilateral treaties. The motive which prompts a state to propose a new treaty is not always clear. Sometimes the state may feel that, since a rival has been successful in promoting a treaty, it is time that it had a similar success. But if there is no topic which is immediately suitable for such treatment, the proposed treaty may receive a somewhat half-hearted reception. Fortunately this was not the case with the draft convention. It clearly met a need, and the doubts about the ambitious mini-definition of terrorism turned out to be mistaken. The negotiations were therefore a good example of what can be achieved in the space of only one year when there is a proposal of substance; the need is generally accepted; the first draft is carefully prepared; and the negotiators, in particular the proposers and their supporters, are open-minded, flexible and imaginative.