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Criminalization of Terrorist Financing; from Theory to Practice

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This article analyses the criminalization provisions of the International Convention for the Suppression of the Financing of Terrorism, the backbone of the legal regime for the prevention of terrorist financing. It makes a detailed examination of the background of the Convention and the nature of the negotiation discussions that led to its adoption. The drafters of the Convention were faced with two problems: first, how to define terrorism, terrorist acts and terrorist groups, the financing of which was the subject matter; second, the precise scope of the offence, in particular, how to define the preparatory acts of financing as an independent offence. This article argues that the definition of the offence provided by the Convention is far too ambiguous and its application at national levels can often lead to an unjustifiable and unfair criminal law.

Keywords: *Terrorism, terrorist financing, criminalization, convention*

INTRODUCTION

The creation of a comprehensive and international counter-terrorism financing regime has been drawn from the idea that cutting off terrorist funds could slow down, disturb and dismantle terrorist networks, which is similar to the ideas driving international measures against organized crime and money laundering. On a practical level, two international organizations (namely the United Nations and the Financial Action Task Force, hereinafter

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the FATF) created and perpetuate a system of measures to prohibit acts of financing, freeze terrorist funds and track down terrorists. After the 9/11 attacks, substantial efforts have been made to assure that countries have adopted and implemented laws consistent with these measures. However, there appears that these measures have been subject to relatively little critical scrutiny, and there has been little debate about whether these measures are proportionate to their potential effectiveness.

This article analyses the criminalization provisions of the International Convention for the Suppression of the Financing of Terrorism,[1] the backbone of the legal regime for the prevention of terrorist financing. It makes a detailed examination of the background of the Convention and the nature of the negotiation discussions that led to its adoption. The drafters of the Convention encountered two main problems: first, how to define terrorism, terrorist acts, terrorise purposes and terrorist groups, the financing of which would be criminalized; second, the precise scope of the offence, in particular, how to define the preparatory acts of financing as an independent offence. This article argues that the definition of the offence provided by the Convention is far too ambiguous and its application at national levels can often lead to an unjustifiable and unfair criminal law.

I. A BRIEF HISTORY OF EFFORTS TO ADOPT A CONVENTION ON TERRORIST FINANCING

It is hard to determine when and how the idea developed that drying up terrorist funds should become a central element in the fight against terrorism.[2] But it seems that a call for the adoption of measures to counter terrorist financing was officially issued in G7/8 ministerial meetings where it was agreed "to peruse measures aimed at depriving terrorists of their sources of finance".[3] Following the G8's statement of its interest in depriving terrorism of funding, on December 1996, the UN General Assembly adopted Resolution 51/210, establishing an *ad hoc* committee to "address means of further developing a comprehensive

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[1] United Nations *The International Convention for the Suprresion of the Financing of Terrorism* (New York, 9 December 1999).

[2] Michael Levi "Combating the financing of terrorism: a history and assessment of the control of 'threat finance'" 2010 50(4) British Journal of Criminology, at 666.

[3] G7 *Ottawa Ministerial Declaration on Countering Terrorism* (December 12, 1995). See also G7 *Ministerial Conference on Terrorism* (Paris, July 30, 1996). The role of G8 in the fight against terrorism is significant, as its members declared that "we are determined as a group to continue to provide leadership on this issue to the international community, using bilateral and multilateral measures and agreements to counter terrorism". For more information about the role of the G8 in the fight against terrorism, see Andre Belelieu "The G8 and terrorism: what role can the G8 play in the 21st century?" June 2002 No. 8 G8 Governance.

legal framework of conventions dealing with international terrorism".[4] Using identical wording to that used in the G7/8 Agreement on 25 Measures for Combating Terrorism made in July 1996, the Resolution, also, called on all States to take steps to counteract terrorist financing.[5]

In the fall of 1998, a draft of a convention on the suppression of the financing of terrorism[6], a French initiative at a G8 summit,[7] was proposed to the United Nations. By the requirement of the UN General Assembly,[8] the draft was considered at a meeting of an *ad hoc* committee[9] and then a Working Group of the Sixth Committee[10]. After an evaluation, the Sixth Committee recommended that the General Assembly adopt the proposed convention.[11] On 9 December1999, the International Convention for the Suppression of the Financing of Terrorism (hereinafter the Terrorist Financing Convention) was adopted by the UN General Assembly and regarded as a significant contribution to the fight against terrorism.[12]

In general, the Convention followed the structure and standard provisions of its previous counter-terrorism conventions particularly the International Convention for the Suppression of Terrorist Bombing (hereinafter the Terrorist Bombing Convention).[13] The notable example is Article 3 of the Terrorist Financing Convention, which limits its application to the cases

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[4] United Nations General Assembly (UNGA), A/RES/51/210, 17 December 1996, para. 9.

[5] Compare paragraph 19 of G7 Ministerial Conference on Terrorism (Paris, July 30, 1996) with paragraph 3(f) of the UNGA Resolution, *id*. Both with the same wording called on all states to "take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and 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". The Resolution additionally emphasized on the prevention of "the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds".

[6] UN Doc *Letter dated 3 November 1998 from the Permanent Representative of France to the United Nations addressed to the Secretary-general* (A/C.6/53/9,4 November 1998).

[7] G8 *Foreign Ministers' Progress Report: Denver Summit of the Eight* (Denver, June 21, 1997). For more details on the French initiative at the Denver summit see Andre Belelieu "The G8 and terrorism: what role can the G8 play in the 21st century?" June 2002 No. 8 G8 Governance. < http://www.g8.utoronto.ca/governance/ >; Michele Fratianni *New perspectives on global governance : why America needs the G8* (Ashgate, Aldershot, 2005).

[8] UN, A/RES/53/108, 26 January 1998, para.12.

[9] UN, A/54/37, 15 to26 March 1999.

[10] UN, A/C.6/54/L.2, 27 September to 8 October 1999.

[11] UN, A/54/615.

[12] UN, A/54/PV.76; A/RES/54/109, 9 December 1999.

[13] UN, A/52/653, 25 November 1997. For more details see Clifton Johnson, "Introductory note to the International Convention for the Suppression of the Financing of Terrorism" 2000 39 International Legal Materials 268, at 268.

involved with a transnational element.[14] The Convention is also inapplicable to a situation involving armed conflict, because such situations are addressed by international humanitarian law.[15] Similar to the Terrorist Bombing Convention, Article 20 and 22 of the Convention emphasizes that it must be applied "in a manner consistence with the principles of sovereign equality and territorial integrity of States, and that of non-intervention in the domestic affairs of other States".[16]

The Convention provided a list of measures directed at terrorist financing, many of which were drawn from the 40 anti-money laundering recommendations of the Financial Action Task Force (hereinafter the FATF[17]).[18] It is not surprising that the United Nations, under the influence of G7/8 which conceived of the idea of counter-terrorist financing, adopted such an approach as since early in the 1990s, it had continuously emphasised the possible link between terrorism and organized crime, particularly drug trafficking.[19]

The drafters were confronted were with a difficult problem. In order to criminalize terrorist financing, they first had to overcome the hurdle of the lack of consensus on the definition of terrorism. Creating the nature and defining the scope of new offence were the "main" and "unusual" problems the drafters were faced.[20]

II. THE PECULIARITIES OF THE NATURE OF THE CONCEPT OF TERRORISM[21]

Logically, without defining terrorism, terrorist offences or terrorist groups, it is impossible to address terrorist financing. Nonetheless, there are some peculiarities about the nature of terrorism which has made not only all attempts to reach an agreement on the definition of

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[14] This is similar to Article 3 of *The International Convention Against the Taking of Hostages* (New York, 17 December 1979), Article 4 (4) of *The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (Montreal, 23 September 1971), Article 4 of *The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (Rome, 10 March 1988).

[15] Article 2 (b). This is identical to Article 12 of the The International Convention Against the Taking of Hostages and Article 19 of International Convention for the Suppression of Terrorist Bombing.

[16] This is similar to Article 17 and 18 Terrorist Bombing Convention.

[17] The FATF is an inter-governmental body established by the G7/8 in 1989 to counter money laundering.

[18] Johnson, *supra* note13, at 269.

[19] For example see UNGA, A/RES/49/60, 9 December 1994. Or see UN Doc, A/CONF 157/23, 12 July 1993. Or see UN, Second session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, A/AC 254/4 Rev 1, 10 February 1999.

[20] Anthony Aust "Counter-terrorism_new approach: the International Convention for the Suppression of the Financing of Terrorism" 2001 5 Max Plank Yearbook of United Nations Law 285,at 286

[21] Discussions in this part have been separately and independently addressed and published in the Journal of Financial Crime. See Hamed Tofangsaz "Terrorism or not terrorism? Whose money are we looking for?" 2015 22(3) Journal of Financial Crime.

terrorism, until now, impossible, but also the criminalization of terrorist financing controversial. That is, there is no agreement on what types of conduct, in what circumstances and when, against whom (targets or victims) and with what intention or motivation constitute terrorism.

In terms of the objective element, the *actus reus* of the offence of terrorism is defined by scholars as the "underlying act" which is an offence in itself: murder, hijacking, kidnapping and so on.[22] The less-discussed question is whether the underlying act of terrorism encompasses any unlawful conducts, including violent ones, "repressive acts"[23] and even minor criminal conduct like vandalism? While some believe that the underlying acts of terrorism only (need to) include serious offences or "violence",[24] in providing a generic definition on terrorism, some regional agreements include "any act which is a violation of the criminal laws of a State Party".[25] This seems to cover all criminal conducts. A UN draft Convention against Terrorism enumerates the underlying act of causing "death or serious bodily injury …, serious damage to public or private property … resulting or likely to result in major economic loss".[26] The question can be also raised whether a lawful conduct which may terrorise people can be an underlying act?

The most peculiar feature of terrorism, as the famous dictum 'one man's terrorist is another man's freedom fighter' indicates, is that "the same kind of action … will be described differently by different observers, depending on when and where it took place and whose side the observer is on".[27] That is, terrorism, unlike other transnational crimes, is not such act inherently and always recognized as criminal. Its criminality can be circumstantial. There are some circumstances, such as struggles for self-determination, attempts at national liberation, rebellion and duress or necessity, on which there is no agreement whether terrorist-type of

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[22] Robert Cryer *An Introduction to international criminal law and procedure* (2nd ed, Cambridge University Press, Cambridge, 2010), at 289. Ben Saul *Defining terrorism in international law* Oxford monographs in international law (Oxford University Press, 2006), at 59.

[23] Proposed by the Non-Aligned Group of *Ad Hoc* Committee (UN, A/RES/3034(XXVII), 18 December 1972) reprinted in M. Cherif Bassiouni and International Institute for Advanced Criminal Science International terrorism and political crimes (Thomas, Springfield, 1974), at 564.

[24]Report of Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Mission to Spain*, UN, A/HRC/10/3 Add.2, 16 December 2008, para 6. See also Cryer, *supra* note 22, at 289.

[25] Article 1 (3) of Organization of African Unity *OAU Convention on the Prevention and Combating of Terrorism* (14 June 1999). See also article 1 (2) of League of Arab States *Arab Convention on the Suppression of Terrorism* (Cairo, 22 April 1998). Article 1 (2) of Organization of the Islamic Conference *Convention of the Organisation of the Islamic Conference on Combating International Terrorism* (1 July 1999).

[26] UN, *Draft Comprehensive Convention against International Terrorism*, A/59/894, (12 August 2005), Article 2.

[27] Jenny Teichman "Terrorism" in C. A. Gearty (ed) *Terrorism* (Dartmouth, Aldershot, England, 1996), at 5.

conduct or the use of violence are unlawful and unjustifiable but excusable, or unlawful but justifiable, or even lawful.[28] Although these circumstances might be regarded as exceptional, ambivalence about the use of terrorism in these circumstances has plagued agreement on a generic definition of terrorism.[29] In some regional agreements, however, some of these circumstances have been taken into account by being exempted from the definition of terrorism.[30] Nonetheless, what law should govern such exempted acts[31], or whether these acts ought to be covered by the international humanitarian law or the "law of international criminal defences" has not been clarified either regionally or internationally.[32]

To solve the problem of how to label terrorist-type conducts, especially in those exceptional circumstances named, one may assume that specifying the targets or victims of terrorism can help to identify which acts constitute terrorism. But, the peculiarity of terrorism also confuses the recognition of the targets of terrorism. Terrorism is a "compound offence" which needs both a *mens rea* in relations to its underlying act and a special intent in regard to the terrorism itself. So, there are two types of victims: the target of the underlying act and the "real target" at which the underlying act has been aimed.[33]

With regard to the targets of the underlying offence, there is a critical controversy about whether acts against non-human targets can be labelled as terrorism. A "British-inspired definition of terrorism"[34] includes various forms of damage to property and interference with or disruption of essential utilities and infrastructure.[35] Others restrict this definition by

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[28]See the debates in UN, Ad Hoc Committee Report (1937), A/9028; Or UN, Ad Hoc Committee Report (1977), A/34/39. Antonio Cassese *Self-determination of peoples: a legal reappraisal Hersch Lauterpacht memorial lectures* ([1st ed, Cambridge University Press, Cambridge, 1996), at 152-152. M. Cherif Bassiouni *International terrorism and political crimes* (Thomas, Springfield, 1975). Georges Sorel *Reflections on violence (*Collier Books, New York, London, 1961). Ted Honderich *After the terror* (Edinburgh University Press, Edinburgh, 2003), at 151, 170 and 184-185.

[29] Neil Boister *An introduction to transnational criminal law* (1st ed, Oxford University Press, Oxford, U.K., 2012), at 63.

[30] Article 3(1) of Organization of African Unity *OAU Convention on the Prevention and Combating of Terrorism* excempts "the struggle waged by peoples … for their liberation or self-determination, including armed struggle against colonalism, occupation, aggression and dominion by foreign forces" from being lablled as terrorst acts. See also Article 2(a) of League of Arab States *Arab Convention on the Suppression of Terrorism.* Article 2 (a) of Organization of the Islamic Conference *Convention of the Organisation of the Islamic Conference on Combating International Terrorism.*

[31] For more details about the countries' positions on this issue see Cassese, Antonio Cassese *International criminal law* (2nd ed, Oxford University Press, Oxford ; New York, 2008), at 167 and 168.

[32] Saul, *supra* note 22, at 128.

[33] Cryer, *supra* note 22, at 290.

[34] Kent Roach "The case for defining terrorism with restraint and without reference to political or religious motive" in Andrew Lynch, George Williams, and Edwina MacDonald (eds) *Law and liberty in the war on terror* (Federation Press, Annandale, N.S.W., 2007), 252 , at 40.

[35] See for example section 1 (2)(b),(e) Terrorism Act 2000 (UK) or section 100.1(2)(b) of Criminal Code Act 1995 (Australia)

requiring that such property damage needs to be "likely to endanger human life".[36] In some regional agreements, an act falls within the scope of terrorism if it is taken with the intention of destabilizing or destroying "the fundamental political, constitutional, economic or social structure of a country or an international organization".[37] Although the property damage element is included in the UN Draft Convention definition of terrorist acts,[38] it is neither in the list of the acts drawn by the Resolution 1566 of the Security Council on the condemnation of terrorism,[39] nor consistent with the meaning of terrorism advocated by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.[40] The concern is expressed that while such inclusion can capture conduct of a terrorist nature, it is likely to target "conduct with no bearing at all to terrorism".[41] A protest against the WTO, for instance, would be a terrorist act if it resulted in property damage.[42]

With regard to the special intent of terrorism, the League of Nations in a failed attempt regarded terrorism as a criminal act with the intention of creating "a state of terror in the minds of particular persons, or a group of persons or the general public".[43] In this definition, it is not clear whether intimidation is the primary purpose of the terrorists or whether it is a means for an ulterior end. A number of recent definitions broaden the element by requiring that the purpose of an act of terrorism must be "to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".[44] The difficulty is that it is not clear what degree of intimidation or compulsion needs to occur for an act to be considered terrorism:[45] mere intimidation[46] or serious intimidation?[47] In

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[36] Section 5(3) (d) of Terrorism Suppression Act 2002 (NZ).

[37] Article 1(1) of EU Council, Framework on Combating Terrorism, (2002/475/JHA). See also Article 1 (2) of Convention of the Organisation of the Islamic Conference on Combating International Terrorism.

[38] Article 2(b), (c) of UN, Draft Comprehensive Convention against International Terrorism, A/59/894, (12 August 2005).

[39] UN, S/Res/1566 (2004). The Resolution defines terrorism as "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act".

[40] Martin Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; promotion and protection of human rights", UN, E/CN.4/2006/98, 28 December 2005, para 36, 38.

[41] *Id.*

[42] Cryer, *supra* note 22, at 291.

[43] Article 1 (2) of The League of Nations,Convention for the Prevention and Punishment of Terrorism, C.546.M383.1937.v. (16 November 1937), ratified only by one state (India).

[44] Article 2(1)(b) of the Terrorist Financing Convention.

[45] Saul, *supra* note 22, at 60.

addition, the concern has been expressed that none of these elements are easy to prove because terrorists do not necessarily make their specific demands or make openly public the purpose of their action.[48] In the Boston marathon bombings, for example, it has not been plainly announced what the perpetrators intended to prompt the US government to do or abstain from doing.

What complicates defining the subjective element of terrorism is the question whether intimidation of the public or coercion of a State constitutes terrorism if it is motivated by personal impulses or by material gain such as in blackmail, extortion, revenge or personal hatred? While some propose that even acts of violence for personal gain should constitute terrorism,[49] others exclude any terrorist-type conduct with a private motive from a definition of terrorism.[50] They argue that "if a definition of terrorism is to reflect the real nature of the harm that terrorism inflicts on the political process", public motives, including political, ideological, religious, ethnic, or philosophical motives, must be distinguished from "private violence".[51] It is exemplified that setting fire to a building motivated by non-political, non-religious or non-ideological cannot be regarded as terrorism but arson as a public motive is lacking.[52] Similarly, an aggravated bank robbery may end with the killing or hostage-taking, but if done in order for the bandits to flee unharmed the intimidating of the public and coercing the police not to take any action against the bandits cannot be regarded terrorism as this action has not be done for advancing an ideological, political or other public cause (there are of course a range of common crimes suited to deal with such situations).[53]

From a criminal law perspective, it is again controversial whether while motive is irrelevant to criminal culpability, the existing criminal law needs to be expanded so as to include motive as an element of the crime of terrorism. The proponents of such inclusion believe that requiring motive as a mental element "allows the criminal law to more finely

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[46] Section 1(b) of Terrorism Act 2000 (UK) considers an act as terrorism if it merely influences a government or an international organization.

[47] Article 1(1) of EU Council Framework on Combating Terrorism considers an act as terrorism which aims to seriously intimidate a population, or unduly compel a government or international organization … or seriously destabilize or destroy "the fundamental political, constitutional, economic or social structure of a country or an international organization". Or terrorism, in section 89a of German Criminal code, is defined as a "serious violent act endangering the state".

[48] Geoffrey Levitt "Is terrorism worth defining?" 1986 13 Ohio Northern University Law Review 97, at 111.

[49] Non-Aligned group's proposed definition of acts of terrorism includes "[a]cts of violence committed by individuals or groups of individuals for private gain, the effect of which are not confined to one state". See UN, A/RES/3034(XXVII), 18 December 1972 reprinted in Bassiouni, *supra* note 23, at 564.

[50] Cassese, *supra* note 31, at 169.

[51] Saul, *supra* note 22, at 61

[52] Cassese, *supra* note 31, at 168.

[53] *Id.*

target, stigmatise and deter what is considered by society to be especially wrongful about terrorism" "which is not inherent in a physical act of violence alone".[54] This may also help "satisfy public indignation, better express community condemnation", "placate popular (but reasonable) demands for justice" and "send[s] a symbolic message that certain kinds of violence cannot be tolerated in plural, secular democracies".[55]

On the other hand, the opponents to this definition of the offence around the motive of the offender insist on retaining as many of the principles of criminal law including the general requirement for the proof of fault as possible.[56] Criticizing the inclusion of motive requirement imposed by some states,[57] they correctly argue that motive should not excuse terrorism nor constitute part of the crime of terrorism because such inclusion would result in detrimental consequences: infringement of basic human rights such as freedoms of conscience, belief, religion, thought, expression and association by targeting and prosecuting on political, religious or ideological grounds,[58] arousing and disseminating "suspicion and anger" of anyone who seems to belong to a religious, ideological or political group connected to a terrorist act,[59] and " politicizing the investigative and trial process" by requiring intelligence agencies and trials to provide extensive evidence about the true meaning of a motive by which a terrorist act might be induced.[60] Alternatively, they believe that a definition of terrorism will be less controversial and more acceptable if it relies more on the essence of terrorism, "namely the intentional murder and maiming of innocent civilians" rather than on motive. It is, therefore, thought preferable to concentrate on the physical harm caused by terrorist acts and to treat terrorists as ordinary criminals. As a solution, this seems deficient as it is not clear what after all is the definition of 'innocent civilians' in peacetime or

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[54] Ben Saul "The curious element of motive in definition of terrorism:essential ingredient or criminalizing thought?" in Andrew Lynch, Edwina MacDonald, and George Williams (eds) *Law and liberty in the war on terror* (Federation Press, Annandale, NSW, 2007), 252, at 29,30.
[55] *Id.,* at 37.
[56] Roach, *supra* note 34, at 42.
[57] UK in section 1 (1)(c) of Terrorism Act 2000 (UK) defines terrorism as "the use or threat of action made for the purpose of advancing a political, religious, racial or ideological cause". See also section 83.1(1) of Criminal Code 1985 (Canada); section 5 of Terrorism Suppression Act 2002 (NZ); s 1(1)(xxv) (c) Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004 (South Africa); section 100.1 of Criminal Code Act 1995 (Australia).
[58] *R v Khawaja* (2006) 214 C.C.C. (3d) 399, (Ontario Superior Court of Justice) para. 45, 80 and 73.
[59] *Id.*, para. 58.
[60] Irwin Cotler "Terrorism, security and rights : the dilemma of democracies" in Errol. Mendes and Debra M. McAllister (eds) *Between crime and war : terrorism, democracy and the constitution* (Thomson/Carswel, Toronto, 2002), at 35-36.

wartime? It is argued by some that the use of violence against non-innocent civilians is justified, in what is so-called "terrorism for humanity".[61]

A. The Terrorist Financing Convention and the Definition of Terrorism

The impossibility of reaching an agreement on a generic and authoritative definition of terrorism led initially to the adoption of a "thematic approach" to condemn and suppress terrorist acts.[62] Accordingly, international conventions were negotiated on certain classes of offences implicitly regarded "terrorist", without attempting to define or even apply the term terrorism or imposing a special intent or motivation.[63] Although setting aside the intent element in the favour of "sharply narrowed and highly elaborated" material elements made the inclusion of these sectoral conventions possible,[64] the criticism has been expressed that the acts criminalized by the conventions miss the unique characteristic of terrorism as these agreements implicitly include acts committed for personal and material causes. [65]

Unlike the sectoral conventions, the drafters of the Terrorist Financing Convention could not define the new offence by simply reference to a particular type of act;[66] rather, they would need to define terrorism, the financing of which the Convention was going to

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[61]Ted Honderich and ebrary Inc. *After the terror* (Expanded, rev. ed, Edinburgh University Press, Edinburgh, 2003) at 151,170, 184-185. See also Ted Honderich *Terrorism for humanity : inquiries in political philosophy* (Pluto Press, London ; Sterling, 2003). The example of terrorism for humanity is Palestinian suicide attacks against Israelis which is considered as the only means for realising Palestinians from Israel domination. Honderich compares and analogizes Palestinian action with intentionally atomic bombing of innocent in the Second World War by the US.

[62]Cryer, *supra* note 22, at 285.

[63] These conventions are : Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973, International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979, Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980, Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988 , Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988, International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997, International Convention for the Suppression of Acts of Nuclear Terrorism New York, adopted by the General Assembly of the United Nations on 13 April 2005

[64] Levitt, *supra* note 48, at 101.

[65] Cryer, *supra* note 22.

[66] Aust, *supra* note 20, at 291.

criminalize. So, the Convention adopted a "two-fold" approach:[67] a listing of offences and "a mini definition of terrorism".[68] With regard to the former, the Convention prohibits the financing of those acts within the scope of the sectoral conventions and any further ones.[69] With regard to the latter, it was also argued that it was necessary to include a generic definition on terrorism for the purpose of the Convention since "not all terrorist offences were covered" by the sectoral conventions.[70] Despite little pressure to delete the mini-definition,[71] the Convention defined terrorism as an

> 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.[72]

Although this definition was endorsed for the purpose of the Convention and for defining a new offence of terrorist financing,[73] not all aspects of terrorism are clearly and comprehensively reflected in the definition; nor have all those international concerns discussed above been properly addressed. First of all, the Convention does not clarify whether if it is to be considered terrorism, the use of violence should be only against people as the generic definition indicates, or whether an act against property can be terroristic as it is inferred from the Convention's reference to the sectoral conventions, some of which criminalise acts against property.[74]

The Convention's identification of people as the victims of terrorism is also not compelling since it has been couched in vague terms. Unlike the first draft of the Convention which did not even employ the term armed conflict on the grounds that the activities of armed forces during an armed conflict are understood under international humanitarian law,[75] in a revised version of the draft Convention, a provision was added to the definition of terrorism, prohibiting "[a]n act designed to cause death or serious bodily injury to a civilian or to any

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[67] UN, Measures to eliminate international terrorism, A/C.6/54/L.2, 26 October 1999, Annex III, para. 62
[68] Aust, *supra* note 20, at 291.
[69] Article 2 (1)(a)
[70] UN, *Report of Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996*, A/54/37, 5 May 1999, Annex IV, para 23. Also see UN, A/C.6/54/L.2, 26 October 1999, Annex III, para 6.
[71] A/C.6/54/L.2, 26 October 1999, Annex III, para. 81.
[72] The Terrorist Financing Convention, Article 2 (1)(b).
[73] Aust, *supra* note 20, at 298.
[74] For example Article II (1)(b) of Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation covers acts which "destroy[s] or seriously damage[s] the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport".
[75] UN, A/C.6/53/9, 4 November 1998, Article 21 (2)

other person, other than in armed conflict … ".[76] The retention of the added provision was supported on the understanding that it was necessary for the Convention to cover not only civilians but also those who are not civilians "but were not engaged in armed conflict either", such as "off-duty military officers".[77] However, the comment was made that the added provision implied that "civilians did not take part in hostilities, which was considered not to be always the case".[78] Instead, it was proposed that the provision be amended to protect any person, whether civilians or nor, who is not "taking an active part" in hostilities. Although this proposal was not taken into account in reformulating the final draft, the qualifier "not taking an active part" was inserted in the definition of terrorism to include "any 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" within the scope of terrorism.

Such a reference to armed conflict can be problematic for the following reasons. Generally speaking, while the lack of consensus on the legitimacy or illegitimacy of the use of violence in some circumstances of armed conflict such as self-determination or national movements is one of the main obstacles to reach a universal agreement on a definition of terrorism, the Convention evades the issue. This evasion increases "a possibility of legal dispute when the [Convention] is applied to a real case" [79] because some may insist on excluding the use of violence in those circumstances from being labelled as terrorism.[80]

In addition, it is not clear what the phrase "any other person not taking an active part in the hostilities in a situation of armed conflict" excludes from the definition. This could "give rise to disputes of interpretation, i.e., as to whether a particular act constituted terrorism, or was undertaken during armed conflict. The United States, for example, interprets this phrase to include an assault on off-duty military personnel in time of armed conflict.[81] In this regard, it might be controversial as to how to deal with combatants of various kinds, either as terrorists or combatants.

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[76] UN, A/AC.252/L.7 and Corr.1, reproduced in UN, A/54/37, 15 to 26 March 1999, Annex II, *Working document submitted by France on the draft international convention for the suppression of the financing of Terrorism*, Article 2(1)(b).

[77] UN, *Measures to eliminate international terrorism*, A/C.6/54/L.2, 26 October 1999, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, para 102.

[78] *Id.*, para. 101.

[79] Jae-myong Koh *Suppressing terrorist financing and money laundering* (Springer, Berlin, 2006), at 65.

[80] UN, *Measures to eliminate international terrorism*, A/C.6/54/L.2, 26 October 1999, *supra* note 77, para 2.

[81] United States. President (1993-2001 : Clinton) and United States. Congress. Senate. Committee on Foreign Relations *International Convention for Suppression of Financing Terrorism: message from the President of the United States* Treaty doc (U.S. G.P.O., Washington, 2000), at VII.

It is also significant to note that the Convention is silent on what the definition of 'civilian' is? So, there remains a lot of controversy over the questions of whether Israeli settlers in Palestinian occupied lands, Pied-noirs in Algeria or white South Africans in the time of apartheid are or were, for instance, 'innocent civilians', and whether the use of violence against police officers or government officials who implement the oppressive policies of a government are terrorism?[82]

The attempt of the authors of the Convention to specify the intention or purpose of the crime is also subject to criticism for its wideness. According to the definition, it may suffice for an act to be classified terroristic if it is determined that the purpose of the act, "by its nature or context", is either to intimidate people "or" to coerce a government or international organization to act.[83] While the former is very broad to the extent that it can apply, for example, to those gangs' activities committed with the conscious objective of intimidating, the latter partly signals the political aspect of terrorism. However, coercing a State in itself is wide enough to include acts which have no political, religious or ideological rationale,[84] such as the assassination of a judge carried out by the mafia to compel a State to abandon investigations or prosecutions. It seems that the drafters were reluctant (or found it controversial) to rely on motive to differentiate private from public violence[85] and they preferred to stick with the traditional criminal principle that "no motive can excuse an intentional crime".[86] Article 14 of the Convention reflects this where it provides that, for the purpose of extradition, a terrorist act shall not be viewed "as a political offence or as an offence connected with a political offence or as an offence inspired by political motives."

III. CRIMINALISATION OF TERRORIST FINANCING: JUSTIFICATIONS AND CHALLENGES

Although the draft Convention was proposed with the intention of addressing terrorist financing independently, some doubted as to whether and if so how an ancillary act of

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[82] Michael Walzer *Just and unjust wars : a moral argument with historical illustrations* (3rd ed, Basic Books, New York, 2000); see also Thomas M Franck and Scott C Senecal " Porfiry's proposition: legitimacy and terrorism" 1987 20(2) Vanderbilt Journal of Transnational Law 195.

[83] During the negotiation on the Convention, concern was made that "there could be other reasons for committing a terrorist act". See UN, *Measures to eliminate international terrorism*, A/C.6/54/L.2, 26 October 1999, *supra* note 77, para 87.

[84] Aust,*supra* note 20 , at 298.

[85]See United Nations Office on Drugs and Crimes *Guide for the legislative incorporation and implementation of the universal ati-terrorism instruments* (2006), para. 31.

[86] Roach, *supra* note 34, at 42.

financing could become the crime of terrorist financing. Three approaches were proposed and discussed during the negotiations on the draft convention: 1) to treat terrorist financing as an ancillary form of participation in the offence of terrorism, 2) to criminalize only the acts of financing of terrorist groups, 3) and to consider terrorist financing as an independent crime. While the drafters adopted the third approach, other approaches are favoured when the Convention is applied at national levels. These approaches will be discussed in this part.

A. Terrorist Financing As an Ancillary Form of Participation in the Offence of Terrorism

During the first and second reading of the draft Convention, reservations were expressed as to whether it was necessary to separately and independently criminalize terrorist financing.[87] It was argued that having an ancillary nature, the financing of any of the existing offences defined by the sectoral conventions would constitute participation or complicity in that offence, and the provisions on accomplices in the sectoral conventions were enough to cover such financing.[88] While rejected by the drafters of the Convention, similar reasoning was given by some jurisdictions to refuse to establish an independent offence of terrorist financing. Aruba, for example, expressed the view that "several parts of the terrorist financing offences" as required by the Convention could be covered by the various existing provisions on accomplices in Aruba law.[89] In addition, it was argued that a separate and independent offence might overlap with some of existing crimes under its law.[90]

In some jurisdictions, terrorist financing may alternatively be considered as coming close to the notion of an inchoate crime in the sense that its criminality is not dependent on the completion of a subsequent offence. In the Netherlands, for instance, the financing of a terrorist act used to be prosecuted as "preparation of an offence" under Article 46 of the Dutch Penal Code.[91] The Dutch Supreme Court in a ruling defined 'preparation' as "an incomplete form of a criminal offence". Widening the scope of the law on attempt, the court

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[87] UN, A/54/37, *supra* note 706, para. 84-86.
[88] Aust, *supra* note 20, at 288.
[89] Caribbean Financial Action Task Force *Mutual evaluation report: anti-money laundering and combating the fianncing of terrorism; Aruba, Kingdom of the Netherlands* (16 October 2009), para. 150.
[90] Aruba has amended its law to satisfy the FATF's requirements and introduced a new offence of terrorist financing. However, it is not clear how Aruba addresses the overlap issue (a separate and independent offence might overlap with some of existing crimes under its law). See Financial Action Task Force *8th the Follow-up Report Mutual Evaluation of Aruba, Kingdom of the Netherlands* (February 2014), para.11.
[91] Financial Action Task Force *Mutual Evaluation Report: anti-money laundering and combating of the financing of terrorism; the Netherlands* (25 February 2011), para. 251

also ruled that "punishable preparation is further away from the completed offence than attempt … but involves acts in which perpetrator … intentionally fabricate[s] or ha[s] at his disposal means that are … intended for the commission of the criminal offence he has in mind".[92] In the case of terrorist financing, it seems that the financing of specific terrorist acts used to include the situation where the act financed or intended to be financed has not been attempted yet.[93] However, in spite of these objections the Netherlands amended its law in 2013 to meet the FATF's requirements by criminalizing the financing of terrorist acts as an autonomous offence. [94]

B. Criminalization of Financing of Terrorist Organizations

There was a minority of delegations which tried to restrict the scope of the offence of financing only to terrorist organisations.[95] They argued that a mere preparatory act cannot be criminalised, unless the act is of a "particularly dangerous nature". In the context of the Convention, it was considered to be true only of terrorist organisations. In fact, it was argued "it is this aspect of organisation, which typically includes long-term planning, continuity of purpose, and division of labour and particular difficulty of detection, which renders entities and their activities so dangerous that criminalising the financing of mere preparatory acts justifiable".[96] They expressed that a similar rationale could not apply to the financing of terrorist individuals as it would simply be a participatory offence (as discussed above) which falls within the scope of the sectoral conventions listed to the Convention. Such a reference to terrorist organisations required the introduction of the precise and detailed elements of the definition of 'organization'.[97] While most of the proposed definitions of 'organization' emphasized the hierarchical structure of a group of persons with common objectives,[98] the drafters began to raise doubts over the usefulness of defining 'organization'.[99] The

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[92] *Id.* , para. 254.
[93] *Id.* , para. 270.
[94] Financial Action Task Force *Second Follow-up Report Mutual Evaluation of the Netherlands* (February 2014), at 17.
[95] See for example Austria's proposal in UN, A/AC.252/1999/WP.11, reproduced in UN, A/54/37, at 29.
[96] *Id.*
[97] UN, A/54/37, Annex IV, para. 11.
[98] See for example, UN, A/AC.252/1999/WP.6, reproduced in UN, A/54/37, at 27. See also UN, A/C.6/54/WG.1/CRP.6, reproduced in UN, A/C.6/54/L.2, at 21.
[99] Marja Lehto *Indirect responsibility for terrorist acts : redefinition of the concept of terrorism beyond violent acts* (Nijhoff Publishers, Boston, 2009), at 312.

Convention was finalised and the drafters avoided including a definition of 'organisation' in the view that the definition of 'organization' may vary from one case to another.[100]

Even the UN Security Council, which has engaged in the suppression of the financing of groups associated with Al-Qaida as another method of countering terrorist financing, has failed to define a 'terrorist organization' or provide legal guidelines for identifying terrorist groups. Instead, it has adopted an "operational" or listing and de-listing approach to the issue.[101] The Security Council in Resolution 1267 (1999) established a committee[102], namely the Al-Qaida Sanctions Committee, and gave it a mandate to create and update a list of individuals, groups, undertakings and entities associated with al-Qaida.[103] Having regard to the information provided by the Member States and regional organizations,[104] the committee, which consists of the Security Council member States, is obliged to make a decision (by "consensus of its members") on whether an individual or organization proposed is eligible to be designated as terrorist or delisted from the list.[105] However, the inclusion of a group on the list provided by the UN Security Council is not always considered as "conclusive evidence" of the terroristic nature of that group. In this regard, an Italian court argued that the list has merely "an administrative value", which does not "override the principle of the free assessment of evidence by an independent judge".[106]

Designating an individual or group as terrorist without instituting criminal proceedings is also adopted by some States. For instance, in the US, a group may be designated as a terrorist group by the Secretary of State in consultation with the Attorney General and the Secretary of the Treasury.[107] The main criterion used to designate a group as terrorist is that the group engages in terrorist activity or "retains the capability or intends to engage in terrorist activity or terrorism".[108] This approach, however, is subject to criticism because of the lack of a certain legal base and procedure for designating individuals or groups and freezing their

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[100]UN, A/C.6/54/WG.1/CRP.35/Rev.1, reprinted in UN, A/C.6/54/L.2, 27 September to 8 October 1999, at 51
[101] Koh, *supra* note 79 , at 97.
[102] UN, S/RES/1267, 15 October 1999, para. 6.
[103]UN, S/RES/1390, 16 January 2002, para.2; UN, S/RES/1989, 17 June 2011.
[104] UN, S/RES/1390, 16 January 2002, para. 5 (a).
[105] UN "Guidelines of the Committee for the Conduct of its Work" (15 April 2013) <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf> viewed at 22 August 2013, at 2.
[106]*Italy V. Abdelaziz and Ors*, Final Appeal Judgment, No 1072; ILDC 559 (IT 2007).
[107] US Department of State "Foreign Terrorist Organizations" (28 September 2012) <http://www.state.gov/j/ct/rls/other/des/123085.htm> viewed at 22 August 2013.
[108] *Id.*

assets.[109] In fact, this approach reduces the degree of judicial control of the designation process, and, instead, politicizes the targeting process,[110] which increases the risk of failure to abide by fundamental principles including the right to a fair hearing, "due process, right to property and freedom of association".[111]

In addition, the lack of a definition of a terrorist group or legal requirements for identifying terrorist organizations has resulted in disagreement among States and international organizations about which organizations or individuals should be listed or de-listed.[112] In this regard, it is instructive to compare the list of States' and international organizations' blacklisted terrorist organizations since "there are notable omissions".[113]

The importance of addressing the organizational character of the offence of terrorism, however, has been highlighted by the European Council through its establishment of terrorist group offences. The EU Council Framework Decision of 13 June 2002 on Combating Terrorism in Article 2 (2) of the Framework Decision requires states member of European Union to criminalize "directing a terrorist group" as well as "participating in the activities of a terrorist group including by supplying information or material resources or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group".[114] Similar to the definition of "organized criminal group" provided by the 2000 United Nation Convention against Transnational Organized Crime,[115] the Framework Decision defines a terrorist group as a "structured group of more than two persons which [has been] established over a period of time and [is] acting in concert

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[109] Raphael Bossong *The evolution of EU counter-terrorism : European security policy after 9/11* Contemporary terrorism studies (Routledge, Abingdon, Oxon ; New York, 2013), at 48.

[110] Julie B. Shapiro "The politicization of the designation of foreign terrorist organizations: the effect on the separation of powers" 2008 6(3) Cardozo Public Law, Policy and Ethics Journal 547.

[111] UN *Letter dated 14 February 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council* (S/2005/83, 15 February 2005), para.50.

[112] The European Union-US friction is a good example in this regard. While The US and Israel pressurises European Union to list Hamas and Hezbollah in its terrorist list, EU members differentiate between the military and political wings of these groups, including only the military wing of the groups to its list. For more discussion see Bianca C. Hostetler *The European Union : expand, shrink or status quo* (Nova Science Publishers, Hauppauge, NY, 2006), at 73.

[113] Alex Peter Schmid "Introduction to the world directory of extremist, terrorist and other organizations associated with guerrilla warfare, political violence, protest, organized crime and cyber-crime" in Alex Peter Schmid (ed) *The Routledge handbook of terrorism research* (Routledge, New York, 2011), at 350.

[114] EU Council Framework on Combating Terrorism, (2002/475/JHA), Article 2 (2) (a) and (b).

[115]UN, A/RES/55/25 New York, 15 November 2000. Article 2 (a) of this convention defines a criminal group as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."

to commit terrorist offences".[116] A 'structured group' means "a group that is not randomly formed for immediate commission of an offence and that does not need to have formally defined role for its members, continuity of its membership or a developed structure". It is worth noting that the FATF provides a wider definition in the sense that it does not require of a terrorist organization some measure of structure or the time factor.[117]

The Framework Decision is applied by European Union's member States, but using somewhat different interpretations.[118] For instance, the financing of a terrorist organization in the Netherlands comes close to the notion of inchoate crime[119] but as discussed above it does not merge into the category of a preparatory offence in the sense that a direct relation between the act of financing and a specific terrorist act is not necessary.[120] In other words, the Netherlands criminalizes the financing of a terrorist group as "participation" in the group under article 140a of the Penal code. In general, participation in a group whose aims are to commit offences is regarded as "the preparatory acts of entering into and maintain a long-lasting collaboration, which is aimed at commission of the crime".[121] In the case of terrorist financing, article 140a does not require that the funds collected and provided be used for the commission of a specific act, or are intended to be used for such an offence. The requirement is that the funds should be collected or provided for the "benefit" of a terrorist organization.[122] According to the Dutch case law, an 'organization' is "a structured and lasting form of collaboration between two or more persons".

Spain criminalizes the financing of a terrorist group as "belonging" to the group.[123] According to the article 571(3) of Spanish Criminal Code, terrorist organizations are those groups which 1) are formed by a large number of persons, 2) possess weapons or dangerous

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[116] EU Council Framework on Combating Terrorism, (2002/475/JHA), Article 2 (1).

[117] The FATF reduces the concept of terrorist groups to broadly cover "any group of terrorists that: (i) commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully; (ii) participates as an accomplice in terrorist acts; (iii) organises or directs others to commit terrorist acts; or (iv) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act". The Financial Action Task Force *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (February 2012)159, General Glossary, at 122.

[118] See Commission of the European Communites *Report from the Commision based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism* (Brussels, 6 November 2007).

[119] Caroline M. Pelser "Preparation to commit a crime: the Dutch approach to inchoate offences" December 2008 4(3) Utrecht Law Review 57. At 70.

[120] *Id.*

[121] *Id.*

[122] Financial Action Task Force, *supra* note 91, para. 280.

[123] Financial Action Task Force *Third mutual evaluation report on anti-money laundering and combating the financing of terrorism; Spain* (23 June 2006), para. 113 and 124.

instruments and 3) have the particular purpose of "subverting the constitutional order or seriously breaching public peace". The financing of such a group under the article 576 (1) of the Spanish Criminal Code is considered as an act of "collaboration with the activities or the purposes of a terrorist organisation". Collaboration, in article 576 (2), is defined as the provision of "information on … or use of accommodation or storage facilities; concealment or transport of individuals related to terrorist organisations or groups; … and, in general, any other equivalent form of co-operation, aid or mediation, economic or of any other kind whatsoever, with the activities of those terrorist organisations or groups". Similar to the approach taken by Spain, some other Ibero-American countries do not establish an independent offence of terrorist financing. Argentina, for example, illegalizes terrorist financing as "illicit association" to a terrorist organization (Article 210 of the Argentine Criminal code).[124] Or Colombia, in Article 340 of the Colombian Criminal Code, treats terrorist financing as an agreement to commit crimes,[125] which is similar to the concept of conspiracy in common law countries.

C. Terrorist Financing As an Independent Offence

Despite the above-mentioned approaches, the tendency in the negotiations on the draft convention was towards retaining an independent offence of terrorist financing.[126] The idea that the provisions on accomplices in the sectoral conventions were sufficient to cover all aspects of terrorist financing was rejected. Instead, it was argued that the financing of a terrorist act, in and of itself, is as serious an offence as the actual terrorist act.[127] This notion is based on the assumption reflected in the preamble of the Convention: "the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain"; [128] so, it was concluded that the financers of terrorism should be punished as severely as those who commit terrorism.[129] The application of this approach can be seen in Australia where the penalty for the commission of terrorism financing is equal to the one which applies

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[124] Yara Esquivel Soto "An autonomous offence for the financing of terrorism: notes from an Ibero-American perspective" in Mark Pieth, Daniel Thelesklaf, and Radha Ivory (eds) *Countering terrorist financing : the practitioner's point of view* (Peter Lang, Bern ; New York, 2009), at 198.
[125] *Id*.
[126] UN, A/54/37, Annex IV, para. 84.
[127] Aust, *supra* note 20, at 288.
[128] The Terrorist Financing Convention, preamble.
[129] Aust, *supra* note 20, at 288.

for the commission of terrorism [130] or in France where under article 421-2-2 of French Criminal Code "it constitutes an act of terrorism to finance a terrorist organisation". It seems that the drafters were determined to give the new offence a broad scope which covers "the financing of any and all crimes" defined by or annexed to the Convention.[131]

This approach is also justified in academia with regard to the harmful and dangerous nature of the act of terrorist financing. It is argued that terrorist financing should be considered to constitute "a separate primary harm rather than an ancillary harm" since "reliable financing" can change the conventional harm of terrorism from "sporadic and local" and give it a "continuous and broader nature" by enabling terrorists to expand the scale and scope of their influence across vast areas and expose various people.[132] It is exemplified how solid resources enable terrorist groups such as the FARC and Al-Qaeda to recruit members, supply themselves with adequate weapons and lunch and expand their activities anywhere in the world.

The injurious and dreadful consequences of terrorism serve also an important function in the construction of terrorist financing as an independent offence.[133] It is argued that terrorist offences are "multi offensive" in that they endanger many "protected values" such as "life, physical integrity, property, freedom and national security".[134] As terrorist financing allows terrorism to become real, the act of financing terrorism poses *ex ante* threat to those values too. As such, it is believed that there is enough justification to extend the reach of criminal law to rationalize the criminalization of the preparatory act of terrorist financing as an autonomous crime.[135]

The criminalization of terrorist financing should be also regarded as a part of "a larger shift in criminal justice from an offender-oriented towards a proceeds-oriented" approach"[136] which has been specifically developed in the fight against organized crime which produces large profits for criminals. The main justification for the adoption of this approach is its "possible deterrence value".[137] It is believed that attacking the root of all economically

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[130] Compare Article 101.2 with Article 102.6 of the Criminal Code Act 1995 (Australia).
[131] Lehto, *supra* note 99, at 274.
[132] Koh, *supra* note 79, at 66.
[133] Lehto, *supra* note 99, at 264
[134] Soto, *supra* note 124, at 200.
[135] *Id.*, at 203.
[136] Guy Stessens *Money laundering : a new international law enforcement model* Cambridge studies in international and comparative law (Cambridge University Press, Cambridge England ; New York, 2000), at 85.
[137] Michael Levi "Taking the Profit Out of Crime: the UK experience" 1997 5(3) European Journal of Crime, Criminal Law and Criminal Justice 228, at 228.

motivated crimes would confiscate the incentive of perpetrators to commit those crimes.[138] At an organizational level, "going after the money" is assumed to incapacitate criminal organizations by taking away their financial lifeblood, "eliminating their capacity to trade and reducing their attractiveness to recruits".[139]

The criminalization of money laundering is considered as the key component of this approach since criminals may hide the proceeds with third parties[140] or give them a legitimate appearance to the extent that confiscation is not possible.[141] So, for the sake of the confiscation of such proceeds, criminalizing laundering can provide a legal tool for law enforcement authorities to deal with suspicious property and assets either in the hand of third parties or the real owner[142] without requiring the prosecution to prove the guilt of the criminals of the predicate crime beyond a reasonable doubt.[143] That is, confiscation is possible by proving the charge of money laundering conduct or the "ownership" of the proceeds. In addition, the fight against money laundering is considered as a means of collecting evidence against the higher-level criminals who stay aloof from criminal activities, but who do come into contact with the proceeds derived from the criminal activities.[144] This contact provides a paper trail of records which constitute the involvement of the top criminals in the criminal activities (predicate crime) from which the proceeds derived.

Regardless of how effective the application of this approach has been in the fight against organized crime,[145] the logic of this argument hardly fits into the case of terrorism and terrorist financing. Firstly, it should be noted that terrorism is not a crime committed for the purpose of making money. It is a "politically motivated act of violence"[146] with two distinctive financial characteristics: 1) terrorists need less money to act than those criminals

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[138] Ethan. A Nadelmann "Unlaundering Dirty Money Abroad: US Foreign Policy and Financial Secrecy Jurisdictions" 1986 18(1) Inter-American Law Review 33, at 34.
[139] Levi, *supra* note 137, at 228.
[140] Frank Verbruggen "Proceeds-oriented criminal justice in Belgium: backbone or wishbone of a modem approach to organised crime?" 1997 5(3) European Journal of Crime, Criminal Law and Criminal Justice 314, at 318.
[141] Koh, *supra* note 79, at 39.
[142] Stessens, *supra* note 136, at 86.
[143] Koh, *supra* note 79, at 43.
[144] Stessens, *supra* note 136, at 86.
[145] R. T. Naylor "Follow-the-money methods in crime control policy" in Margaret E. Beare (ed) *Critical reflections on transnational organized crime, money laundering, and corruption* (University of Toronto Press, Toronto ; London, 2003). See also Peter Alldridge "The moral limits of the crime of money laundering" 2002 5(1) Buffalo Criminal Law Review 279.
[146] Robin Morgan *The demon lover : the roots of terrorism* (Updated ed, Piatkus, London, 2001), at 40.

who seek to maximise their financial gains;[147] 2) terrorist funds are derived from legal and illegal sources. Taking these facts into account, it seems implausible to argue that going after terrorists' funds undermines their incentive simply because funding terrorism is "a product of an ideology".[148] As long as there is a desire for politically or ideologically inspired people to seek their purposes through violence, they will discover a way to do so. In terms of an impact on the organizational capacity of terrorist groups, while drying up terrorists' funds may have disruptive effects on the potential of the groups to recruit and conduct operations on the scale of the September 11, it does not necessarily result in deterring or resolving "terrorism risks".[149] Instead, it may "reshape" the risks in the sense that, as the case of al-Qaeda shows, a hieratical (single-centralized) group may be replaced by smaller, decentralized groups[150] which seek individually damaging set of scattered attacks.[151] Therefore, the amount of money these groups would seek "would be much smaller; the means used to raise them would vary widely and depend on the local conditions, … there would be much less need for fund transfers and the communication among groups … would be minimal".[152] A concern is raised that if terrorist networks become increasingly decentralized and self-funding, it is much harder for authorities to track and capture their funds.[153] This also challenges the assumption that "terrorists need a financial support network".[154] It is worth to note that similar conclusions were drawn by many regarding efforts to interrupt finances of organized crime.[155]

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[147] Michael Levi "Lessons for countering terrorist financing from the war on serious and organized crime" in Thomas J. Biersteker and Sue E. Eckert (eds) *Countering the financing of terrorism* (Routledge, London, 2008), at 267.

[148] Raphael Perl "Anti-terror strategy, the 9/11 Commission Report,and terrorism financing: implicating for U.S.policy makers" in Jeanne K. Giraldo, Harold A. Trinkunas, and ebrary Inc. (eds) *Terrorism financing and state responses a comparative perspective* (Stanford University Press, Stanford, Calif., 2007), at 255.

[149] Levi, *supra* note 2, at 662.

[150] National Commission on Terrorist Attacks upon the United States. *The 9/11 Commission report : final report of the National Commission on Terrorist Attacks upon the United States* (1st ed, Norton, New York, 2004), at 383. See also United Nationas Security Council *Letter dated 23 August 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council (S/2004/679)* (25 August 2004), at 6.

[151] Levi, *supra* note 2, at 662.

[152] Nikos Passas "Terrorism financing mechanisms and dilemmas" in Jeanne K. Giraldo and Harold A. Trinkunas (eds) Terrorism financing and state responses : a comparative perspective (Stanford University Press, 2007) , at 32-3.

[153] Perl, *supra* note 148 , at 251.

[154] National Commission on Terrorist Attacks upon the United States., *supra* note 150, at 382. See also John Roth and others *Monograph on terrorist financing staff report to the Commission* (National Commission on Terrorist Attacks upon the United States, Washington, D.C., 2004), at 29.

[155] Perl, *supra* note 148, at 251. See also Levi, *supra* note 2, at 662.

Although by criminalizing money laundering techniques, the freezing and confiscation of the proceeds of criminal activities can be facilitated, attacking terrorist finance as a tool "to starve of funds "can be "problematic" and "premature".[156] The main problem in this regard derives from the fact that the nature of terrorist financing conduct is "the inverse of the structure of the money laundering offence".[157] Although money laundering cases are based on predicate offences already taken place, the principal offence on which terrorist financing is premised, in most cases, is not committed or even attempted yet. Freezing such funds appears to be much more difficult than the one in money laundering cases as the law enforcement agencies need to establish a hypothetical link between the suspicious funds and a possible terrorism connection. From a practical viewpoint, as the 9/11 Commission Report indicates, focusing on the freezing strategy may also throw away the chance of intelligence and law enforcement agencies to monitor the movement and transfers of those funds, understand terrorists' networks, and consequently search them out and disrupt their operations. [158]

D. Terrorist Financing As a Predicate Offence of Money Laundering

Following the adoption of the Terrorist Financing Convention, the FATF now also emphasizes the criminalization of terrorist financing as an independent offence; but referring to "the close connection between international terrorism and, *inter alia*, money laundering", [159] it additionally pushes countries to criminalize terrorist financing as a predicate crime to money laundering.[160] There are, nonetheless, some uncertainties about the scope of this FATF recommendation. Practically, it is not clear what the reference to the link between terrorism and money laundering implies? Does it mean that terrorism is a crime which generates proceeds which need to be laundered? This has had an impact at a national level. India, for example, defines "proceeds of terrorism" as "all kinds of properties which have been derived or obtained from commission of any terrorist act or have been acquired through funds traceable to a terrorist act …".[161] While terrorism defined by the Convention is the use of violence against civilians which results in bodily injuries for the purpose of

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[156] Passas, *supra* note 152, at 36.
[157] Boister, *supra* note 29, at 106.
[158] National Commission on Terrorist Attacks upon the United States., *supra* note 150, at 382.
[159] The Financial Action Task Force *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (February 2012), interpretive note to Recommendation 5, at 37.
[160] *Id.*, Recommendation 5, at 13.
[161] See Chapter I (2)(g) of Unlawful Activities (Prevention) Act 1967 (India).

intimidating or coercing, it seems that India either is confusing terrorism with the acts carried by terrorists or their financiers to raise funds for terrorist purposes or intends to label any acts executed by terrorists as terroristic. The consequence of such an interpretation would be criminalization of persons rather than their conduct.

In addition, terrorist financing logically does not fit into the money laundering scheme. Terrorist financing does not necessarily involve money laundering processes since the source of funds and the direction of financial flows in terrorist financing are considerably different from the ones in money laundering.[162] Regardless of this fact, even if it is assumed that terrorist financing includes money laundering processes or is another form of money laundering (in so-called "reverse-money laundering")[163], it does not make any sense at all to criminalize a form of money laundering (terrorist financing) as a predicate offence to another form (money laundering). Probably to avoid this inconsistency, Saudi Arabia in article 2 (d) of its Anti-Money Laundering Statute mistakenly considers terrorist financing as a form of money laundering, rather than establishing an independent offence of terrorist financing as a predicate offence to money laundering .[164]

IV. THE ANALYSIS OF THE ELEMENTS OF THE CRIME OF TERRORIST FINANCING

The drafters of the Convention obviously struggled with introducing terrorist financing as an autonomous offence. This is not only because delineating the elements of the new offence of financing, which is, in most cases is in itself victimless, harmless and preparatory in nature, is difficult and controversial, but also because the drafters could not succeed in providing a precise and comprehensive definition of terrorism, terrorists and terrorist groups, the financing of which should be independently criminalized. Under the shadow of such a failure, the result could not be expected to be promising. Neither could it be hoped that the criminalization of terrorist financing, in a way it was finalized, would be easily accepted and similarly understood or practiced by States parties to the Convention. This part is devoted to showing how the negotiations on the elements of the crime of terrorist financing took place and how such criminalisation is understood and implemented at national levels.

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[162] See Roberto Durrieu *Rethinking money laundering & financing of terrorism in international law : towards a new global legal order* (Martinus Nijhoff, May 2013) .
[163] Stefan D. Cassella "Reverse money laundering" 2003 7 Journal of Money Laundering Control, at 93.
[164] The Middle East & North Africa Financial Action Task *Mutual evaluation report; Anti-Money Laundering and Combating the Financing of Terrorism: Kingdom of Saudi Arabia* (4 May 2010), para. 149.

A. The Elements of the Offence of Terrorist Financing

The finalized draft of the Convention defines the basic terrorist financing offences in article 2 (1) as follows:

> 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: (a) [a]n act which constitutes an offence within the scope of … [annexed conventions]; or (b) [a]ny other act intended to cause death and serious body injury to a civilian … .

The Convention in article 2(3) gives difference meaning to this definition by adding that "[f]or an act to constitute an offence set for forth [article 2 (1)], it shall not be necessary that the funds were actually used to carry out an offence referred to an offence" annexed to the Convention or the offence of terrorism defined by the Convention.

1. Controversy on the definition of the term "funds"

Before examining the elements of the offence of terrorist financing provided in the above-quoted paragraph, attention needs to be devoted to the term "funds" to which reference is made. Despite the first[165] and revised draft[166] of the Convention in which the term 'funds' which was used in a generic definition that encompassed "any form of pecuniary benefit",[167] the drafters decided to stretch the meaning of the term 'funds' beyond its dictionary meaning. The Convention extends the meaning of the funds to cover

> assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or 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, letters of credit.[168]

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[165] See Article 1 of UN, *Letter dated 3 November 1998 from the Permanent Representative of France to the United Nations addressed to the Secretary-general*, A/C.6/53/9, 4 November 1998
[166]UN, A/54/37, Annex II, Article 1(1).
[167]*Id.*, Annex IV, para. 10.
[168] The Terrorist Financing Convention, Article 1 (1).

This definition seems to include "anything under the sun", from "animals, buildings, or vehicles of any kind" to any other objects which have pecuniary value. [169] Under such a definition, the title of the Convention would be more precise to be titled "material assistance" than 'the financing of terrorism'.[170] As illustrated in the discussion below, which examines a very broad approach and more narrow approaches to interpreting 'funds' and 'funding', the apparent broadness of this definition, which may seem functional in abstract proves, however, to be controversial when it is applied at national levels.

a. Definition of the term "funds": a broad but controversial interpretation.

The Convention does not clarify what the expression "but not limited to" refers to. From a US perspective, which applies a very broad definition of support, this means support beyond pure funding. That is, the US law prohibits providing "material support or resources" to terrorists and foreign terrorist organizations.[171] The term "material support or resources" contains not only funds and tangible goods, but also "training", "personnel", "transportation", "service" and "expert advice or assistance", "except medicine or religious materials". [172]

However, the precise scope of the "material support and recourses" provisions has proved controversial and come under constitutional attack for their vagueness. The main challenge that the US courts have faced is deciding whether the support provided by groups seeking to advocate for human rights and peace to and with the organizations designated as terrorist organizations fits the definition of "material support and resources".[173] In the complicated 12-years Humanitarian Law Project litigation, the plaintiffs, among other things, claimed that prohibitions against providing "material support and resources" to foreign designated terrorist organizations are "unconstitutionally vague".[174] Specifically, the plaintiffs sought to enjoin

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[169] Roberto Lavalle "The International Convnetion for the Suppression of the Financing of terrorism" 2000 60 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 491, at 496.
[170] *Id.*
[171] *18 U.S.C.* §§ *2339* A and B.
[172] The US Congress intended the term medicine "to be understood to be limited to the medicine itself, and does not include the array of medical supplies". The term religious should not be read to include "anything that could be used to cause physical injury to any person. It is meant to be limited to those religious articles typically used during customary and time-honored rituals or teaching particular faith, demonstration, or sect". see House of Representative *Terrorism prevention Act* (Report number 104-518, April 15 1996) < https://www.fas.org/irp/congress/1996_rpt/h104518.htm> viewed at 25/11/2013. See also *18 U.S.C.* § *2339*A (b)(1).
[173] *Humanitarian Law Project v. Reno* 9 F.Supp.2d 1176 (United States District Court, C.D. California. 1998) at 1180.
[174] *Id* , para. 1185.

enforcement against the ban on providing "training, expert avarice or assistance (when derived from "specialized knowledge"), service and personnel".

Despite the clarifying explanations of these terms added to the material support provisions,[175] the District Court and the Court of Appeals ruled that these terms (except the term "personnel"[176]) are impermissibly vague. With regard to the term "training" which is defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge",[177] the court accepted the plaintiffs' argument that the term "training", does not clearly "put a person of ordinary intelligence on notice that his or her contemplated action is unlawful" because it is highly improbable "that a person of ordinary intelligence would know whether, and when teaching someone to petition international bodies for tsunami related aid … is imparting a "specific skill" or general knowledge", and because "a plaintiff who wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such protected expression falls within the scope of the term "training"".[178] The court stated that even if persons of ordinary intelligence could understand the scope of the term training, the term would remain vague as it could still be read to cover speech and advocacy protected by the First Amendment.[179]

With regard to the term "expert advice or assistance" defined as imparting "scientific, technical or other specialized knowledge",[180] the plaintiffs argued that the "specialized knowledge" portion of this definition is unclear because "it merely repeats what an expert is and provides no additional clarity";[181] so, "they must now guess whether their expert advice constitutes specialized knowledge".[182] The Court of Appeals ruled that

> "specialized knowledge" includes the same protected activities that "training" covers, such as teaching international law for peacemaking resolutions or how to petition the United Nations

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[175] 18 U.S.C. §§ 2339A(b)(2), (3), 2339B(h),

[176] The US court in the case of *Humanitarian Law Project v. Gonzales* 380 F.Supp.2d 1134(United States District Court, C.D. California, Western Division, 2005) at1152 held that the amendment to the material support provisions (Article 2339B(h)) limits "prosecution for providing "personnel" to the provision of "one or more individuals" to a foreign terrorist organization "to work under terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organizations". The provision also clarifies that "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goal or objectives shall not be considered to be working under the foreign terrorist organization's direction and control".

[177] 18 U.S.C. § 2339A(b)(2)

[178] *Humanitarian Law Project v. Mukasey* 552 F.3d 916(United States Court of Appeal, Ninth Circuit, 2009) para. 929.

[179] *Id.*

[180] 18 U.S.C. § 2339A(b)(3)

[181] *Humanitarian Law Project v. Gonzales*, *supra* note 176, para.1152

[182] *Id.*

> to seek redress for human rights violations". … [T]he phrase "scientific, technical, or other specialized knowledge" does not clarify the term "expert advice or assistance" for the average person with no background in **law**".[183]

The insertion of the undefined term "service" to the definition of the 'material support' provisions has been also attacked on vagueness grounds. Emphasizing that the plaintiffs could freely engage in human rights and political advocacy "on behalf of" designated groups before any forum of their choosing, the defendants argued that the dictionary meaning of the term 'service,' which is "an act done for the benefit or at the command of another" or useful labor that does not produce a tangible commodity", clarifies the scope of the prohibition on the provision of service.[184] The plaintiffs opposed the defendants 'contradictory arguments, claiming that such a definition "forces the plaintiffs to guess whether human rights and political advocacy action taken "on behalf of" another, which [the] [d]efendants concede is protected action, or "for the benefit of another", which [the] [d]efendants argue is prohibited".[185] Adopting the District Court's reasoning and its holding, the Court of Appeal found the term "service" unconstitutionally vague because "the statute defines 'service' to include 'training' or 'expert advice or assistance', terms the court has already ruled are vague",[186] and because "it is easy to imagine protected expression that falls within the bounds' of the terms 'service'".[187]

The Supreme Court, however, reversed the Court of Appeals' decision on insufficient and controversial grounds. It found that the lower courts inappropriately merging the plaintiffs' vagueness challenge with their First Amendment concerns.[188] It claimed that the provisions survive scrutiny if each of those challenges is regarded independently. With regard to the vagueness challenge, the court criticized the lower courts' approach for examining the statute's application in any possible circumstances, not to the facts before them.[189] While acknowledging that "the material-statute may not be clear in every application",[190] the Supreme Court upheld that most of the activities in which the plaintiffs wish to engage are clearly banned by the provisions.[191] That is, a reasonable person would realize that training

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[183] *Id*., para. 1151.
[184] *Id.*, para. 1151, 1152.
[185] *Id.*, para. 1152
[186] *Id*.
[187] *Humanitarian Law Project v. Mukasey*, *supra* note 178, para. 930.
[188] *Holder v. Humanitarian Law Projec*t 130 S.Ct. 2705 (Supreme Court of United States. 2010) at 2719.
[189] *Id*.
[190] *Id.*, at 2720.
[191] *Id*,. para. 2719.

the PKK's (Partiya Karkerên Kurdistanê)[192] members to use international law to resolve disputes or to petition the UN for relief falls within the scope of the terms "training" and "expert advice or assistance" because they impart a "specific skill", not "general knowledge".[193] The court found that political advocacy on behalf of the PKK or LTTE (The Liberation Tigers of Tamil Eelam)[194] may be also regarded as material support in the form of providing "personnel" or "service" the scope of which are extended by the statute to cover coordinated or directed, and not "independent", advocacy.[195] The court refused to answer the plaintiffs' questions of "how much directions or coordination is necessary for a conduct to constitute a "service" or "personnel"? Would any communication with any members be sufficient? Would a leader? Must the relationship have any formal elements, such as an employment or contractual relationship? What about a relationship through an intermediary?"[196] The court found these questions too "hypothetical" to be considered.[197]

With regard to free speech claims, the Supreme Court, in a controversial ruling and for the first time in its history, ruled that the government may prohibit the provision of material support in the form of political advocacy of the type at issue to a terrorist organization without violating the First Amendment.[198] Favouring urgent political demands, [199] the court recited the government's concerns that foreign terrorist organizations are so tainted by their criminal conduct that training and coordinated support, which takes place in coordination with or at the direction of a terrorist organization, in the form of advocacy of a terrorist group's lawful activities might be put to violent ends in the way that money, food and other "fungible" resources could be.[200] They may "lend legitimacy to foreign terrorist groups … that makes it easier for those groups to persist, to recruit members and to raise funds".[201] Providing foreign terrorist groups with material support in any form strains the US's relationships with their allies and undermines their efforts to prevent terrorism.[202] Terrorist groups acquainted with the United Nations human rights bodies might use also the

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[192] The Kurdish Workers' Party (the PKK) in turkey is designated as a terrorist in the US. See US Department of State, *supra* note 107.
[193] *Holder v. Humanitarian Law Project supra* note 188, para. 2720.
[194] The Liberation Tigers of Tamil Eelam. See US Department of State, *supra* note107.
[195] *Holder v. Humanitarian Law Project, supra* note 188, para. 2721-2.
[196] *Id.*, para. 2722.
[197] *Id*.
[198] *Id.*, para. 2725
[199] *Id.*, para. 2724.
[200] *Id*.
[201] *Id*,. para. 2725-6.
[202] *Id*.

information to "threaten, manipulate and disturb".[203] Assisting groups to peruse peaceful negotiations might be used as "a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks".[204]

The politically-motivated decision of the court has been criticized mainly because neither the court nor the government provided any evidence to prove how the plaintiffs' advocacy of human rights or peacemaking could be turned to terrorist activities.[205] Regardless of its reliability, the court's reasoning is moot; that is, if the harm of political advocacy is adequate to justify the prohibition, why it is not sufficient to justify the ban on 'independent' advocacy, which "is not directed by, or coordinated with, a designated terrorist organization", and which also might free resources, legitimatize groups or give terrorists the opportunity of exploiting it for their illegal purposes.[206] The court's reasoning also raised the concern that if the government does not intend to discriminately suppress particular advocacy for particular groups, why does not it (or should not have banned) ban the provision of "job training" to other groups such as gangs which might make them more effective criminals or lend them legitimacy? Or should peaceful coordinated advocacy with activist non-governmental organizations like Greenpeace be proscribed on the theory that these organizations sometimes use illegal methods to achieve their goals?[207] Might advocating for delisting a foreign terrorist group, which usually requires some degree of coordination with the organization, be considered as provision of material support in the form of "services to the group? After the decision in the Humanitarian Law Project's, the answers to these questions may be yes, although they differ from question to which the court was applying itself.[208].

In a similar case,[209] the Court of Appeals complicated the issue by holding that the First Amendment does not permit the government to proscribe advocacy coordinated with a

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[203] *Id.*, para. 2729
[204] *Id.*
[205] *Id.*, para. 2730-40 (Justice Breyer, dissenting).
[206] Owen Fiss "The world we live in" 2011 83(2) Temple Law Review 295, at 302.
[207] David Cole "The first Amendment's borders" the place of Holder v. Humanitarian Project in First Amendment Doctrin " 2012 6(1) Harvard Law & Policy Review 147, at 157.
[208] With regard to advocacy for the Communist Party which engaged in illegal activities, the court held that even teaching or advocating criminal conduct cannot be banned except where such teaching and advocacy produce incite and likely produce "imminent lawless action". See *Brandenburg v. Ohio* 395 U.S. 444 (Supreme Court of United States, 1996) at 448. Or in *De Jonge v. Oregon* 299 U.S. 353 (Supreme Court of United States, 1937) the court quashed the conviction of the defendant who engaged in speaking and recruiting on behalf of the Communist Party because he advocated lawful, nonviolent activities.
[209] In *Al Haramain Islamic Foundation, Inc. v. US Department of Treasury* 660 F.3d 1019 (United States Court of Appeals, Ninth Circuit, 2011), a local community organization sought to engage in coordinated advocacy with a group designated as a domestic terrorist group to protest the designation, issue a press release and hold a press conference.

"domestic" terrorist organization. Although it applied the Humanitarian Law Project, the court reasoned that the coordinated advocacy for a designated group whose assets has already been frozen could not free up the group's assets for its illegal purposes simply and logically because there is no any assets available.[210] Nor does it endanger the US relationship with its allies as it is domestic.[211] However, neither the court nor the statute defined the term "domestic".[212]

b. Narrow definition of the term "funds".

Unlike the US and the other States that broadly define the term "funds",[213] some States impose define funds to include only pecuniary resources or to funds of a certain value. Following its proposal in the negotiations on the Convention,[214] Japan, in Article 2 of the Act on the Punishment of Financing of Offences of Public Intimidation, uses the term "shikin" which is the translation of the word "funds" and which is used and understood as "cash and monetary instruments easily convertible into cash".[215] In the case of the law at issue, the scope of the term "shikin" has been also defined by the Ministry of Justice of Japan under whose jurisdiction a law is enacted and applied to include not only "cash and other means of payment", but also "other kinds of assets that are provided or collected with the intention of gaining such cash or other means of payment as a fruit or to be converted into such cash or other means of payment".[216]

The scope of the terms "assets" is also limited under German law by section 89a (2) number 4 of German Penal Code to comprise only assets which are not "insubstantial" in value. The term insubstantial is defined by the German Parliament to include movable and immovable property of a certain value. It was added that "assets [that] might be deemed insignificant when seen in isolation may be more than merely insubstantial if, in an overall

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[210] *Id.*, para. 1053.
[211] *Id.*
[212] The court asserted that the designated group at issue in this case is "neither wholly domestic nor wholly foreign". But it is considered "domestic" because it is "incorporated" under US law, it is "physically located" in the US, it has domestic bank accounts, and most of its activities are carried out in the US. The court, however, alleged that the groups had ties and interactions to and with foreign organizations. See *Id.*, para 1052.
[213] In Article 421-2-2 of the French Penal Code, the reference to the term funds includes "funds", "securities or property of any kind and "advice". Or in Article 187A of Greek Penal Code, material support includes "information and material means", "funds" in the meaning of the Terrorist Financing Convention, "financial means" of any kind.
[214] In the negotiations on the Convention, Japan proposed the use of the generic definition of "funds" such as "any form of pecuniary benefits". UN, A/AC.252/1999/WP.10 reproduced in UN, A/54/37, at 28.
[215] Financial Action Task Force *Third mutual evaluation report; anti-money laundering and combating the financing of terrorism; Japan* (17 October 2008), para. 219.
[216] *Id.*, para. 221.

evaluation, they have made a greater than merely insubstantial contribution to the preparation of a serious violence act endangering the state".[217] With regard to financing of terrorist groups, broadening the scope of term "assets", Section 129a (5) of the German Penal Code forbids provision of the "support" for terrorist groups. While the term "support" is not defined, according to the Federal *Supreme Court,* "support" of a terrorist group includes "any objectively useful, supportive, and therefore also all types of provision of funding referred to under the [Terrorist Financing] Convention".[218] However, the definition of a terrorist group within the meaning of the Section 129 is narrower than the definition provided by the FATF.[219]

While the German approach has been criticised by the FATF,[220] it should be noted that the drafters of the Convention did not take into account the similar suggestion put forward during the negotiations, and which emphasised the fact that the Convention "should be carefully reviewed so as to avoid the criminalization of minor offences".[221]

2. The objective elements of the offence: what constitutes acts of financing?

Defining the material act of the new offence is not as easy as one may imagine. It is because the act of financing, in its nature, is harmless and preparatory, and, in many cases, has a legal appearance. Unsurprisingly, the drafters of the Convention struggled with clarifying how and when an act of financing turns into the crime of terrorist financing. In a revised draft of the Convention, the term "financing" was defined in a separate paragraph to mean "the transfer or reception of funds, assets or other property, whether lawful or unlawful, by any means, directly or indirectly, to or from another person or another organization."[222] However, such a definition provoked serious differences of opinion among the delegations.

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[217] International Monetary Fund *Germany: detailed assessment report on anti-money laundering and combating the financing of terrorism* (March 2010), para. 207.
[218] *Id.*, para. 221.
[219] According to Section 129 German Criminal Code, a terrorist group is viewed to be "an organization combination of at least three persons, designed to exist for a certain period of time, where_with subordination of the will of the individual to the will of the group as a whole _the members pursue common goals, while standing in such relation to one another that they feel themselves to be a uniform cluster". Terrorist organizations are also those whose purposes or activities are aimed at committing the certain classes of crimes specified by the section.
[220] The FATF experts believe that the imposition of a requirement for the finds to be of a certain minimum value is not fully in line with its requirements. See International Monetary Fund, *supra* note 217, para. 208.
[221] UN, A/54/37, Annex IV, para.14.
[222] UN, A/54/37, Annex II, Working document submitted by France on the draft international convention for the suppression of the financing of terrorism, Article, 1(1).

The most controversial issue in this regard was whether the act of financing should include "the reception of funds in addition to their transfer".[223] A concern was expressed that the term "transfer" did not include all kinds of financial assistance. An alternative proposal was made to replace the term transfer with "providing, provisions" or "making funds available" "so as to make it clear that an actual transfer was not required per se",[224] and "to provide a broader scope of the term financing beyond the technical connotation of transfer".[225]

The retention of the term "reception" was also opposed on the basis that "it would cast the meaning of the term financing too broadly, criminalizing a wide variety of activities beyond what was originally intended", from "active acts of financing" to "the passive act of receiving".[226] It was also pointed out that the term financing did not need to include the case of intermediaries who received funds as "the subsequent transfer of those funds would fall within the scope of the term transfer".[227]

On the other hand, the retention of term "reception" was supported as it could enable authorities "to counter the funnelling of funds through middlemen, who possessed the specific intention required by the draft convention, or through other similar complex financial arrangements used to finance terrorist acts".[228] It was also pointed out that the deletion of the reference to "reception" would restrict the prosecution of the intermediaries who possesses funds, but decline to transfer them or get arrested before transferring them. A concern was expressed that if the delegations considered a reference to "reception" necessary, a specific intent element in relation to the act of reception should be defined.[229] A relative suggestion was proposed in favour of the criminalization of the act of reception "as a separate offence to transferring".[230] As a result of the divergent views on the definition of financing, the drafters decided to delete the reference to the term "financing". In the final draft of the convention,

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[223] UN, A/C.6/54/L.2, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, para. 32.

[224] *Id.*, para. 35

[225] UN, A/54/37, Annex IV, Informal summary of the discussion in the Working Group, prepared by the Rapporteur, para. 2.

[226] UN, A/C.6/54/L.2, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, para. 37.

[227] *Id.*

[228] *Id.*, para. 38

[229] *Id.*, para. 39.

[230] *Id.*, para. 40.

the objective element of the offence was defined to mean the unlawful provision or collection of funds.[231]

While this definition was accepted by the delegations without any further argument, there are some uncertainties in regard to the application field of this definition. First of all, unlike the 2000 United Nations Convention against Transnational Organized Crime (the Palermo Convention) in which the possession of proceeds is regarded as one of the material elements of money laundering,[232] the Terrorist Financing Convention is vague on whether the terms collection and provision can be extended to cover the possession of funds. Different approaches have been adopted by States. Unlike Japan,[233] the UK in Section 16 of Terrorism Act (2006) criminalizes the "possession" of money or property intended to be used or likely to be used for terrorism.

In addition, the replacement of the terms transfer and reception by the terms collection and provision without any explanation results in different understandings. The main question in this regard is how these two acts (collection and provision) should be treated? On the one hand, in some jurisdictions, such as Portugal, the collection of funds is regarded as a preparatory act which constitutes "an attempt or preliminary form of attempt".[234] Similarly, in Spain, the financing of a terrorist organization constitutes an attempted offence when funds are collected in order to be provided to the terrorist group in the furtherance of its illegal aims and activities.[235]

On the other hand, some believe that "the collection of funds" and "the provision of funds" are two distinct acts, each of which represents "a separate offence".[236] It is argued that "although collecting funds may be a preparatory act to their provision, it is not a prerequisite to it since funds provided to terrorists need not have been the object of a prior collection".[237] So, if a person raises funds and then provides them to terrorists, he perpetrates two different, but successive, crimes. Moreover, in the case of the involvement of intermediaries, the person who commits the "collection offence" is different from the person who perpetrates the "provision offence" by providing the funds to the terrorists. In such a case, however, the

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[231] Article 2 (1).
[232] Article 6 (1)(b)(i).
[233] Under Japanese Penal Code, the mere possession of funds does not constitute criminal labiality. See Financial Action Task Force,*supra* note 215, para. 224
[234] Financial Action Task Force *Third mutual evaluation report on anti-money laundering and combating the financing of terrorism; Portugal* (13 October 2006), para 183.
[235] Financial Action Task Force, *supra* note 123 , para. 121.
[236] Lavalle, *supra* note 169, at 498.
[237] *Id*.

question may arise as to whether the transfer of funds from collectors to intermediaries should be regarded as a collection or a provision? In the US where the term collection includes "raising and receiving", and the term provision means "giving, donating and transmitting",[238] a court did not try to differentiate between these two acts. It simply held that "the banking activities of receiving deposits and transmitting funds between accounts on the basis that the accounts (and funds) belong to groups engaged in terrorist activity" or charity fronts may create criminal liability under the US law.[239]

It is worthy of note that in some jurisdictions, the illegality of an act of collection depends on who the financers are. In Japan, for example, the collection of funds for terrorist purposes does not create criminal liability if the collectors are not terrorists.[240] Their acts will not be punishable unless and until they provide the collected funds to terrorists.[241] In other words the crime is never inchoate; only choate.

3. The requirement of unlawfulness

What gives an unconventional appearance to the Convention is the requirement of unlawfulness in Article 2 (1); that is, funds have to be collected or provided "unlawfully".[242] As the German delegation in the negotiation pointed out, if the Convention aims at criminalizing the act of financing terrorism as an offence, "the mentioning that such financing has to be unlawful seems superfluous".[243] It should be noted that the same qualifier was used in the Terrorist Bombing Convention so as not to criminalize the lawful use of explosives.[244] The application of this qualifier in this case is justified on the basis that non-military people may lawfully use explosives for civilian purposes such as construction and mining;[245] however, such a justification cannot be applied in the case of terrorist financing since the provision or collection of funds for use in committing terrorist acts cannot be legal in any event.

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[238] *18 U.S.C. §§ 2339 C (e) (4) and (5).*
[239] National Commission on Terrorist Attacks upon the United States., *supra* note 150 , at 588.
[240] Financial Action Task Force, *supra* note 215, para. 217.
[241] It should be noted that from the Convention's perspective, it does not matter who collects the funds. In other words, "any person" who supplies funds with terrorist purposes is liable.
[242] Article 2 (1) the Terrorist Financing Convention.
[243] UN, A/AC.252/1999/WP.26, reprinted in UN, A/54/ 37.
[244] Article 2 (1) of The Terrorist Bombing Convention.
[245] Lavalle, *supra* note 169, at 500.

As far as the discussions in the *travaux préparatoires* of the Convention are concerned, the term "unlawfully" was included to add "an element of flexibility" to the definition by excluding from the ambit of the application of the Convention financing cases such as "ransom payments",[246] or cases which "might have the unintended result of aiding the commission of" terrorist acts[247] such as the provision of material assistance to groups believed to pursue terrorist offences as well as humanitarian activities.[248] Similar concerns were expressed by the representatives of the International Committee of the Red Cross and the United Nations High Commissioner for Refugees, whose material assistance to groups of individuals (refugee camps were quoted) might unintentionally fall into the hands of the guilty.[249] It is also cited that the term "unlawfully" might be retained by the drafters to mean "conduct undertaken without authority (whether legislative, executive, administrative, judicial, contractual or consensual) or conduct that is otherwise not covered by established legal defences or relevant principles under domestic law".[250]

Regardless of what the drafters wished to exclude from the ambit of the application of the Convention, the inclusion of the qualifier "unlawfully" has left a gap in the Convention, which is open to different interpretations. In fact, the insurmountable difficulty that the drafters faced in introducing the new offence of terrorist financing was how to define terrorism distinguishable from the acts committed by freedom fighters in furtherance of a struggle against oppression and foreign occupation.[251] As mentioned earlier, all attempts in this respect failed because the drafters could not adequately outline the contours of terrorism and terrorist acts; they also avoided defining terrorist groups. In such uncertain and controversial circumstances, it is not surprising that the term "unlawfully" can be used as a "shorthand reference to grounds excluding" the financing of acts and groups that a state does not wish to label them terrorist and unlawful.[252] For example, Switzerland[253] and Austria[254]

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[246] UN, A/C.6/54/L.2, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, para. 67.
[247] UN, A/54/37, Annex IV, para. 17.
[248] Aust, *supra* note 20, at 294.
[249] UN *Comments by the United Nations High Commissioner for Refugees on the draft international convention for the suppression of the financing of terrorism* (A/C.6/54/WG.1/INF/1, 9 November 1999), para. 4. See also UN *Replies given on 22March 1999 by the observer of the International Committee of the Red Cross to the questions asked by the delegations of BelgiumandMexico regarding the implications of article 2, paragraph 1 (b)* (A/AC.252/1999/INF/2, 26 March 1999).
[250] *Council of Europe Convention on the Prevention of Terrorism* (16 May 2005, CETS No. 196), para. 82.
[251] A/C.6/54/L.2, Annex III, para. 2, 81
[252] Lavalle, *supra* note 169, at 501.
[253] Swiss Criminal Code, Article 260 *quinquies*(3).
[254] Austrian Criminal Code, Article 278c (3).

introduce an exclusion of criminality for an act of financing directed to the establishment or re-establishment of a democratic and constitutional regime or the exercise or protection of human rights.[255] However, how and on what basis the legitimacy of people who resort to violence to establish a democratic situation or protect human rights should be determined may vary from one state to another, depending on whose side a state would be on (the current civil law is Syria is a good example).

In the absence of clarity and consensus on whether (or how) terrorism includes a situation of armed conflict, the inclusion of the qualifier 'unlawfulness' gives rise to controversy over whether the terrorist financing offence includes cases where the financing is carried out for the support of situations involving armed conflict. It seems that countries are confronted with dilemmas. Some states, such as Switzerland, may not regard an act of financing as unlawful "if with the financing, acts are to be supported that are not in contradiction with the rules of international law pertaining to armed conflicts".[256] Other states, such as New Zealand[257], may favour broadening the meaning of terrorism to include any activities that occur in a situation of armed conflict, and the purpose of which is to cause death and bodily injury to a civilian, and to intimidate a population or to compel a government to do or prevent from doing an act. In such a case, counter-terrorist financing laws can be applied to the financing of armed groups involved in a situation of armed conflict, including freedom fighters.

4. The link between acts of financing and terrorist acts

One of the main challenges that the drafters faced was how to outline the scope of the new offence so that it could not to be understood or interpreted as a preparatory offence to terrorism. To do so, the drafters had to clearly define the connection between acts of financing and a terrorist act. Under the initial draft of the Convention, the offence was defined to include "the financing of a person or group of persons" who "commits or proposes to commit" an offence annexed to the Convention or a terrorist act defined by the Convention.[258] While the language of this definition, which refers to the commission of

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[255] It is worth noting that Greece, in Article 187A (8) of its Penal Code, had included a similar exception; but it removed the exception in order to meet the FATF requirements. See Financial Action Task Force *Follow-up Report to the Mutual Evaluation Report of Greece* (28 October 2011), para. 60.

[256] Mark. Pieth "Criminalization of the fianncing of terrorism" 2006 4(5) Journal of International Criminal Justice, at 1081.

[257] Terrorism Suppression Act 2002 (New Zealand), Section 5(1)(c) and 4 (1).

[258] UN, *supra* note 6, Article 2.

subsequent terrorist acts, seemed to suggest that the act of financing need be related to a specific act, it was argued that there should be no need for the establishing of a precise connection between particular funds provided to terrorists and a specific act because most of the funds given to terrorists are spent on long-term preparations which are not directly related to a particular attack.[259] It was also pointed out that, while it can be possible to trace the providers of a physical item used in the commission of a terrorist act, it would be very hard (if not impossible) to trace and prove that a specific amount of funds or money have been used to facilitate or finance the commission of a particular terrorist attack.

On the other hand, those delegations which tried to limit the scope of the offence to the financing of an organization, found this reasoning inapplicable to the case of the financing of individuals.[260] They argued that while the independent criminalization of the financing of groups, which have the elements of "long-term planning, continuity of purpose, division of labour and particular difficulty of detection", is justifiable, the financing of an individual in order to enable that individual to commit a crime would merely constitute a preparatory offence under national and international law. As mentioned earlier, this reservation was not taken into account as the draft sponsors wished the offence to have a broader scope.

After failure to define terrorist groups, the drafters deleted the references to both a person and organization. The Convention was reformulated with a direct reference to terrorist acts, which do not necessarily need to be committed or attempted; that is, the Convention requires the criminalization of the collection or provision of funds with the intention that the funds should be used or in the knowledge that they are to be used, in full or in part, to commit "an act" annexed to the Convention or "any other act" which matches the definition of terrorism provided in Article 2 (1). To make sure that the scope of Article 2 could expand to include the financing of any and all terrorist-related offences, the draft sponsors, France, suggested that "in order to convict a person for an offence [defined by the Convention] it shall not be necessary to prove that the funds were in fact used to prepare for or to commit a specific offence".[261] Therefore, it does not matter how remote the act of collection or provision of funds is from the actual commission of subsequent terrorist offences. What is important for an act to be considered as a terrorist financing offence is the mental elements, that the

[259] Aust, *supra* note 20, at 296 -297.
[260] UN, A/AC.252/1999/WP.12 reprinted in A/54/37.
[261] UN. A/54/37, "working paper prepared by France on article 1 and 2.

collected or provided funds "should be" or "are to be used" for terrorist purposes. This will be discussed in detail in the next part.

As a result of the inclusion of this paragraph, the proposal, which tried to restrict the scope of the offence to the financing of the terrorist acts which constitutes "main" offences within the scope of the conventions listed to the Annex did not find its way into the final draft.[262] The "main offence" was defined as any offence within the scope of one of the Conventions set forth in the Annex, excluding attempts and contributory or participatory offences. The proposer (Austria) may have been concerned that a financial contribution to an act which constitutes complicity in an offence such as hostage-taking or a car bomb attack would be far from the subsequent terrorist act. In the proposer's view, such criminalization would create "the danger of very long chains of participation removing a reasonably close nexus to the main offence; the scope of application would become too large".

However, in practice, controversy still exists as to how the preparatory act of financing a specific terrorist offence or financing of an individual who is to commit a particular attack can be classified as an independent offence. In practice, some countries resist criminalizing the financing of a specific act as an independent offence (probably because of its inconsistency with their domestic law). For instance, "if the financing of terrorism is related to a specific crime, Denmark's approach to criminalization ... is through a person's complicity in the terrorism offence" pursuant to sections 114 (terrorism offences) and Section 23 (complicity) of the Danish Criminal Code.[263] Similarly, in Germany, the financing of terrorist acts and financing of individual terrorists may be prosecuted based on the participatory offence of "assisting another to commit a crime.[264]

Perhaps the main concern lies in the fact that the application of the Convention to the financing of a specific act results in over-criminalization. For example, if someone provides his car to terrorists with the intention that it should be used or with the knowledge that the car is to be used in a car bomb attack at a specific place and at a certain time,[265] the car provider, according to the Terrorist Financing Convention, is to be charged with the primary offence of terrorist financing. The car provider can be also convicted of another ancillary offence under

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[262] UN, A/AC.252/1999/WP.12 reprinted in A/54/37

[263] Financial Action Task Force *Third mutual evaluation on anti-money laundering and combating the financing of terrorism, Kingdom of Denmark* (22 June 2006), para 216. See also Financial Action Task Force "Mutual evaluation third follow-up report anti-money laundering and combating the financing of terrorism; Kingdom of Denmark" 22 October 2010.

[264] International Monetary Fund, *supra* note 217, para. 210.

[265] Lavalle, *supra* note 169, at 501.

the Article 2 (3) of the Terrorist Bombing Convention. While the Convention is silent on this issue and while national attempts vary with regard to the issue of multiple convictions,[266] the FATF insists that criminalizing terrorist financing as complicity in a terrorist's act is not sufficient to meet its requirements. In spite of the FATF's recommendations, and in order to avoid multiple convictions, suspects, in Finland[267] and Sweden[268], are not prosecuted for the terrorist financing offence if the act is punishable as the commission of or an attempt to terrorist offences covered by their Penal Code, or offences for which a severe sentence is provided elsewhere in the law.

5. Key role of the subjective element in the construction of the new offence

The final formulation of the offence in which no causality between the act of financing and subsequent terrorist acts needs to be established turned the attention of negotiators to the definition of the mental elements; that is, what the collector or provider of funds needs to intend or know in order to commit the crime of terrorist financing. Under the working document submitted by France, a person commits a crime if that person intentionally proceeds with the financing of a person or a group in the knowledge that such financing "will or could be used, in full or in part, in order to prepare or commit" terrorist acts.[269]

However, the inclusion of the expression "could be used" was heavily criticized mainly for its vagueness. It was argued that the acts of financing should be criminalized only if the funds "provided" are likely to be used for the commission of terrorist acts.[270] "The language "or could be used" covers all possibilities of a use of the assets or property for terrorist activities and leaves too much room for interpretation.

The majority of states suggested the deletion of the term "could be used", which would have resulted in the requirement that the financer should know or intend that the funds provided "will be used, in full or in part, to commit or to prepare" the commission of a

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[266] For more info about national and international debates on multiple convictions see *the Prosecutor v. Zejnil DELALIC, Zdravko MUCIC*, Case No. IT-96-21-A, the Appeals Chamber, 20 February 2001, para. 405- 412.

[267] Financial Action Task Force *Third mutual evaluation on anti-money laundering and combating the financing of terrorism, Finland* (12 October 2007), para.153. see also Financial Action Task Force *9th follow-up report; mutual evaluation of Finland* (June 2013).

[268] Section 5 of Act on Criminal Responsibility for the Financing of Particularly Serious Crime in some cases (2002:444) (Sweden).

[269] UN, A/54/37, Working document submitted by France on the draft international convention for the suppression of the financing of terrorism, Article, 2 (1), at 15

[270] UN, A/AC.252/1999/WP.26, reprinted in UN, A/54/37. See also, UN, A/AC.252/1999/WP.12, reprinted in UN, A/54/37.

terrorist act. A suggestion was also made to lower the *mens rea* standard to risk-taking, requiring the criminalization of the provision of funds where "there is a reasonable likelihood that the funds will be used for" the preparation or commission of terrorist offences.[271]

Another proposal of particular interest was put forward by a group of some delegations (Austria, Belgium, Japan, Sweden and Switzerland) which tried to limit the scope of the criminalization to the financing that were not remote from the act of terrorism. According to their proposal,

> Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally provides funds, directly or indirectly and however acquired, to any person or organization committing or attempting to commit:
>
> a) Any offence within the scope of the one of the Convention listed in the Annex ... or
>
> b) ...
>
> Such financing shall [either] be made with the intention that the funds be used [or in the knowledge that the funds are to be used], in whole or in part, for the commission of the offences mentioned above.[272]

No rationale was provided for this proposal. But, the proposal sponsors explained that "the inclusion of the term 'or attempting to commit' [in this definition] is subject to the deletion of any reference to attempts and participatory offences under the scope of the Convention listed in the annex".[273] In fact, the proposers tried to introduce a filter in the definition in order to exclude from the ambit of the Convention the financing of an attempt of the offences listed in the Annex because they had doubts that a contribution to an act which constitutes complicity in those conventions and which would be too far remote from its subsequent act could be independently criminalized in any jurisdictions. The language "committing or attempting to commit" also implied that the financer had to be aware of the material causality between his or her provision of the funds and an attempted or committed act.

None of these proposals were taken into account as they seemed to emphasize on the knowledge and intention of the financer in relation to the preparation or commission of a terrorist act. This would have restricted the scope of the new offence to an act of complicity, which was not what the draft sponsors wished. In other words, from the drafter's perspective, any reference to the attempt or commission of a subsequent terrorist act or inclusion of any qualifier which excludes from the scope of the Convention the financing of particular terrorist

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[271] UN, A/AC.252/1999/WP.20, reprinted in UN, A/54/37.
[272] UN, A/AC.252/1999/WP.49**,** reprinted in UN, A/54/37.
[273] *Id.*

acts,[274] including the financing of attempts and participatory offences as proposed, might have endangered the effectiveness of the Convention. This is because it could have required the prosecution to infer the knowledge or intention of a financer in regard to the specific act for which the funds have been collected or provided.

As a result, the drafter decided to reformulate the definition in Article 2(1) to be read as follows:

> 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:
>
> a) An act which constitutes an offence ... 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 organization to do or to abstain from doing any act.

Paragraph 3 was added to Article 2 to emphasize that "for an act to constitute an offence set forth in paragraph 1, 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)". As a result, the inclusion of paragraph 4 and 5 in Article 2 was accepted without any argument. These provisions criminalize any attempt to finance, including secondary participants, those organizing and directing others to commit terrorist financing, and conspiracies to commit terrorist financing. The inclusion of these provisions extends the scope of the criminalization to conduct which is remote even from the act of financing, regardless of whether the funds are used for a subsequent terrorist act and regardless of whether a subsequent act is committed or planned.

In short, what makes the act of financing an offence is not the criminal or terrorist nature of the act, but the malicious intent of the financer. With the inclusion of the paragraph 3, the fault element of the crime acquires a "hypothetical" nature as the financer who does not know

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[274] During the negotiation, a proposal was made to exclude from the ambit of the Convention the financing of offences listed to the Annex, and which are not "serious". According to this proposal, it should be avoided to expand the scope of the application of the Convention to "trivial offences". This proposal was rejected for the same reason as mentioned_ any qualifier such as this would have required courts to find a link between the act of financing and a terrorist act attempted or accomplished. See UN, A/C.6/54/L.2, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, para. 71.

about an actual terrorist act should assume or admit that that the recipient will use the funds collected or provided to further a terrorist cause. Under such a formulation, in a similar way to the law in the UK and Canada,[275] it would be more precise to speak of the financing of "terrorist purposes" or "terrorist activities".[276]

This conception of the offence in which the intention or the knowledge of the financer is referred to (but not relied on) future conduct or a possible harm is "groundbreaking" in the law on terrorist offences.[277] While all of the prior terrorist-related conventions target the harmful and self-standing offences such as murder, kidnapping or destruction of and severe damage to property and require a fault element which is specified in relation to the physical elements of these offences, the Terrorist Financing Convention criminalizes victimless, nonviolent and preparatory acts or illegal (but non-terrorist) conduct (where funds are derived from illegal sources) only on the basis of the terrorist purposes that a financer may have.

The criminalization of terrorist financing as an independent stand-alone offence extends the scope of criminal law in a way not previously done in the criminal law. Traditionally, the law has incriminated preparatory acts through the extension of criminal liability to accessorial liability. Accessorial liability has a "derivative" nature in the sense that the prosecution should prove that the substantive offence has been committed or least attempted.[278] Under a new approach pursued by some common law jurisdictions, the scope of inchoate crimes has been extended to include "encouraging and assisting" offence(s) that "will be committed".[279] It is clear that this offence applies irrespective of whether the substantive or anticipated offence(s) are or actually will be carried out by the principal offender. The inchoate offender in these offences must believe, without any significant doubt, that the principal offender will commit the anticipated offence(s) with the relevant intent element.[280] The inchoate offender must also believe that any circumstances or consequences specified in the anticipated offence(s) will be fulfilled. Therefore the prosecution must specify the offences that the

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[275] Criminal Code (Canada), s. 83.04(b); Terrorism Act (UK) 2000, s. 16(2).
[276] Lehto, *supra* note 99, at 263.
[277] *Id.*, at 269.
[278] Bernadette McSherry "Expanding the boundaries of inchoate crimes; the growing reliance on preparatory offences" in Bernadette McSherry, Alan Norrie, and Simon Bronitt (eds) *Regulating deviance: the redirection of criminalisation and the futures of criminal law* (Hart Publishing, 2008) 141-164, at 142.
[279] Serious Crime Act 2007 (UK), Section 44-47
[280] Andrew Ashworth *Principles of criminal law* (6th ed. ed, Oxford University Press, Oxford, 2009), at 460-1

inchoate offender's act might have assisted or encouraged.[281] In contrast, the terrorist financing offence need not be proved in relation to any specific or subsequent terrorist crime. The only relevant offence here, as some argue, is a "fictional crime" that the financer assumes or admits the recipient of the funds will commit.[282]

6. Can this formulation be justified on the basis of analogy with remote harms?

Generally speaking, the autonomous criminalization of preparatory acts including terrorist financing should be considered in the context of the shift towards "preventive" approach,[283] where "the post-crime orientation of criminal justice is increasingly overshadowed by the pre-crime logic of security"[284]. Under this approach, States are licensed to criminalize "abstract endangerment" acts that pose the risk of certain harms.[285] These acts are criminalized not because they are "wrongful or harmful" in themselves, but because they create an opportunity for the commission of future danger.[286] The typical examples of these acts are possession offences: possession of weapons,[287] of illegal drugs[288], and burglarious instruments[289]. Unlike inchoate offences, conviction for these offences does not necessitate proof of intent to commit any subsequent crime. Instead, the prosecution simply needs to prove that the offender has been aware of the possession "under suspicious circumstances".[290] The justifiability of criminalizing these types of offences is, however, questioned. It is argued that these offences "may criminalize people at a point too remote from the ultimate harm, not allowing for a change of mind".[291] It is also pointed out that possession offences extend the scope of criminal law beyond the inchoate crimes, sweeping too wide in the sense that "[t]hey encompass cases where there is no potential social harm".[292]

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[281] *Id.*
[282] Lehto, *supra* note 99, at 287.
[283] See Carol S. Steiker "The limits of the preventive state" 1988 88(3) Journal of Criminal Law & Criminology.
[284] Lucia Zedner "Pre-crime and post-criminology" 2007 2(11) Theoretical Criminology, at 263.
[285] A. P. Simester and Andrew Von Hirsch *Crimes, harms, and wrongs : on the principles of criminalisation* (Hart, Oxford ; Portland, Or., 2011), at 57.
[286] Ashworth, *supra* note 280, at 38.
[287] See for example Prevention of Crime Act 1953 (UK).
[288] Misuse of Drugs Acts 1977 (UK), S. 5 (2). Or Criminal Code (Canada), S. 88.
[289] Theft Act 1968 (UK), S. 25
[290] Christopher Slobogin "A jurisprudence of dangerousness" 2003 98(1) Northwestern University Law Review, at 56.
[291] Ashworth, *supra* note 280, at 97.
[292] George P. Fletcher *Basic concepts of criminal law* (Oxford University Press, New York, 1998), at 176.

Regardless of whether the criminalisation of remote harms are justifiable, it seems that there are substantial differences between these offences and the terrorist financing offence introduced by the Convention in terms of risks that flow from them, objects involved, and circumstances within which these offences are carried out. While the risk in many of the remote harm offences is more visible and immediate, a risk which is either explicit (dangerous driving), or implicit (speeding),[293] the risk of harms in the terrorist financing offence is even more remote. Indeed, it is far too remote and "fictional" as the financer need only assume or admit that the funds collected or provided will be used (by the financer or others) for terrorist purposes. Terrorist financing is more similar to the rare cases when a State, for example, prohibits certain public demonstrations because of what they may prompt others to do in response.

In regard to objects and circumstances, while the criminality of remote harm offences is, in most cases, reliant either on the illegal nature of the object possessed (possession of controlled drugs or unregistered possession of a firearms or explosives), or on the circumstances within which the object is being used (possession of tools for use in a burglary at the place other than the abode of the possessor),[294] terrorist financing includes material assistance or financial contributions which, in most cases, have a legal appearance (fund-raising or the transfer of the funds collected to middlemen). Even if the financing involves illegal transactions such as purchase of explosives, although the criminal intention of the offender can be easily related to the illegal circumstance that the offender is involved in, the proof of the intention or knowledge of the offender in relation to terrorism or a terrorist act seems difficult (if not impossible) and, furthermore, according to the Convention, unnecessary.

Moreover, unlike remote harm offences in which the fault element is the intent in relation to the act that the offender carries out, not to its eventual harmful consequences, the fault element in terrorist financing cannot be merely an intent to perform acts of financing because such acts, in themselves, do not have a terrorist nature especially when all that is involved is the collection or the transfer of the funds collected to middlemen.

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[293] Ashworth, *supra* note 280, at 38.
[294] Theft Act 1968 (UK), s. 25(1)

V. EXAMINATION OF THE FAULT ELEMENTS OF THE OFFENCE OF TERRORIST FINANCING

The question which the drafters left unanswered is, if there is no need to link the acts of financing to any subsequent terrorist act, and if financing alone can hardly provide a solid basis for prosecution or conviction, what should the financer know to be held criminally responsible? How should the intention be read where the act of the financer is far remote from any subsequent act? And what are the particular context or circumstances of the offence of terrorist financing?

While the Convention is not clear on these matters, the answer to these questions seems to be very critical as all other elements of the offence are heavily reliant on the fault element:

1. While financing is the basic element of an offence in the inchoate mode (collection or provision of funds with intent to supply terrorism), the drafters established an independent offence of terrorist financing by putting so much weight upon the fault element: financing with the intention or in the knowledge that the funds collected or provided will be used for commission of a terrorist act. The Convention does not even differentiate between the act of provision and the act of collection which seems (at least in some cases) to be a prerequisite to the act of provision; that is, as long as an act, either collection or provision, is involved in the idea of terrorism, it falls into the category of the offence.
2. The term “funds” has been defined very broadly to cover any contributions (with or without legal origin) which are intended or known to be used for terrorist purposes.
3. The Convention requires the criminalization of financing of an attempt and attempt to finance which are carried out with terrorist intent although they are very remote from a possible subsequent act and although their criminalization extends the scope of criminal liability beyond the law of attempts.

Drawing on States’ legislation on terrorist financing and cases, this part examines whether the fault element of an independent offence of terrorist financing can be adequately defined whether such criminalization can be justified using traditional justifications for criminalization.

To clarify the issue, it would be better to test the fault element in the circumstances within which financing may take place. In reality and regarding the current counter-terrorism regime, two scenarios can be envisaged:

1. When the financing is carried out for the preparation or commission of a terrorist act.
2. Financing of a group or a person who is designated as terrorist or is involved or has been involved in terrorist activities.

A. Financing of a Terrorist Act

This scenario includes the situation where a financer is involved in the collection or provision of funds known or intended to be used for the preparation or commission of a terrorist act. The main question here is whether, in the absence of a requirement to link the financer's conduct with a terrorist act, the imposition of guilt on the financer is justifiable and compatible with the basic principles that underlie the criminal law? According to the Convention, the financer acquires independent criminal liability (similar to terrorism) for the conduct that is no more than preparatory to the intended commission of the subsequent offence. While many features of this situation are similar to an inchoate offence or complicity, the common argument put forward in justification of this approach is that the criminalization of such an act as an inchoate crime may not secure the conviction sought since, "in most jurisdictions, aiding and abetting occurs only when the alleged perpetrator has knowledge that the principal offence is being committed or at least attempted".[295]

Three objections to criminalizing the financing of a terrorist act as an independent offence, however, stand out. One is that normal principles seem not to support such liability: if financing carried out to support the commission of a particular offence is independently criminalized without the requirement to prove the financer knew of or intended to fund a specific violent act the occurrence of which depends on a further decision by the financer or by another, such an intervening voluntary act might relieve the original actor of the subsequent offence of criminal responsibility, and so it is the financer who should be punished. If the financer is to perform the subsequent offence, such an approach does not treat the financer as an independent agent capable of deciding to abandon his criminal enterprise.

This also brings the potential for injustice. The fault element of the financer should not be inferred with regard to the putative offence for which the financing has been carried out because the commission of the subsequent crime may not be necessarily the result of the

[295] International Monetary Fund "Suppressing the financing of terrorism: a handbook for legislative drafting" (2003) <http://www.imf.org/external/pubs/nft/2003/sfth/> viewed at 12 Oct 2014. See also Koh, *supra* note 79, at 66.

financing. But under the Convention, any contribution seems to suffice for liability, no matter how small and no matter whether the contribution has any impact on the commission of the subsequent offence.[296] So, financers in both minor and major cases of financing incur the same liability and are subject to the same punishment. Such an approach is not acceptable to some jurisdictions. For example, in spite of the FATF's criticism, [297] in Germany, "insubstantial" contribution to the commission of a violent act is outside the scope of the offence of terrorist financing even if it is collected or provided with the intent to be used for a terrorist act.

Finally, the criminalization of the financing of a terrorist act leads to confusion about the further fault element that should be proved. If financing can be criminalized without any need to prove its connection to the subsequent offence for which the financing has been carried out, what state of mind should be shown in order to hold the financier criminally responsible? If the Convention should be read to mean that the collection or provision of funds should be merely carried out for terrorist purposes, what, then, amounts to terrorist purposes or terrorist intent? Is terrorist intent definable? Does terrorist intent mean the objectives of terrorist acts defined by the Convention: intimidating population or compelling a government or an intentional organization to do or to abstain from doing an act? That is, should a financer know or intend that the funds collected or provided to be used to bring about these purposes?

1. Is 'terrorist intent' adequate as the mental element?

Regarding the fact that there is no consensus on the definition and elements of terrorism, it seems that such a reading of the Convention may give rise to the absence of a harmonized implementation of the Convention. In this regard, national attempts to come to grips with the fault element have proved that defining 'terrorist intent' can be controversial. For example, Germany, in implementing the Convention, criminalizes the collection or provision of funds carried out with the intent to fund serious violent act "endangering the state". "Endangering the state" is defined as "an offence against life ... or against personal freedom ... which under the circumstances, is intended to impair or and capable of impairing the existence or security of a state or of an international organisation, or to abolish, rob of legal effect or undermine

[296] The Convention does not differentiate between minor or major cases of terrorist financing.
[297] Financial Action Task Force *Mutual evaluation report; anti-money laundering and combating the fianncinag of terrorism; Germany* (19 Feb 2010), para. 210.

constitutional principles of the Federal Republic of Germany".[298] As can be seen, the serious violent act "endangering the state" is narrower in scope than the definition of terrorist acts introduced by the Convention as it does not cover the objective of 'intimidation of population'.

Other jurisdictions have introduced explicit criteria which exclude from their implementation of the obligation in the Convention the financing of violent acts carried out for some particular purposes. Switzerland, for instance, does not consider the financing of a violent act as a terrorist financing offence if the financing has been carried out with the intention to establish or re-establish a democratic regime or a State governed by the rule of law, or with the intention to exercise or safeguard human rights.[299] While it is not very clear how human rights or democratic values can be restored by resorting to violence, imposing such requirements is not beyond expectation when the scope of the offence of terrorism has not been (cannot be) defined.

Regardless of what constitutes terrorist intent and how such intent could be inferred, courts in some jurisdictions do not require the proof of terrorist intent as an essential element of preparatory terrorism offences, including the terrorist financing offence, at all. For example, an Australian court held that it is not necessary to prove that the defendant, who was accused of possessing things connected with preparation for, the engagement of a person in, or assistance in a violent act, had terrorist intent.[300] That is, the prosecution did not need to prove that the defendant carried out the conduct that he was accused of with the intent to further a political, religious or ideological cause; and with the intent to coerce, influence by intimidation, a State, Territory of Commonwealth government or intimidate the public or a section of a public.[301] The Court reasoned that a defendant might not have any interest in accomplishing any of these purposes, but he might, for instance, be simply plying his trade, or doing a favour for an acquaintance, or repaying a debt.[302]

But what then of the intent requirement as the connection between the act of financing and the subsequent violent act? Here, again, problems may arise with interpretation.

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[298] German Criminal Law, sec.89a (1)
[299] Swiss Criminal Law. Art. 260 quinquies (3)
[300] *Lodhi v. The Queen* (2007), 179 A Crim R 470, para. 91.
[301] Australian Criminal Code, sec.100.1
[302] *R v. Lodhi* (2006), NSWSC 468 reprinted in Mcsherry *supra* note 278.

2. So, what is the mental element for terrorist financing?

Generally, the mental element of a crime can be determined in relation to the physical elements of that crime. Physical elements, in general, can be divided into three parts: the individual conduct, the consequences of that conduct, and the circumstances in which the conduct has occurred.[303] The Rome Statute illustrates how the fault element can be demonstrated in respect of each material element of a crime. Setting out the requirements of knowledge and intention for the purposes of creating criminal liability, the article 30 of the Rome Statute provides that "a person has intent where (a) in relation to conduct, that person means to engage in the conduct, and (b) in relation to a consequence, that person means to cause that consequence". Similarly, knowledge only exists where the person is aware that "a circumstance exists or a consequence will occur in the ordinary course of events".

Similar to the Rome Statute, the mental element of the offence set out by the Convention consists of two main variants: intention that funds will be used to carry out a terrorist act, and knowledge that the funds are to be so used. However, it is often impossible to presume the intent from the physical act of financing as the conduct element of the offence consists of acts which are innocent in themselves (especially when the funds have a legal origin, and the charge is that of collecting), or which may have a criminal but non-terrorist nature.

In addition, intention in the sense of the desire to bring about a certain consequence or knowledge of consequences seems to have a "hypothetical quality"[304] when it comes to the crime of financing of a terrorist act. According to the paragraph 3 of article 2, it is not necessary that funds are to be used to carry out a terrorist act. If this provision has any meaning at all, this must indicate that intention or knowledge does not have to linked to the terrorist act for which the funds are collected or provided; that is, the end use of funds is irrelevant, it is what the financer thinks the end use is, which is relevant. The point is that if a specific (subsequent) violent offence was required to be intended or known, it would limit the crime of financing to the equivalent of an act of complicity or attempted offences.[305] Intending to create an independent crime of financing, the drafters of the Convention seems to be successful in defining what does not constitute the intent of the offence. It seems this is the case for all preparatory terrorism act - "the financing, planning, preparation or preparation of terrorist acts" - which should be treated "as serious criminal offences" even in the absence

[303] Lehto, *supra* note 99, at 285.
[304] *Id.*, at 283
[305] *Id.*

of a subsequent violent act or where there is no connection between these offences and a specific violent act.[306] But, at national levels, this seems to lead to confusion and controversy over the intent that must be proved.

3. Can awareness of a circumstance be the mental element?

R v. Lodhi

Awareness of a circumstance was regarded as a sufficient ground for imposing liability by the court in an Australian[307] case where the court tried to determine the necessary fault element for independent preparatory terrorism offences. Lodhi was accused of three offences: collecting (purchasing) of two maps of the Australian electricity supply system in preparation of a terrorist act, possessing information regarding the ingredients for and the method of manufacture of explosives in preparation for a terrorist act, and seeking a price list of chemicals for the use of explosives for a terrorist act.[308]

The accused explained that his collection of the maps had nothing to do with any terrorist act or part of any plan to execute a terrorist act against the Electricity Supply System.[309] He explained he simply wanted them for a company of an electrical nature he was planning to establish. He gave similar explanation for the seeking a price list of chemicals. He stated that he was proposing to set up a business venture to export certain chemicals from Australia.[310] Regarding the possession of the materials containing information about making explosives, he gave evidence that many years earlier, he had seen them on a computer when he was studying some architectural subjects at the University of Sydney.[311]

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[306] The United Nation Security Council in the Resolution 1373 (2001) sec. 2 (e) includes a provision declaring that all states should "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.

[307] Australia in sections 101, 102 and 103 of its Criminal Code has introduced a broad range of ancillary terrorism offences ("possessing things connected with terrorist acts", "collecting or making documents likely to facilitate terrorist acts", "collecting or making documents likely to facilitate terrorist acts", "other acts done in preparation for, or planning, terrorist acts" and terrorist financing). As the definition of funds under section 101.1 is an expansive definition which includes various objects, and as the language of other terrorism-related sections - particularly the phrases such as "things" or "document" - is very broad, these offences can capture many forms of financing of terrorism. But, what all these provisions have in common is that they fail to draw a clear connection between the person who collects materials and the subsequent offences for which the materials are collected.

[308] *R v. Lodhi 2006,* 199 FLR 364, (Whealy J).

[309] *Id.*, para. 15.

[310] *Id.*, para. 30.

[311] *Id.*, para. 41.

Relying on circumstantial evidence, the prosecution alleged that Lodhi intended to "advance the cause of violent jihad and intimidate the government and the public" by plotting to bomb part of Sydney's electrical Supply system.[312] The prosecution referred to DVDs and CDs of jihadist doctrine which were found in his house. The prosecution argued that the possession of this material by the defendant shed lights on his malicious intention with regard to these offences.[313] The prosecution also alleged that Lodhi was in contact with a French terror suspect while he was in Sydney.

Lodhi explained that he had not seen this jihadi material, so he could not explain its presence at his home.[314] He admitted the existence of other material containing exhortations to violent jihad; but, he explained that "he had either not seen it or, if he had seen it, it was only in part and that he had generally little to do with the contents".[315] Regarding the association with the French suspect, Lodhi admitted that he was in contact with the French suspect, but he stated that he did so as a courtesy and favour to a foreigner visiting a new country at the behest of a mutual friend.[316]

The Lodhi court provided a test case for the provisions on preparatory terrorism offences which do not define a clear fault element in relation to the physical element of these offences. The court needed to examine the criminal intent of the accused in the absence of the subsequent offence for which the preparatory acts were carried. But, the court struggled to come to a decision.

The court stressed that

> an evaluation of the criminal culpability involved in any particular offence requires an analysis not only of the act itself, which may be relatively innocuous, but as well an examination of the nature of the terrorist act contemplated, particularly in the light of the intentions or state of mind of the person found to have committed the offence.[317]

However, it read the offence as not requiring the prosecution to prove that the accused intended to facilitate either a specific or general terrorist act. The judge said that such offences "will have been committed by a person in a preliminary way ... even where no final

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[312] *Id., para* 17.
[313] *Id., para* 18.
[314] *Id., para* 19.
[315] *Id., para* 19.
[316] *Id.*
[317] *Id., para* 5.1

decision has been made over the final target."[318] Which means knowledge of a target is not needed.

The main question is how the court could have inferred the terrorist nature of such preparatory acts without requiring the prosecution to prove that the accused intended to bring about the subsequent offence. The court's rulings do not seem to be consistent. On the one hand, the court was satisfied "beyond reasonable doubt, at the forefront of the offender's mind when he collected the maps, that he had not at that stage necessarily made a final determination as to the precise target, or the precise area of the target, that was to be hit."[319] The court held that

> the maps themselves would not have given sufficient information to the offender. Nor would they, of themselves, have given sufficient insight into how such an attack upon the electrical system could be maintained at a time when the actor has not decided precisely what he or she intends to do, an offence.[320]

So, the court concluded that it was "not satisfied beyond reasonable doubt ... that the offender had at any time made up his mind that it would be he who would carry out the bombing of the Australian Electrical Supply System".[321] In the same way, it concluded that although there was a formula for making a bomb in the accused's possession, there was no evidence to suggest that the offender ever intended that there would be an enterprise involving the use of the formula aimed at any person, or for that matter, any property.[322]

On the other hand, the court ruled that it was not important that the existing evidence could not demonstrate that Lodhi had ascertained and decided "when, how, where or by whom a terrorist act might be carried out".[323] The court found that the accused was aware of the circumstances in which the preparatory acts occurred. That is, the accused knew that there was, "in the circumstances of all three offences, really one continuing uninterrupted course of conduct centring upon an enterprise to blow up a building or infrastructure".[324] In spite of the fact that the document which contained information on how to make explosives was written (collected) a long time before the accused bought the maps and asked for the price list of chemicals, the court concluded that the contents of the document considerably fleshed out the

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[318] Reprinted in McSherry, *supra* note 278, at 149.
[319] *R v. Lodhi*, *supra* note 308, para. 21.
[320] *Lodhi v. the Queen* (2007) 179 A Crim R 470, para. 20.
[321] *R v. Lodhi*, *supra* note 308, para. 26.
[322] *Id.* para. 44.
[323] *Lodhi v. the Queen*, *supra* note 320, para. 207.
[324] *R v. Lodhi*, *supra* note 308, para. 44.

accused's intention in relation to the circumstances surrounding the obtaining of the maps and the enquiries he made of the chemical supply company.[325]

In addition, the court, without explanation, considered the accused's contact with the French suspect as a relevant matter to the existence of these intentions without clarifying what the French suspect's role was to be with regard to any terrorist act.[326] Similarly, the court found the accused's possession of the "Jihadi CD" relevant, stating that the "truth is that all this material makes it clear that the offender is a person who has, in recent years, been essentially informed by the concept of violent jihad and the glorification of Muslim heroes who have fought and died for jihad, either in a local or broader context."[327] It stated that "the [Jihadi] material is eloquent as to the ideas and emotions that must have been foremost in the offender's mind". The court sentenced Lodhi to 10 years imprisonment for the possession and collection of the materials related to terrorism and 20 years for doing an act in preparation for a commission of a terrorist act. The sentences were required to be served concurrently. This decision was upheld by the Court of Appeal.[328]

Is the court's decision is justifiable and fair? If the fault requirement, as the court ruled, should be limited only to the awareness of the act of preparation or facilitation without a need to prove that an accused intended to facilitate or finance either a specific or general terrorist act, any preparatory act which is presumed to be connected to some sort of unplanned and unforeseen terrorist acts, should be punished. This is a "significant extension of concepts of criminal liability"[329] as it imposes liability and heavy punishment on a person with unclear criminal intent, who proceeds with the collection or possession of materials such as collecting a map, asking for price of chemicals or possessing a document about how to make explosives which might never be used for any terrorist act. There was no proof that a terrorist act was even planned. While the traditional criminal law has long identified offences based on complicity in a crime or attempt to commit a crime, the application of this fault requirement colours otherwise innocent conduct as a serious offence at a very early stage.

This mental element also cannot even be justified from a purely subjectivist approach, which imposes liability on the basis of a person's intention or knowledge with which the person acted regardless of whether the commission of the offence is incomplete or physically

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[325] *Id.*, para. 45.
[326] *Id.*, para. 11.
[327] *Id.*, para. 20.
[328] *Lodhi v. Regina* (2007) NSWCCA 360.
[329] Andrew Lynch and George Williams *What price security? : taking stock of Australia's anti-terror laws* (University of New South Wales Press, Sydney, 2006), at 18.

impossible.[330] A subjectivist approach to the preparatory offences such as financing of a terrorist act would require a high standard of the mental element, which would be actual knowledge of the subsequent terrorist offence. But when there is no need to prove knowledge of any terrorist act, "any remaining knowledge of a terrorist activity would have to be extremely tenuous, abstract and hypothetical".[331] So, there is a great risk that an awareness of a terrorist act could be nothing more than possessing a Jihadi CD or "reckless or angry talk" or expression of "extreme political or religious views about past or future acts of terrorism or about known terrorists".[332] Such a fault requirement, of course, would not be supportable by a subjectivist approach.

In addition, this loose reference to the mental element appears to unfairly reverse the burden of proof; that is, by not being required to link the act of collection or provision to any material terrorist act, the prosecution seems to have to prove little; and then the accused bears an evidential burden of exculpation, by introducing evidence that his conduct was nothing to do with commission or preparation of a terrorist act. Although the prosecution needs to refute the accused's claim beyond a reasonable doubt, the accused must first put them to the task of doing so by establishing an evidential case that his actions were innocent first.[333]

The shifting of the evidential burden is also of concern because of the breadth with which the fault element is identified by the Lodhi's court. There is no doubt that by not being required to prove the intention of the accused as to the subsequent crime, the prosecution can precipitately lay charges on those who are strategically preparing for the commission of an offence; but it does not "provide others with sufficient certainty about what could expose them to prosecution".[334] So, an innocent person who, for example, provides funds in response to the request of an unknown impoverished student who later turns out to be a suicide bomber[335] can put themselves at risk of being charged and convicted for financing terrorism if the person cannot prove that she did not intend or know the funds would be used for the commission a terrorist act.

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[330] See Antony Duff *Criminal attempts* (Clarendon Press, New York, 1996), at 191-2.
[331] Kent Roach "Terrorism offences and the Charter: a comment on *R. v. Khawaja*" 2007 11(3) Canadian Criminal Law Review 271, at 286.
[332] *Id.*
[333] Lynch and Williams, *supra* note 329, at 20.
[334] *Id.*, at 20-1.
[335] Princess Haifa of Saudi Arabia, wife of the ambassador to Washington provided funds in response to request of an unknown student who was actually a suicide bomber. See Abdel Bari Atwan *The secret history of al Qaeda* (Updated ed, University of California Press, Berkeley, 2008), at 121.

Despite these criticisms, the presumption of innocence seems to be becoming so insignificant (at least in a democratic country such as Australia), to policy- makers, legislators and courts that they do not even consider it as necessary to give a reason for imposing a burden on the accused. The neglect of the presumption is well reflected in the reasoning of the Australian Minister for Justice and Customs when he justified terrorism offences as follows:

> In the security environment that we are dealing with, you may well have a situation where a number of people are doing things but you do not yet have the information which would lead you to identify a particular act ... When you are dealing with security, you have to keep an eye on prevention of the act itself as well as bringing those who are guilty of the act to justice ... [T]he original intention of the legislation [is] to remove any doubt that a person can be prosecuted for a terrorist act and acts preparatory to a terrorist act, and that our agencies can investigate such acts even if a specific target has not been identified.[336]

4. Is general knowledge of a terrorist act sufficient? Knowledge v. Intention

R v. Khawaja

In introducing a mental element for terrorism offences which are preparatory in their nature and which do not need to be connected a specific terrorist act, a Canadian court held that a general knowledge of a terrorist act is sufficient. The Ontario Court of Appeal found Khawaja guilty of developing, working on and possessing an explosive substance with the intent to perform a terrorist act, namely in what became known as the British "fertilizer bomb plot". Unlike the trial court which dismissed these charges because the prosecution could not prove that the accused knew he was assisting in the fertilizer bomb plot,[337] to secure the conviction, the Court of Appeal referred to section 83.19 (2) of the Canadian Criminal Code which states that "a terrorist activity is facilitated whether or not the facilitator knows that a particular terrorist activity is facilitated; or any particular terrorist activity was foreseen or planned at the time it was facilitated".[338]

The accused argued that the qualifiers in this provision are not consistent with the approach of the traditional criminal law as it does not require adequate levels of subjective fault, which would be knowledge or intention related to a specific terrorist act (the British

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[336] Senator Chris Ellison, reprinted in Lynch and Williams, *supra* note 329, at 19.
[337] *R v. Khawaja* (2010) ONCA 862, para. 253.
[338] *R v. Khawaja* (2006) CarswellOnt 6551, 42 C.R. (6th) 348, 214 C.C.C. (3d) 399, 147 C.R.R. (2d) 281, 71 W.C.B. (2d) 723, para. 34.

fertilizer bomb plot).[339] A concern was also raised as to how a person can knowingly facilitate a terrorist act when he does not know that "any particular terrorist activity was foreseen or planned at the time it was facilitated"?[340] There seems "to be little or no *mens rea* at the time the *actus reus* of facilitation was committed".[341]

The court, however, accepted the prosecution's argument that these qualifiers seems designed to address cases where a terrorist cell may not know the specific nature of the terrorist act he is going to carry out until the last moment.[342] But, unlike the Australian court's ruling, the court added an extra requirement by concluding that "it is unnecessary that an accused be shown to have knowledge of the specific nature of terrorist activity he intends to aid, support, enhance or facilitate, as long as he knows it is terrorist activity in a general way".[343]

The fault requirement of general knowledge of a terrorist act is different from the Australian court's fault requirement in which the prosecution is not required to prove that the accused knew or intended to support either a specific or general terrorist act, meaning that the accused does not need to know that any terrorist act is planned or foreseen at the time it was facilitated or financed. According to the Canadian court's ruling, the accused may not know the specific details of the subsequent terrorist act but does need to know "an act of terrorism is coming".[344] This reading of the fault requirement is similar to the reading upheld by some other jurisdictions. For example in Sweden, "there is a need to show that funds were provided with intent that a particular serious crime sooner or later will be carried out".[345]

While it seems that the Canadian court's extra fault requirement satisfies minimum standards of knowledge since it requires some type of material or actual connection between the act of preparation and facilitation and the subsequent crime, there are three sources of uncertainty as to the breadth of such a fault requirement. First, although this fault requirement is broad enough to secure the conviction of those who facilitate the commission of a terrorist

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[339] *Id.*, para. 31

[340] *Id.*, para. 34. The court referred to the article written by Roach, Kent, *The New Terrorism Offences in Canadian Criminal Law*, (2002) 14 N.C.J.L. 115, at 124.

[341] *Id.*

[342] *Id.*, para. 31. The court referred to a transcript of a videotape of Bin laden who said: "Brothers, who conducted the operation, all they knew was that they have a martyrdom operation and was asked each of them to go to America but they did not know anything about the operation, not even one letter. But they were trained and we did not reveal the operation to them until they are there and just before they boarded the planes...those who were trained to fly did not know the others. One group of people did not know the other group."

[343] *Id.*, para. 39

[344] Roach, *supra* note 331, at 286.

[345] Financial Action Task Force *The third mutual evaluation/detailed assessement report; anti-money laundering and combating the the fianncing of terrorism; Sweden* (17 Feb 2006), para. 134.

act without knowing the specific details of that terrorist act until the last moment, it imputes guilt to those who are remotely and indirectly linked to a terrorist act and who do not have any intention to finance or facilitate any terrorist act or do not know how their conduct will serve terrorism. For example, a restaurant owner who knows that certain customers are using his restaurant to plan a terrorist act can be held criminally liable for financing a terrorist act the same as those who are directly involved in the facilitation of that terrorist act.[346] The court may not accept the accused's argument that he did not have any particular intention to finance the terrorist act, and that his main purpose was to gain money from his business. The court may argue that whatever his purpose was, he knowingly made his restaurant available to be used for planning a terrorist act.[347]

In addition, it appears that this mental requirement suggests a *mens rea* element closer to recklessness or negligence than a knowledge requirement. That is, if an accused does need to have the knowledge of the specific nature of an upcoming terrorist act, he cannot be absolutely or virtually certain that his funds or donation will be used for the commission of the terrorist act. It seems that the Judge in *Khawaja* case admitted such an interpretation by concluding that "I see nothing wrong in asking, indeed expecting law-abiding citizens to avoid any knowing activity that aids, support or advances terrorist activity or a group engaged in such activity."[348] However, his conclusion was criticized as it "runs the risk of blurring the distinction between punishing a person as a terrorist for their subjective fault or for their negligence in not taking reasonable steps to avoid assisting terrorists."[349] It was pointed out that any understanding that negligent engagement in the facilitation or financing of a terrorist act would suffice for the offence is inconsistent with the Canadian law [as well as the Terrorist Financing Convention], which excludes references to negligence and recklessness.[350] Concern is also raised that it would be unjust to expose "negligent and intentional assisters of terrorism to the same liability and punishment".[351]

The breadth of the mental element is also worrying as it may impose liability on innocent conduct not carried out for the commission of any terrorist act unless otherwise proven. For instance, if a member of a terrorist group which is planning a terrorist act engages in fund-

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[346] Kevin E. davis "Cutting off the flow of funds to terrorists: whose funds? which funds?who decides? " in Ronald J. Daniels, Patrick Macklem, and Kent Roach (eds) *The security of freedom : essays on Canada's anti-terrorism bill* (University of Toronto Press, Toronto ; London, 2001), at 305.
[347] *Id.*
[348] Rutherford J, see *R. v. Khawaja*, *supra* note 338, para. 36.
[349] Roach, *supra* note 331, at 286.
[350] *Id.*
[351] *Id.*, at 286.

raising for religious purposes, he can be charged for terrorist financing if he knows of this possibility, even if it is only remote, as all elements of the offence exist. The act of fund-raising along with the knowledge of an upcoming terrorist act provides a sufficient ground for the prosecution to ask for the conviction of the accused for terrorist financing without a need to prove that he intended to finance the terrorist act. The accused can be held liable for the financing of a terrorist act if he fails to prove-in the sense of providing some evidence to disturb the inference of his knowledge-that the act of fund-raising was carried out for different purposes and he did not think it was to be used for terrorism. The imposition of such liability on a person only on the basis of mere knowledge about an upcoming act is unjustifiable. This brings back the argument full circle to the necessity of proving the actual knowledge of the terrorist destination of funds, or the intention that the funds will be used for the commission of the subsequent offence. However, proving such intent limits the scope of terrorist financing to an inchoate offence or complicity in the crime of terrorism itself. This was the interpretation that the supporters of the Convention wanted to and always avoid.

B. The Fault Element of the Offence of Financing Terrorist Organizations

Despite the fact that the Convention failed to define a terrorist or terrorist organization, cutting off financial resources of terrorist organizations is another and later much-used method of addressing terrorism financing. However, applying the Convention to suppress the financing of terrorist organizations gives rise to uncertainty as to what amounts to the fault elements of the offence of the financing of terrorist organizations.

This mainly resulted from the ambiguity of the provisions of the Convention. The term ‘funds’ has as illustrated above a broad meaning which includes any materials, legal or illegal tools, fungible and non-fungible resources, which may not even be usable for the commission of a terrorist act, and which in themselves may not indicate a disposition to support terrorism. Also, according to Article 2(3) of the Convention, the terrorist end use of funds is irrelevant, which literally means there is no need to prove the link between financing and a terrorist act. Therefore, in the case of financing of a terrorist organization, it is not clear what the elements of intention, that funds should be used to carry out a terrorist act, or the knowledge that funds are to be so used, refer to. What can be inferred from the wording of the Convention is that the Convention should not be read to mean that mental states of financers has to refer to any terrorist offences being prepared or carried out by a group, otherwise the offence of financing

of terrorist groups would come close to the concept of complicity in the sense that it depends on the commission or preparation of its subsequent terrorist offence. For a similar reason, the proof of the knowledge of the intention of the recipient of funds to commit specific offences is not intended to be the fault element.

Such a vague reference to a connection between a financer's and illegal activities of a group has been the cause of some confusion. Is it enough if a financer knows the identity of the recipient of funds as a designated terrorist group or a group which involved in terrorist activities? What if the financer knows the recipient is a terrorist group, but intends to further the lawful purposes of the group? Does the offence need specific intent? Or is does it only require recklessness? These questions will be examined in this part. In order to avoid over complication of this discussion, it is assumed that the law of a State is clear on the definition and scope of a terrorist organization. The discussion also does not have regard to whether and how the political process of designating a group as terrorist may impact the criminalization of terrorist financing.

1. Does the knowledge of the identity of the recipient of funds suffice?

The most direct way to hamper a corrupt and dangerous group is to proscribe it outright, including by making the knowing provision of any support to the group an offence. But, there are multiple legal challenges targeting such a fault requirement. First of all, if the knowledge of the identity of the recipient alone suffices for the intent, somewhat similar to status or situational offences, the offence of financing terrorist groups seems to impose punishment on an act based only on the connection of that act with others' state of being, not to their criminal conduct. In other words, the physical element of collecting or providing funds is innocuous enough; it is (the knowledge of) the status of the person or the group with whom people associates criminalizes these acts. Consequently, the intent of financers is irrelevant.

While the principle of legality seeks to punish criminal conduct or participation in a criminal act "not criminal types",[352] and while the principle of *mens rea* emphasizes that people "should be held liable only for events or consequences which they intended or knowingly risked", [353] one may argue that applying a status-based approach to terrorist

[352] McSherry, *supra* note 278, at 157.
[353] Ashworth, *supra* note 280, at 75.

group- related offences is "neither novel, nor extraordinary".[354] The criminal law has long included "status offences", such as consorting with criminals, that penalize people "on the basis of whom they know and associate with".[355] However, these offences have usually been considered to be of a less serious nature (summary offences), and a result of the controversial expansion of police powers in response to the threat of criminal groups and gangs.[356] In contrast, terrorist organization and association offences are classified as serious offences which carry hefty sentences[357], and which inflict grave damage to the accused' reputation.

Historically, it was also unprecedented in democratic states to apply such an approach to the *mens rea* of criminal organization and association offences. For example in the US, courts in dealing with cases of membership in and association with quasi-political groups seeking the violent overthrow of the government as well as social welfare goals, such as the Communist Party, ruled that:

> [i]n our jurisprudence guilt is personal, and when imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt.[358]

However, where the relationship between the accused's involvement and the criminal activities of a group is "too tenuous to permit its use as the basis of criminal liability", [359]or where the involvement includes a status or conduct that establishes a relationship with a criminal enterprise rather than its criminal activities, the principle of personal guilt "are be cured, so far as any particular defendant is concerned, by the requirement of proof that he knew the organization engages in criminal activity, and that was his purpose to further that criminal activity".[360] This approach was later applied to civil cases where, for example, the Supreme Court ruled that:

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[354] Simon Bronitt "Australia's legal response to terrorism: neither novel nor extraordinary?" (The Year in Review Conference, Castan Center for Human Rights Law, Melbourn, Australia, 4 Dec 2003).
[355] Jude McCulloch and Sharon Pickering "Pre-crime and counter-terrorism; imagining future crime in the 'war on terror'" 2009 49(5) British Journal of Criminalogy 268, at 633.
[356] Alex Steel "Consorting in New South Wales: substantive offence or police power?" 2003 26(3) University of New South Wales Law Review 567, at 576. It should be noted that in the so-called "war on terror", there are some serious status offences with heavy sentences. For example in Australia, the offence of "being "knowingly concerned" in the importation of illicit drugs" carries the maximum penalty of life imprisonment. However, these offences are not common. See Simon Bronitt and Bernadette McSherry *Principles of criminal law* ([1st ed, LBC Information Services, Sydney, 2001), at 162.
[357] McCulloch and Pickering, *supra* note 355, at 633.
[358] *Scales v. United States* (1961), 367 U.S 203, 205, para 224-5
[359] *Id.*, para. 226
[360] *Id.*, para. 226.

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed act of violence. For a liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further illegal aims.[361]

Even with regard to providing fungible resources, the US Supreme Court, in another case, ruled that the mere provision of money (membership dues) to the Party did not establish a "meaningful association with the party" on the basis of which the accused could be liable.[362] The court adopted the position of the prior courts by requiring the prosecution to prove that the accused was aware of the nature of the Party and its involvement in illegal activities, and he intended to contribute to those criminal activities by paying dues and attending some meetings.[363]

Similar to the above-mentioned practice,[364] the Palermo Convention, in establishing criminal group and association offences, introduces a specific mental element far greater than

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[361] *NAACP v. Claiborne Hardware Co.* (1982), 458 U.S. 886, para. 920

[362] *Gastelum-Quinones v. Kennedy* (1963), 374 U.S 469, para. 476-77.

[363] *Id.*, para. 477-80.

[364] In the US, there was a controversy on whether such a fault requirement can be applied to terrorist financing. While courts in the early cases of terrorist financing applied the fault requirement by holding that a donor is not liable for supporting a designated terrorist group so long as he does not know or specifically intend that the recipient of funds would use the support to further the terrorists functions of that group (See for example *United States v. Al-Arian* (2004), 329 F. Supp. 2d 1294), courts, in subsequent cases, took the position that the Communist Party court's decisions are not applicable to terrorist financing. It is argued that the Communist Party cases "address[ed] situations where people are punished by reason of association alone ... in other words, merely for membership in a group or for espousing its view". Instead, the terrorist financing offence criminalizes "the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives" (See *Humanitarian Law Project v. Reno* (2000), 205 F. 3d, para 1133). It is also argued that terrorist groups are so tainted by their criminal conduct that any contribution to such groups aids their unlawful purposes by freeing up resources that can be used for terrorism. So, because all contributions can be directly or indirectly used for terrorism, it does not matter what a financer intends that his contribution will be used. As long as he knows the group that he is supporting is a terrorist group, he is criminally liable (*Id.*, para. 1136).

As Jonakait argues, this "action-membership distinction" reasoning is not persuasive for following reasons. Although membership seems to be a status, a membership is not acquired "passively". "Except for memberships resulting from birth, it takes some sort of act to become a member of a group"(See Randolph N Jonakait "The *mens rea* for the crime of providing material resources to a foreign terrorist organization" 2004 56 Baylor Law Review 861, at 905) . Also other courts applied the same *mens rea* requirement to the cases where "the defendant had engaged in variety of activities [beyond mere membership] to support the Communist Party including organizing new members, teaching Communist principles to students and members, and soliciting contribution for the Communist party (see *Humanitarian Law Project v. United States* (2003), 352 F.3d 382 , para. 395).

In addition, membership is kind of providing human resources to an organization. If any contribution to a terrorist group frees up resources that can be used for terrorist acts, an active member may very well free up another member to undertake illegal actions in furtherance of the group's illegal purposes (*Id.*, para. 910).

Moreover, the courts in Communist Party cases applied this fault requirement (the specific fault requirement) to include not only membership, but also 'association'. Association, from these courts' perspective, has a broader meaning than membership (See for example *NAACP v. Claiborne Hardware Co, supra* note 361, para. 886). It

the knowledge of the identity of a criminal group. According to article 5 (1)(a) of the Convention, the offence of "active" participation in the criminal activities of a criminal organized group requires knowledge of either the aim and general criminal activity of the group or its intention to commit the crimes addressed by the Convention. With regard to the involvement in non-criminal and supportive activities of a criminal group - activities which "may not constitute crimes, but they perform a supportive function for the group's criminal activities and goals" [365] - the Convention introduces an additional requirement: "knowledge that such involvement will contribute to the achievement of a criminal aim of the group".[366] Such an approach can be seen in the implementation of the Convention at the national level. For example in Canada, a person who "knowingly... participates in or contributes to any activity of [a] criminal organized organization" is criminally liable if such involvement or contribution is made with "the purpose of enhancing the ability of [the] criminal organization to facilitate or commit an indictable offence".[367]

Practically, this knowledge requirement - convicting a person for the provision of funds to a group on the ground that he or she knows the group is designated group or it is involved in criminal activities - causes some concerns in terms of sweeping up both guilty and non-guilty mental states. A US court tested several hypothetical situations against this knowledge requirement:

> Under [the construction of this knowledge requirement], a cab driver could be guilty for giving a ride to a [terrorist organization] member to the UN, if he knows that the person is a member of a [terrorist organization] or the member or his organization at sometime conducted an unlawful activity in a foreign country. Similarly, a hotel clerk in New York could be committing a crime by providing lodging to that same [terrorist organization] member under similar circumstances as the cab driver.[368]

The court concluded that this knowledge element does not satisfy the requirement of personal guilt as the knowledge of the identity of the recipient or the knowledge of the unlawful

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captures the concept of financing; that is, "[o]ne can associate with a group in more ways than joining its formal membership rolls"; people may "associate with a group by donation their money, services or goods" (Jonakait, at 901). Also, in terms of the right of association, it is argued that "the distinction between association and material support is illusory. Groups cannot exist without the material support of their members and associates. If the right of association meant only that one had the right to join organization but not to support them, the right would be empty." (See David Cole "The new McCarthyism: repeating hisotry in the war on terrorism " 2003 38 Harvard Civil Rights-Civil Liberties Law Review, at 15) .

[365] See also United Nations Office on Drugs and Crimes "Legislative guides for the implementation of the United Nations Convention against Transnational Organized Crime and the protocol thereto" 2004, at 24.

[366] The Palermo convention, Article 5(a)(ii)(b)

[367] The Canadian Criminal Code, Article 467.11

[368] *United States v. Al-Arian* (2004), 308 F.Supp.2d 1322, para. 1337-38

activities of a group is not strong enough to impute guilt on the donor's conduct; that is, "when criminality and punishment are justified by a relationship to others' conduct, that relationship must be sufficiently substantial to constitutionally support criminal liability".[369] To support this conclusion, the court discussed another hypothetical situation:

> A and B are members of a [foreign terrorist group or a] FTO. The FTO exists to oppose and remove (by violent and non-violent means) a foreign government. A opposes the FTO's use of violent means to accomplish its goals. B has no problem with the group's use of violence and wants to raise funds for weapons to further that interest. B travels to where A lives to raise money. A does not know that B is coming to fundraise on behalf of the FTO. A picks B up at the airport. A allows B to stay in his home, use his telephone, and use his house to entertain other FTO members while A is at work. B fundraises while A is gone. Under the government's construction of Section 2339B(a)(1),[[370]] A is criminally liable for providing transportation, lodging, communications equipment, and facilities, and, if the money raised results in the death of any person, he will face life in prison. A's criminal liability is inextricably connected to his association with B and the FTO. Further, the level of A's criminal punishment is totally dependent on B's and other members of the FTO's criminal conduct.[371]

Concern also arises that such a knowledge requirement imposes liability on well-intentioned financers. That is, because a financer does not need to intend that his or her funds be used for terrorist activities or for the terrorist functions of a group, no humanitarian support can be sent to any designated group.[372] This has a chilling effect on those who seek to provide material resources to "the non-violent humanitarian and political activities" of designated groups.[373] It also has a tragic effect on the provision of humanitarian aid to the disaster and war zone controlled by designated terrorist groups.[374] In addition, this seems to be in contrast to the intent of the drafters of the Terrorist Financing Convention who desired

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[369] *United States v. Al-Arian* (2004), 329 F. Supp. 2d 1294, para. 1300

[370] Section 2339B(a)(1) of the US Criminal Code states that "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization ..., that the organization has engaged or engages in terrorist activity ..., or that the organization has engaged or engages in terrorism".

[371] *United States v. Al-Arian, supra* note 369, para. 1300.

[372] David henrik Pendle "Charity of the heart and sword: the material support offense and personal guilt" 2007 30(3) Seattle University Law Review 777, at 785.

[373] *Humanitarian Law Project v. United States* (2003), 352 F.3d 382 , para. 385.

[374] Halimuddin Sandi "U.S. counterterrorism laws block international humanitarian aid" (19 December 2013) <http://www.worldpolicy.org/blog/2013/12/19/us-counterterrorism-laws-block-international-humanitarian-aid> viewed at 31 March 2015.

to criminalize only financing cases carried out "unlawfully". As mentioned earlier, the qualifier "unlawfully" was included to the definition of offence to add "an element of flexibility by, for example, excluding from the ambit of application of the draft convention legitimate activities, such as those of humanitarian organizations and ransom payments." [375]

2. Is the knowledge requirement the only solution?

Despite all of the above-mentioned critiques, this knowledge requirement is justified in terms of dangerous and extraordinary nature of terrorist groups. An often-used line of reasoning argues that terrorist organizations are

> so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct. ... It follows that all material support given to such organizations aids their unlawful goals. ... [T]errorist organizations do not maintain open books. Therefore, when someone makes a donation to them, there is no way to tell how the donation is used. ... [E]ven contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive. More fundamentally, money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts.[376]

Therefore, since any contribution to a terrorist group can be directly or indirectly utilized by a group for the promotion of the group's illegal purposes, the financer's intention does not matter; that is, "[o]nce the support is given, the donor has no control over how it is used".[377]

While this reasoning may have some merit, it can be criticized for seeking the conviction of a donor on the basis of how a terrorist group could use donation, not on the basis of the mental state of the donor.[378] This approach is in contrast to the approach used to address groups such as the Communist Party in the US or the approach adopted to criminalizing organized criminal groups offences in which the focus is "on the activities and mental states of the associating individual not on how an organization ... might further its illegalities from an act of association".[379]

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[375] UN, A/C.6/54/L.2, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, para. 67.

[376] *Humanitarian Law Project v. Reno* (2000), 205 F.3d 1130 , para. 1136.

[377] *Id.*, para. 1134.

[378] Jonakait, *supra* note 364, at 909.

[379] *Id.*

In addition, the premise that terrorist groups could use any donation for terrorist purposes does not really justify why there is no need to introduce a specific intent greater than the knowledge of the identity of the group; on the contrary, in order to satisfy the principle of personal guilt, such reasoning necessitates a higher intent requirement. In fact, if the focus of the criminalization of terrorist group offences is on donation and how a group might use the donation, the evidence should be sufficiently strong in demonstrating that the donation is substantial enough in its value or its effects to strengthen the group's illegal activities. Consequently, to impute guilt on the donor, it should be proved that the donor knew (had a specific intent) that his substantial donation would contribute to the achievement of criminal aims of the group.

However, the imposition of a specific intent requirement is opposed for (among other reasons discussed later) creating a dangerous loophole for terrorist organizations and their supporters to raise and receive funds and avoid prosecution. While the specific intent can be inferred from the nature of support when the financing is involved in or related to the provision of weapons or explosives to a terrorist group,[380] this may often not be the case when the support contains "dual use" and fungible resources. To illustrate the "security flaws" of this requirement, the following hypothetical situation is normally discussed:

> if a person writes a check to [a terrorist group involved in both violence and humanitarian activities] for $10,000 and writes on the memo line of the check for educational purposes only, the donor would not be liable under the specific intent standard so long as there was not other evidence showing an intention to aid terrorism. But, whether the donor intended to aid terrorism or not, the check could be used for many other projects, including illicit ones.[381]

Moreover, no criminal liability could be imposed on a donor who is told (deceived) by the fundraiser working on behalf of the group that the money would be spent "for the support of orphans", not on any violent act. Under the specific intent requirement, the intentional, deceived and reckless donors should be acquitted where the prosecution cannot prove the specific intention of the donors. So, the donation can flow into the hands of terrorists.[382]

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[380] See *US V. Aref* (2008), 553 F.3d 72. In this case, the court found the defendants guilty of multiples counts arising out of money laundering conspiracy intended to support a sting operation of the secret importation of a missile for a terrorist group. Although the court argued that there is no need for the prosecution to prove the specific intent of the defendants as the US law does require to do so, to uphold the conviction, the court focused on the fact that the defendants knew from the nature of their support that they were contributing to the illegal aims of the group.

[381] Pebdle, *supra* note 372, at 804.

[382] Robert M. Chesney "The sleeper scenario: terrorism-support laws and the demands of prevention" 2005 42(1) Harvard Journal on Legislation , at 70-1.

3. Reckless financing of a terrorist group

In order to close this loophole and to avoid legal challenges resulted from the imposition of only the knowledge requirement; some suggest a lower mental element of recklessness as an alternative *mens rea* to the specific intent.[383] Under the recklessness requirement,[384] a person should be held to be reckless about the terrorist end use of funds where the person knows the group that he is financing is a designated terrorist group, or engages in terrorist activities, but he proceeds with financing the group despite knowing the risk that the supplied resources will be used to further the illegal aims of the group; in fact, a person incurs liability when he recklessly supports a group by not "ensuring sufficient oversight over the supplied funds to make certain they are not utilized illegally".[385]

It is argued that the structure of the terrorist financing offence defined by the Convention gives support to such a mental requirement.[386] The Convention does not require that the mental elements of the knowledge, that funds collected or provided are to be used for the commission of a terrorist act, or the intention, that the funds will be used for terrorism, be proven in relation to any actual terrorist act. Also, the funds do not need to be "actually" used for the commission of any terrorist act; so, they do not necessarily have to have a substantial effect on the commission of a terrorist act. In the case of financing terrorist groups, such a structure is claimed to inject a concept of foreseeability into the mental elements of the offence; that is, when a financer intends a terrorist end use of his funds, it is not the financer but the recipient of the funds "whose actions may bring about the intended result at a later, unspecified point of time".[387] The financer also does not have control over the decision of the

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[383] Lehto, *supra* note 99.

[384] The recklessness requirement at issue is different from 'reckless knowledge' which is an alternative *mens rea* to the knowledge requirement. In the case of financing terrorist groups, reckless knowledge refers to the circumstances where the financer disregards the risk that the group that he is supporting is a designated group, or engages, or has engaged in terrorist activities, or is a front for a terrorist group. The risk also includes cases where a fund raiser is a front for a terrorist group. Under this requirement, it does not really matter what intent prompts financing; nor does it need to prove that the financer was reckless about the terrorist end use of the funds. Instead, it is sufficient for the prosecution to show that the financer was aware of a substantial risk that the group is a proscribed group or engages in terrorist activities "and that such a risk was unjustifiable". (See *R v. Vinayagamoorthy* (2010), VSC 148, para. 6). Due to its broadness, the implementation of such a requirement would cause greater due process concerns than those resulted from the implementation of the knowledge requirement mentioned here. Regardless, this intent element is applied (although rarely) in some jurisdictions. For example, under Section 102.6 of the Austrian Criminal code, a person will be sentenced to 15 years imprisonment for receiving funds from, or making funds available to, an organisation if "the person is reckless as to whether the organisation is a terrorist organisation".

[385] Pendle, *supra* note 372 , at 805.

[386] Lehto, *supra* note 99, at 291.

[387] *Id.*, at 283.

recipient; nor can there be "absolute certainty" that the funds will be used for such purposes[388] especially if the funds are in a fungible form, and the recipient (group) is involved in multiple activities of a humanitarian as well as violent nature. Similarly, with regard to the knowledge element, the financer is far "too removed from" terrorist acts that the recipient may carry out "in terms of time and knowledge".[389] Also, the practical effect of the supplied funds on those acts is neither foreseeable, nor easy to determine. Therefore, when it is stated that the financer knows that the funds are to be used for terrorism, it means he either actively takes the risk that the funds will be used by the recipient for terrorism, or foresees, but ignores, "the possibility, sometimes even the probability that the funds may be used for the commission of terrorist acts".[390] In the both cases, the financer takes the risk that the funds will be used by others for terrorism. While in the former, the risk is willingly taken, the risk, in the latter, seems to be ignored, meaning that the risk is deliberately taken in the hope that it does not cause harm.

In practice, it is believed that this mental requirement would secure the conviction against those who know or foresee whom and what their supplied funds goes to support, but they disguise their intention or foolish faith through, for example, a statement in the memo of a cheque.[391] Unlike the knowledge requirement in which the donor can be convicted for merely knowing that the group is a terrorist group (regardless of his intention), this mental requirement imputes personal guilt on the donor who cannot bring sufficient evidence that "there was proper oversight over the donation to ensure it was used lawfully".[392] The recklessness requirement would also permit "non-reckless" resources to aid the humanitarian goals of a group; resources such as sending medicines and non-controversial materials to the areas suffered from natural disasters and controlled by terrorist groups.[393]

However, there are some doubts as to whether a recklessness requirement would be a convincing and viable alternative as a mental element for the offence. From the Convention's point of view, it should be noted that although the structure of the offence defined by the Convention implies that the offence may include cases of less certain *mens rea*, any interpretation whereby the *mens rea* of the offence is defined in terms of recklessness or negligence is inconsistent with the actual wording of the Convention, which clearly requires

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[388] Lavalle, *supra* note 169, at 499.
[389] Lehto, *supra* note 99, at 292.
[390] *Id.*, at 293.
[391] Chesney, *supra* note 382, at 70-1.
[392] Pendle, *supra* note 38572, at 805.
[393] *Id.*

only two mental elements of intention and knowledge. In addition, such an interpretation contradicts the aims of the Convention's drafters. During the negotiation on the Convention, all of the proposals which aimed at imposing liability on those who collect or provide funds in circumstances "where there is a reasonable likelihood that they will be used for terrorist purposes" were rejected.[394] In addition, the drafters of the Convention added the qualifier "wilfully" to the definition of the offence seemingly "to emphasize that the financing had to be done deliberately, not accidently or negligently".[395]

In practice, although using a recklessness requirement would secure the conviction of those who "convincingly plead ignorance while secretly desiring" the terrorist end use of their funds,[396] the examination of some of the hypothetical cases used above illustrates that this recklessness requirement would not be able to alleviate the due process concerns of sweeping breadth and vagueness. In terms of overbreadth, the offence under this recklessness requirement would still sweep-up non-guilty mental states in the scope of criminality. The first example is the hypothetical case where A, a member of a terrorist group who opposes the group's use of violence, allows B, another member of the group who supports the use of violence by the group, to use his house, phone and car, in order to do B a favour. Without informing A, B uses A's property to raise funds for the group. Under the recklessness requirement, A would be still be liable for letting a terrorist friend use his properties "without monitoring him", or, in other words, for failing "to ensure sufficient oversight when he provided the above mentioned resources and consequently reckless".[397] Similarly, in the example of the cab driver who knowingly gives a ride to a member of terrorist group, it is still likely that the cab driver would incur liability if, for example, the customer (the terrorist) held a weapon in his bag and the driver did not have sufficient oversight over what (and why) the customer was carrying in his bag. Similarly, a hotel clerk could be prosecuted for being reckless in offering the same person services "under similar circumstances as the cab driver". It is pointed out that under the recklessness requirement, providing any fungible resources such as money to a terrorist group would raise liability;[398] therefore, no explanation would be

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[394] UN, A/AC.252/1999/WP.20, printed in UN, A/54/37. Similar proposal was put forward to criminalize "the financing of a person or organization in the knowledge that such financing is or is likely to be used, in full or in part, in order to prepare or commit" a terrorist act. See A/AC.252/1999/WP.16, reprinted in UN, A/54/37.

[395] Aust, *supra* note 20, at 295.

[396] Pendle, *supra* note 372, at 804.

[397] *Id.*, at 806.

[398] Chesney, *supra* note 382, at 84.

accepted for writing a cheque to a terrorist group for educational purposes as the donor knows the group would be free to use the money as it would see fit, but he takes the risk.

The imposition of guilt on the innocent financers in the above cases is neither surprising, nor unexpected; it is because their liability would not be inferred from their 'advertent recklessness' as to a proscribed consequence or their 'reckless knowledge' of a specific circumstance, but from their mere association with a member of a group whose dangerous or corrupt nature causes the concern that they may use any support for terrorist purposes. The main reason that this mental requirement acquires a sweeping character is its failure to define the relationship between a financer's conduct and the criminal activities of a group. Normally, when a criminal liability of one person is tied to the criminal activity of another, culpability or guilt is imputed to the former on the basis of his awareness or intention (or recklessness) as to the criminal conduct of the latter, and on the basis of his awareness as to his ability to assist the latter to commit the crime. But, it seems that this formulation is not applicable to the offence of terrorist financing. That is, to establish an independent offence, the Convention does not require any of these elements: the act of financing should not result in or be related to any subsequent offence; nor do the supplied funds need to be actually spent for the commission of a terrorist act. Instead, this recklessness standard adds the new element of 'terrorist purposes' to the definition of the offence to fill this gap; that is, the financer needs to intend or be reckless that the supplied funds will be used for terrorist purposes.

But what, then, constitutes "terrorist purposes"? No definition has been provided for these phrases.[399] Literally, the term 'terrorist purpose' seems to include conduct including but of greater scope that just an act of terrorism. A comment has been made that "[t]his terrorist purpose supposedly consists of the perpetration or preparation of terrorist acts, or the participation in terrorist acts or terrorist training".[400] It can also include activities related to "the maintenance of terrorist structures" of a group;[401] or if understood in an even broader sense, it can refer to political or religious ideology of a group. Therefore, if the funds given to a terrorist or a terrorist group "could be used for broad terrorist purposes including but not

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[399] The Convention in its preamble and Article 2(5)(3) uses the term terrorist purpose. But no detention has been provided for the term.

[400] Kai. Ambos "Our terrorists, your terrorists? The United Nations Security Council urges states to combat "foreign terrorist fighters", but does not define "terrorism"" (2 October 2014) <http://www.ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/> viewed at 25 May 2015.

[401] Lehto, *supra* note 99, at 297.

limited to the preparation of terrorist offences",[402] prosecution would precipitately and largely lay charges on any donor on the ground of taking the risk that the funds would be used somewhere and somehow for broad terrorist purposes.

It seems that under this view of 'terrorist purposes', terrorist groups are "so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct" or "frees up resources that can be used for" that conduct,[403] and it follows that almost every donation can be assumed to directly or indirectly result in terrorism unless the financer proves otherwise. Therefore, a grocery store manager, for example, could be prosecuted for trading with a member of a terrorist group while he foresaw the risk that the goods sold to the member would meet the basic needs of the group and eventually assist the group to fulfil its terrorist purposes. The accused might only escape conviction if he proves that he had no reason to believe they would be used for terrorist purposes.

But, when the scope of terrorist purposes is not precisely defined, what exactly should a donor prove to avoid falling into the scope of the offence? This requirement seems to place a heavy burden on a financer without clarifying what he needs to foresee, and avoid, in order to escape conviction. Consequently, if the financer could not adduce persuasive evidence in response to the prosecution's allegations or convince the court that there was "proper oversight over the funds to ensure it was used lawfully",[404] his conviction would be guaranteed regardless of his good -intentions or his oversight over the legal end use of the donation.

4. A specific intent Standard: intention or motive?

Imposition of criminal liability under a higher *mens rea* standard (specific intent) is also controversial and problematic, irrespective of how narrowly or broadly the term 'terrorist purposes' is understood. Financing 'terrorist purposes' can be read to mean an act or acts which are enhancing the ability of a terrorist group to facilitate or carry out a terrorist act or acts (as the Canadian criminal law indicates).[405] Under this reading, in order to acquire

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[402] *Id.*, at 299.

[403] *Humanitarian Law Project v. Reno* (2000), 205 F.3d 1130, para. 1136.

[404] Pendle, *supra* note 385, at 805.

[405] Canadian Criminal Code, Section 83.18 .

criminal liability, a financer needs to know or specifically intend that the funds given to a group will enhance the ability of the group to commit a terrorist act or acts it is involved in.

Regardless of any controversy that may arise over what constitutes acts enabling a group to carry out its terrorist activities, such a fault element creates a serious evidentiary burden for law enforcement. That is, the prosecution would need to demonstrate what type of terrorist act or acts a group is involved in, how the funds supplied to the group would or could be used for the commission or preparation of those acts, and whether the financer knew or specifically intended such an end use of the funds. In practice, the proof of such a connection is believed to be a particularly difficult, if not impossible, especially when support is in a fungible form, and a group is involved in multiple activities of a humanitarian as well as violent nature.[406] The critics of this formulation claim that this prosecutorial hurdle "permits skilful terrorist sympathizers to evade detection and slip through the prosecutorial net".[407] In addition, it seems that the Convention does not support such an intent requirement by not requiring the proof of the terrorist end use of funds.

'Terrorist purposes', in a broader sense, can also be read to include a group's ultimate aims and purposes of (what the Convention regards as) intimidating a public or coercing a government or an organization to do or abstain from doing. Under this definition, the mental element of the offence would be understood in the sense of having intent to enhance the ability of a group to peruse and fulfil its ultimate purposes of intimidation or coercion. In the absence of commission or preparation of any terrorist act from which such intent may be inferred, it would be sufficient for the prosecution to introduce evidence that a financer entertains similar views and purposes to those that the group supported holds. Such a reference to the ultimate purposes of a group implies a state of mind closer to a motive requirement than specific intent.

Regardless of whether motive can constitutes an essential element of terrorism offences, the main concern is whether reliance on evidence of political motive, as circumstantial evidence, in the proof of terrorist financing charges would be justifiable and fair? Even

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[406] See for example *US v. Arnaout*, (2005), 431 F.3d. In this case, the accused was charged in several cases including purchasing and providing clothes, boots, uniforms, blankets, tents, X-ray machine, ambulances and walkie-talkies to an organization that he knew they are involved in violence and military operations. Despite the substantial intelligence and documentation on the close relationship between the accused and Bin laden dating from mid 1980s, the court dropped his terrorism charges as the prosecution could not prove that the recipient of the resources was engaged in "a federal crime of terrorism", and that the accused intended the donated material to be used to "promote a federal crime of terrorism" (para. 1001).

[407] Pendle, *supra* note 372, at 778.

though one may assume it is fair,[408] it should be noted that there is a considerable difference between a person who intends the resources he supplies to be used for the commission or preparation of terrorist acts and a donor who, for example, admires the Palestinians' resistance and their resort to violence to stop the Israeli government from the expansion of its settlement plan, and who supplies resources to the area controlled by Hamas for humanitarian or educational purposes. But under this motive requirement, a court would need to admit evidence about the donor's political views and beliefs (as an essential element of the offence) and uphold his conviction irrespective what intent promoted the donation. This evidentiary problem indicates that even the imposition of a motive requirement does not guarantee that the offence would not sweep together both guilty and non-guilty mental states.

CONCLUSION

On the basis of the theory that terrorism (similar to organized crimes and money laundering) could also be hindered by the adoption of a comprehensive and global system of mechanisms against its financing, a call for the creation of a new convention on terrorist financing was made. As a result, the Terrorist Financing Convention was adopted, obliging States parties to regard the preparatory act of financing as an independent offence of terrorist financing. However, examination of the Convention's criminalization provisions has shown that the definition of the offence is far too vague and in many respects, inconsistent with the traditional principles of criminal law, as summarised as follows:

1- The Convention does not provide a solid platform for a better understanding of terrorism, the financing of which it obliges States to criminalize. Its definition of terrorism does not really take into account the underlying problem which hampers reaching an international agreement on a convention on terrorism: the distinction between terrorism and other forms of armed conflict. It has failed to define terrorist groups. It has not addressed what constitutes 'terrorist purposes' or 'terrorist activities' while it refers to them.

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[408]Roach, *supra* note 331. While Roach disagrees with the idea that the mental element of terrorist offences should be defined with a vague reference to a "political and religious motive requirement ... because of its potentially harmful effects on those who may share political and religious beliefs with terrorists and on its harmful effects on the accused by requiring admission of political and religious motive evidence regardless of the balance between its probative value and prejudice" (at 271), he does not found it unsupportable and unfair to define terrorism offences with an implicit reference to the intention of intimidating the public or coercing a state or an organization. He argues that in comparison with the political and religious motive requirement according to which courts need to face "the difficulty of determining and judging the true nature of a person's religious beliefs, or the sincerity of their expression", the intent of intimidation and coercion are "easy to determine and judge" and deserve less constitutional protection (at 292-3).

2- The Convention provides a broad definition of ‘funds’ which seems to include almost anything under the sun. This definition proves to be controversial when it is applied at national levels (for example, in the US’s definition of funds). The definition of the term ‘funds’ also varies considerably from one State to another.

3- The Convention’s definition of the objective elements of the offence raises serious issues of clarity and certainty. Acts of financing, according to the Convention, include acts of collection and provision. Controversy has arisen over whether the act of collection is perquisite to the act of provision, or there are two different, but successive offences? Different approaches have been adopted by States.

3- The offence is heavily reliant on poorly-defined and ambiguous fault elements (knowledge and intention). To establish an independent offence, the Convention does not require the act of financing to be linked to any terrorist act. But in the absence of preparation or commission of a terrorist act, the Convention has not clarified what a financer needs to know or intend, in order to be criminally liable. The mental elements of the offence have been examined in two circumstances within which acts of financing may take place: financing of a terrorist act and financing of a terrorist group.

With regard to the former, by analysing the Australian case of Lodhi and the Canadian case of *Khawaja*, it has been illustrated that when the financing is involved in collection or possession of funds for the commission or preparation of a terrorist act, any mental requirements other than actual intention and knowledge as to the subsequent offence would significantly expand the concept of criminal responsibility beyond the traditional inchoate offences; it might impose liability on the innocent, on people who are remotely and indirectly are linked to a terrorist act, or people with an unclear criminal intent. It might also result in an unfair and unjustifiable reversal of the burden of proof. However, a requirement of proof of an actual intention or awareness as to the subsequent terrorist act would limit the crime of financing to the equivalent of inchoate offences, which is not supported by the Convention and the FATF.

With regard to the financing of terrorist groups, different alternative fault elements have been tested. It has been illustrated that mere knowledge of the identity of the recipient of funds would not suffice for the offence as it sweeps up both guilty and non-guilty mental states into the scope of liability. It also imposes liability on well-intention financers who seek to provide resources to non-violent humanitarian and political activities of a group. Multiple legal challenges would also target any higher intent requirements (recklessness or specific

intent), including arguments based on vagueness, overbreadth and the requirement of the presumption of innocence. This is because, in the absence of commission of any terrorist act, a financer should have “terrorist purposes”; but the term ‘terrorist purposes’ has not been defined. It has been argued that the application of terrorist purposes as a mental requirement could result in the creation of a whole new class of political crimes.