

International Convention for the Suppression of the Financing of Terrorism

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The International Convention for the Suppression of the Financing of Terrorism was adopted without a vote by the United Nations General Assembly in New York on 9 December 1999 (resolution 54/109). It entered into force on 10 April 2002 and, as of 31 October 2008, 167 States were parties to thereto. This instrument aims to facilitate the prosecution of persons accused of involvement in the financing of terrorist activities, by obliging States parties to prosecute them or extradite them to another State that has established its jurisdiction to try them. It also requires States parties to take a number of measures to prevent and counteract the financing of terrorism. This Convention is therefore broader in scope than earlier so-called sectoral counter-terrorism conventions, in that it does not relate to certain specific types of terrorist acts, but rather seeks to prevent such acts by “drying up” their sources of financing.

Context

With a view to enhancing its involvement in counter-terrorism efforts, the United Nations General Assembly established pursuant to resolution 51/210 of 17 December 1996, an Ad Hoc Committee to elaborate two draft conventions aiming to combat certain types of terrorist activities (terrorist bombings and nuclear terrorism, respectively). Even though the Committee’s mandate did not include the issue of the financing of terrorism initially, it was subsequently rapidly broadened to include the issue. The work of the Ad Hoc Committee led to the adoption, in 1999, of the Convention presented here. This initiative was prompted by an increased awareness of the significance of the funding of terrorist activities and of the potential role that movements of funds — ostensibly perfectly legal — play in the preparation of acts of terrorism. It also shows the links that can exist between various “ordinary” criminal activity and the financing of terrorist activities. These concerns had already been expressed by the General Assembly with the adoption of resolution 51/210 on measures to eliminate international terrorism, in which the Assembly called on States to take steps to prevent or counteract the financing of terrorist organizations, “whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering [...]” (paragraph 3 (f) of the resolution).

Main provisions

The 1999 Convention criminalizes the act of providing or collecting funds “directly or indirectly, unlawfully and wilfully [...] 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”:

– An act which constitutes an offence under one of the previous nine “sectoral” conventions listed in the annex to the Convention (from The Hague Convention of 1970 for the Suppression of Unlawful Seizure of Aircraft to the 1997 International Convention for the Suppression of Terrorist Bombings); or

– “Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act” (article 2, paragraph 1).

The first part of this categorization obviously applies only to States that are party to the 1999 Convention and to the “sectoral” conventions (article 2, paragraph 2). Far from being exhaustive, the list of treaties annexed to the Convention upon adoption may be extended in the future by a decision of the States parties (article 23). Since it criminalizes an activity that is not necessarily unlawful of itself (financing), the 1999 Convention needed to define the circumstances in which such activity was punishable by defining the “terrorist” acts thereunder. It has therefore become the main universally authoritative instrument currently in force to offer a definition (or at least elements of a definition) of terrorism. These include elements often highlighted in national legislation or legal literature: serious violence against people, intimidation of the population, compulsion of national or international authorities. There appears to have been broad consensus on these elements during the *travaux préparatoires*. It was another, older, issue, one closely linked to the definition of terrorism, specifically the financing of terrorism — whether the activities of national liberation movements could be characterized as terrorist acts — that polarized many of the debates of the Ad Hoc Committee of the General Assembly and the Sixth Committee; it was also reflected in several declarations made upon signature or ratification of the Convention. Reviving a debate which dates back to the 1970s, and to the adoption of the first General Assembly resolutions on terrorism, some States reiterated, during the drafting of the Convention for the Suppression of the Financing of Terrorism, their concern that the activities of national liberation movements or acts of resistance to foreign occupation might be characterized as acts of terrorism under the Convention (for declarations and reservations, see the ratification status of treaties deposited with the Secretary-General). Other States objected to that view, arguing that the Convention was aimed at depriving those acts covered of any justification, and that its purpose was to punish those offences by whomsoever committed (*ibid.*). Those divergent views re-emerged during the *travaux préparatoires* for the draft comprehensive convention on combating terrorism and were not satisfactorily reconciled at that stage (see the report of the Working Group of the Sixth Committee on measures to eliminate international terrorism, United Nations document A/C.6/60/L.6, 14 October 2005).

Lastly, with regard to the scope of the offence, it should also be noted that it is the intent to further the commission of an act of terrorism, which gives rise to prosecution under the Convention, since such prosecution could be initiated even where the funds collected or transferred were not actually used to carry an act referred to in article 2, paragraph 1, as long as such intent was established (article 2, paragraph 3).

Attempts to commit such acts, organize them, participate as an accomplice therein or intentionally contributing to their commission are also offences under article 2, paragraphs 4 and 5. The Convention is only applicable to offences involving a foreign component, meaning that it cannot be applied to purely domestic situations (article 3).

With regard to criminal proceedings, the Convention requires States parties to adopt such measures as may be necessary to establish as criminal offences under their domestic law the offences set forth thereunder, and to make such offences punishable by penalties “which take into account the grave nature of the offences” (article 4). It should also be noted that, under the Convention, both legal entities and individuals incur liability for the acts covered, which is unusual in instruments of international criminal law (article 5). However, such liability is not necessarily criminal, as the Convention refers to liability which may be “criminal, civil or administrative” (article 5, para. 1). Like other recent “sectoral” conventions, under the 1999 Convention the perpetration of such acts may not be justified by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature (article 6). In order to ensure effective prosecutions, States parties are required to establish their jurisdiction over those offences. In that regard, the 1999 Convention lays down particularly broad bases for jurisdiction: territorial jurisdiction, “defensive” jurisdiction (taking into account the doctrine “of effects”, to wit, that the purpose or result of the act of financing — wherever it took place — was the commission of an offence on the State’s territory), active personal jurisdiction (covering stateless persons who have their habitual residence in the territory of a State party), passive personal jurisdiction and universal jurisdiction where the alleged offender is present in the State’s territory (article 7). In addition, any State that one of the offences covered by the Convention had the intention to compel to do or abstain from doing any act can also establish its jurisdiction over the offence (article 7, para. 2 (c)). These are just actions left at the discretion of States parties, who may elect to establish their jurisdiction on one, several, or all of these bases (article 7, para. 3). The State party in the territory of which the alleged offender is present may elect either to submit the case to its competent authorities for prosecution or to extradite that person to another State party that has established its jurisdiction over the case pursuant to the Convention (article 10). Several provisions are aimed at facilitating extradition and mutual legal assistance among States parties (articles 11 and 12). For the purposes of implementing these mechanisms, the offences covered by the Convention may not be regarded as fiscal offences and extradition may not be refused on that ground alone (article 13). Similarly, none of the offences may be regarded as a political offence and extradition or mutual legal assistance may not therefore be refused on the sole ground that it concerns a political offence (article 14). This does not, however, prevent a State from refusing a request for extradition or mutual legal assistance if there are substantial grounds for believing that the request “has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion” (article 15). Also with a view to protecting individual human rights, the Convention provides that any person taken into custody or prosecuted in application of its provisions “shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law” (article 17). More unusually, it also provides for the right of persons detained under the

Convention to benefit from the consular protection of their State of origin (article 9, para. 3).

In addition to the prosecution of offenders, States parties are required to adopt “appropriate measures [...] for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth [...] as well as the proceeds derived from such offences” in order to permit their confiscation where appropriate (article 8).

Lastly, we also note that in addition to the provisions aimed at punishing those crimes, which are its core provisions, the 1999 Convention also requires States parties to adopt a variety of measures to prevent the financing of terrorist activities or groups, by requiring, among other things, greater transparency in financial transactions and better monitoring of financial transactions and flows (article 18).

Application

The International Convention for the Suppression of the Financing of Terrorism initially had only moderate success. When the 11 September 2001 attacks were perpetrated, only four States had acceded to the Convention, which was therefore a long way from coming into force. As a result of those tragic events, States began to view combating the financing of terrorism as a top priority. With that in mind, the United Nations Security Council adopted resolution 1373 (2001), on 28 September 2001. The Council decides therein, on the basis of Chapter VII of the Charter, that States are responsible for preventing and punishing the financing of terrorism, by criminalizing the provision of funds by their nationals or in their territories to be used to carry out terrorist acts. A number of other related duties is also placed on States under resolution 1373 (2001), which incorporates almost in their entirety several key elements of the 1999 Convention regime. Quite unexpectedly, the Council thus gave broad scope to the application of a treaty regime which it intended to implement as a matter of urgency, by including such essential elements thereof in a decision binding on all United Nations Member States. The fact that the Security Council has framed its provisions in mandatory, general, permanent and abstract terms (because their application is not time bound nor limited to any particular circumstances) led a number of commentators to suggest that, in adopting resolution 1373 (2001) the Council was engaging in law-making, and the legality of this action under the Charter has sometimes been questioned. In addition, the Council has also been criticized for acting selectively by incorporating only some elements of the 1999 Convention regime in resolution 1371 (2001) and not others (such as the provisions aimed at protecting the human rights of those prosecuted under the Convention, for example). Ultimately, the universal legal framework for combating the financing of terrorism has been considerably strengthened, since States have to comply in that regard with the obligations under both the 1999 Convention (the number of States ratifying it has increased exponentially since then) and resolution 1373 (2001). Whether under the resolution or the Convention, many States have taken the necessary measures, under their domestic legislation, to establish their jurisdiction with regard to the offences covered by the 1999 Convention.

Noteworthy among the measures aimed at enforcing the implementation of the 1999 Convention, at the regional level, is the adoption, on 16 May 2005, of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of

the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198). This instrument, which entered into force on 1 May 2008, refers explicitly to the 1999 Convention in its preamble, and aims to extend the scope of a convention adopted by the Council of Europe in 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS No. 141) to include the financing of terrorism. It requires States parties to adopt the necessary measures to confiscate assets covered thereunder, criminalizes money-laundering, imposes on States parties the duty to adopt measures to prevent such offences and establishes various procedures for international cooperation. This regional convention therefore constitutes a useful complement to the 1999 Convention on the Suppression of the Financing of Terrorism. With regard to the Council of Europe Convention we may also note that, in an obvious attempt to remedy the difficulties that arose in enforcing the coercive financial measures agreed by the Security Council as part of its counter-terrorism efforts, it obliges States parties to ensure that those affected by its enforcement measures “shall have effective legal remedies in order to preserve their rights” (article 8).

Related Materials

A. Legal instruments

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8 November 1990, (CETS No. 141), United Nations Treaty Series, volume 1862, p. 69.

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16 May 2005 (CETS No. 198).

B. Documents

General Assembly resolution 51/210 of 17 December 1996 (Declaration supplementing the 1994 Declaration on Measures to Eliminate International Terrorism).

Security Council resolution 1373 of 28 September 2001 (threats to international peace and security caused by terrorist acts).

C. Doctrine

N. Angelet, “Vers un renforcement de la prévention et de la répression du terrorisme par des moyens financiers et économiques?”, in K. Bannelier, T. Christakis, O. Corten and B. Delcourt, *Le droit international face au terrorisme*, Paris, Pedone, 2002, pp. 219-238.

I. Bantekas, “The International Law of Terrorist Financing”, *American Journal of International Law*, vol. 97, 2003, pp. 315-333.