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**SUPPRESSION OF TERRORIST FINANCING:
OVER-CRIMINALIZATION THROUGH
INTERNATIONAL LAW**

A thesis

submitted in fulfilment

of the requirements for the degree

of

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THE UNIVERSITY OF
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Abstract

In the last few decades, there has been a considerable effort, mainly from Western liberal States, to create and develop an internationally harmonized counter-terrorist financing regime through international treaties, soft laws and Security Council resolutions, and to diffuse this regime into domestic laws. Aimed at preventing terrorism, this regime has introduced two types of measures: financial measures which involve financial institutions in the fight against terrorism, and penal measures which rely on criminalization, freezing and confiscation tools. This thesis examines the penal measures, the notions on which these measures are based, their scope and structure, the human-rights implications arising from their implementation and their consistency with the principles of criminal law. The main idea behind the adoption of these penal measures is to prevent any terrorist activities at early stage and before they are actualized. So, the measures have been designed to target any financing activities that contribute to, or facilitate, the preparation or commission of any terrorist act, or the activities of those involved in terrorist activities even when there is a tenuous or no link between the financing acts and an actual terrorist act. But there are two challenges that this regime faces: defining what is terrorism, terrorist acts or terrorist groups, the financing of which should be tackled, and whether and how far criminal law should be justifiably expanded to criminalize financing of terrorism or confiscate terrorist funds when there is no connection between acts of financing or funds and actual terrorist acts. This thesis illustrates how the lack of consensus on the definition, scope and elements of terrorism (terrorist acts, terrorist groups) has resulted in the adoption of different definitions of terrorism in contradiction with the principle of legality. This also raises doubts as to the effectiveness of the regime in terms of the enforcement of a harmonized counter-terrorist financing measures (although their effectiveness is not discussed here). The thesis argues that the expansion of the reach of criminal law to suppress activities which are not clearly and reasonably closely connected to the commission or preparation of terrorist activities is vague and unjustifiable in terms of the rule of law (especially values of legal certainty) and principles of the criminal law of Anglo-American States which have played a significant role in adoption and development of the regime. The implementation of these measures is in gross violation of some of the basic human rights and values that these States have been promoting.

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3. Hamed Tofangsaz, “Confiscation of terrorist funds; can the EU be a useful model for ASEAN?” *UCLA Pacific Basin Law Journal*, (2017), Vol. 34, Iss. 2. pp. 149-213.
4. Hamed Tofangsaz, “Rethinking terrorist financing; where does all this lead?” *Journal of Money Laundering Control* (2015), Vol. 18 Iss: 1, pp.112 – 130.
5. Hamed Tofangsaz, “Terrorism or not terrorism? Whose money are we looking for?” *Journal of Financial Crime* (2015), Vol. 22 Iss: 3, pp.378 – 390.
6. Hamed Tofangsaz, “A new approach to the criminalization of terrorist financing and its compatibility with Sharia law”, *Journal of Money Laundering Control* (2012), Vol. 15 Iss: 4, pp.396 – 406.

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11. Hamed Tofangsaz, “Counter-terrorist financing laws and principles of Shari’ah: dancing to the same beat?”, *The 9th Asian Law Institute (ASLI) Annual Conference*, May 31, 2012, Singapore.

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Chapter One: Introduction

1.1 Background

Although terrorism is not a new phenomenon,¹ since the end of World War II, there has been widespread concern over the “intensity and urgency” of attacks on civilians or civilian property, carried out with the purpose of frightening ordinary people or states or international organizations into acting in a particular way or desisting from action.² To deal with this phenomenon called terrorism, the United Nations has created a global system of counter-terrorism treaties. The aims of these treaties are to target specific threats such as hostage taking³ or hijacking⁴ regarded as terrorist acts without defining or applying the term terrorism.⁵ Using the traditional principles of criminal law, these treaties consist of a set of provisions defining the offences sanctioned by these treaties.

The only exception to this approach is the adoption of the International Convention for the Suppression of the Financing of Terrorism (hereinafter Terrorist Financing Convention).⁶ The Convention requires the criminalization of terrorist financing as an independent offence in spite of the facts that such criminalization requires an agreement on a generic definition of terrorism, the financing of which should be criminalized, and in spite of whether traditional criminal law can accommodate terrorist financing, a preparatory conduct dealt with by the law of complicity or inchoate offences, as an independent offence.

The introduction of the Terrorist Financing Convention should be regarded as a shift to a pre-emptive approach adopted by some Western liberal States in their

¹ See Gérard Chaliand and Arnaud Blin *The History of Terrorism: From Antiquity to al Qaeda* (University of California Press, Berkeley, CA, 2007).

² Micheline Calmy-Rey in Mark Pieth, Daniel Thelesklaf and Radha Ivory *Countering Terrorist Financing: The Practitioner's Point of View* (Peter Lang, Bern, 2009), at vii.

³ *The International Convention Against the Taking of Hostages* (New York, 17 December 1979).

⁴ *The Convention for the Suppression of Unlawful Seizure of Aircraft* (the Hague, 16 December 1970).

⁵ Although the term “terrorist” is used in the title of the convention on bombings, the term terrorist bombing is not used anywhere in the text. See *UN International Convention for the Suppression of Terrorist Bombings* (New York, 15 December 1997), (hereinafter the Terrorist Bombing Convention).

⁶ *UN International Convention for the Suppression of the Financing of Terrorism* (New York, 9 December 1999), (hereinafter the Terrorist Financing Convention).

domestic law to “criminalizing acts that have never happened to deal with threats that are not yet and may never be”.⁷ Advocating the necessity of a shift to this approach in “the war on terror”, the former US president, George W Bush argued that

for much of the last century, America's defense relied on the Cold War doctrines of deterrence and containment. In some cases, those strategies still apply. But new threats also require new thinking. Deterrence, the promise of massive retaliation against nations, means nothing against shadowy terrorist networks with no nation or citizens to defend. ... If we wait for threats to fully materialize, we will have waited too long. ... We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.

This argument was a driving factor in the formulation of the Terrorist Financing Convention proposed a few years before September 2001 by some of the Western States which intended to internationalize the use of a pre-emptive approach in the fight against terrorism. As will be explored, a call for the adoption of measures to counter terrorist financing was officially issued in G7/8 ministerial meetings in 1995.⁸ In 1999, a draft of a convention on terrorist financing, a French initiative at a G8 summit,⁹ was proposed to the United Nations.¹⁰ The draft regarded terrorist financing as “a matter of grave concern to the international community”,¹¹ which it thought needed to be tackled independently. After two weeks of negotiations, the Terrorist Financing Convention was adopted by consensus and the offence of terrorist financing was introduced as an autonomous offence. However, until

⁷ McCulloch, J. “Precrime: Imagining future crime and a new space for criminology”, in M. Segrave (Ed.), *Conference Proceedings: Australian & New Zealand Critical Criminology Conference 2009*, Australia: Criminology, School of Political & Social Inquiry, Monash University, at 151

⁸ Foreign Affairs and International Trade *Ottawa Ministerial Declaration on Countering Terrorism: P-8 Ministerial Conference on Terrorism* (Ottawa, Canada, 12 December 1995). See also U.S. Department of State *Ministerial Conference on Terrorism, Paris, France; July 30, 1996* (Paris, 1996)). 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?” (2002) <<http://www.g8.utoronto.ca/governance/belelieu2002-gov8.pdf>>.

⁹ Ministry of Foreign Affairs Japan *Foreign Ministers' Progress Report: Denver Summit of the Eight* (Tokyo, 1997).

¹⁰ 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).

¹¹ The Terrorist Financing Convention, above n 6, Preamble.

September 2001, only four states had ratified the Convention. The Convention now has 132 signatories and 188 parties.

The 9/11 attacks, nevertheless, created an opportunity for pushing through this pre-emptive approach reflected in the Terrorist Financing Convention, but it was never welcomed by most states. Therefore, substantial efforts have been taken to assure that this approach is adopted by states in the fight against terrorist financing. The Financial Action Task Force (hereinafter the FATF), an inter-governmental body established by the G7/8 in 1989 to counter money laundering, agreed to set out specific recommendations for dealing with terrorist financing.¹² Since 2001, the United Nations Security Council has also been dealing with the issue of terrorist financing by adopting some quasi-criminal law measures. Assuming that terrorism is closely and heavily connected to criminal (organized) activities, these international organizations (the United Nations, the FATF, and the UN Security Council) created and perpetuated a regime of measures to counter terrorist financing. This regime, relying on a pre-emptive approach, provides two types of preventive measures:

- a) Financial measures: Emphasizing a risk-based approach, these preventive measures centre on the role of financial institutions in preventing terrorist financing from occurring in the first place. These measures will not be discussed by this thesis.
- b) Penal measures: These aim at the enforcement of the criminal law in relation to the acts of financing of terrorism. The two main penal legal devices used in the fight against terrorist financing are criminalization of financing terrorism and the freezing and confiscation of terrorist funds.

There has been a great deal of analysis of the effectiveness of domestic measures against terrorist financing, but not of the international regime created by the Convention itself. In this thesis, I will only examine the penal measures (criminalization and confiscation) closely and exhaustively.

¹² Financial Action Task Force *FATF guidance: criminalising terrorist financing (Recommendation 5)* (October 2016), at [1].

1.2 The notion underpinning the penal measures

Under the Convention (and the guidance of the FATF's recommendations), states are asked to criminalize terrorist financing and confiscate terrorist funds without a link to, or the existence of, a terrorist act.¹³ The underlying idea on which this pre-emptive approach is based is that, because terrorism is a serious offence which relies heavily on the funds derived from criminal (organized) activities, it should be tackled at a very early stage before it is actualized. This seems to be the main justification for the enactment of a wide range of terrorism-related offences, including terrorist financing, which criminalize preparatory conduct, as a stand-alone offence, even in the absence of the connection between the alleged preparatory conduct and terrorist activities. However, in the absence of such a connection, the main difficulty is identifying the origin of the criminality of the impugned conduct. As will be discovered, the offense, in its current formulated form, relies heavily on its mental element to remedy this ambiguity—that is, it is the mental element of a terrorist financing offender, which is the basis of the imposition of criminal liability or confiscation sanctions.¹⁴ This approach has expanded the boundary of the criminal law to enable it to include activities and associations that are not normally criminalized as independent offences under conventional criminal law, due to their preparatory nature or because the connection to the possible subsequent offences for which they are carried out is vague.

As explained, the adoption of this approach by the Terrorist Financing Convention, FATF and the UN Security Council has been defended on the grounds of the heinous and catastrophic effects of terrorist attacks. In other words, the counter terrorist financing measures' purpose is to prevent terrorist attacks pre-emptively by disturbing and dismantling the financial capabilities of terrorists, terrorist groups and their supporters long before their resources turn into catastrophes. There is no doubt that law should be used not only to deal with harmful and wrongful conduct such as terrorism, but also with conduct that falls short of causing actual harms but which contributes to or facilitates the commission of potential terrorist attacks.

¹³ See Article 2 of Terrorist Financing Convention. Financial Action Task Force "International standards on combating money laundering and the financing of terrorism & proliferation" February 2012, at 11.

¹⁴ Marja Lehto *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts* (M. Nijhoff Publishers, Boston, MA, 2009), at xxxiv.

Indeed, criminalization of attempts is a well-rationalized subject of criminal law which has its own rules and boundaries. As Antony Duff argues “a law that condemned and punished actually harm-causing conduct as wrong, but was utterly silent on attempts to cause such harms and on reckless risk-taking with respect to such harms, would speak with a strange moral voice”.¹⁵ But the question is how far criminal law can (or should) be stretched to fulfil this task? Does criminalizing terrorist financing, which fits neatly into the category of the law of attempt or inchoate offence, as an independent offence without a link to any terrorist act push criminal law beyond its limits?

My main purposes in this thesis are to examine the justifiability of the adoption and development of this approach to criminalising terrorist financing and confiscating terrorist funds as well as identifying the legal issues and challenges that arise from its implementation. It should be noted that my purpose in this thesis is neither to question the basic need for countering terrorist financing nor to provide a lesson in the arcane history of the laws on terrorism; instead, it is to draw attention to the actual and potential dangers which may be inherent in counter-terrorist financing measures. In addition, I will not examine whether the regime has been effective in terms of cutting off terrorists’ funds; instead, I will examine whether it has been based on a theoretically and conceptually correct foundation in such a way that these laws’ implementation does not harm (innocent) citizens, violate their rights or pervert the criminal law.

1.3 Research questions

To achieve the purpose of the research, I shall seek to answer the following questions:

1. What is terrorist financing? And how has it been dealt with?
2. What is the basis of criminal liability when there is no connection between financing and any criminal (terrorist) activity? Does the terrorist financing offence extend criminal liability based on *mens rea* vaguely and unjustifiably?

¹⁵ Antony Duff “Perversions and Subversions of Criminal Law” in Antony Duff and others (eds) *The Boundaries of the Criminal Law* (Oxford University Press, Oxford, UK, 2010), at 91.

3 Are the criminalization and confiscation of terrorist financing in the way that international treaties have been adopted and diffused understandable, justifiable, and consistent with the accepted principles of criminal law and the principle of legality?

1.4 The main hypotheses

The main hypothesis of the thesis is that this extension is untenable in terms of existing principles of criminal law. This breaks down into the following arguments:

1- A distinctive effort has been forthcoming from the international community to push the idea that terrorism and organized crimes are closely connected, so an approach similar to that taken to counter organized crimes and money laundering can be taken to address terrorist financing. It is the submission of the thesis that the counter-terrorist financing regime which relies on this idea is fundamentally flawed partly because basic facts about the nature and characteristics of terrorist financing have been ignored.

2- Criminalization of terrorist financing as an independent offence, in the way drafted in the Terrorist Financing Convention and diffused by the UN Security Council and FATF, stretches out the boundaries of criminal liability beyond the principles of criminal law and beyond the limits of existing limits of preventive measures around 'attempts' which penalise conduct preparatory for crimes. Such a poorly-defined and vague offence can result, as will be explored, in massive variations in its application (criminalization and confiscation), in the violation of the principle of legality and of some of the principles of criminal law.

3- The incorrect conceptualization and criminalization of terrorist financing pave the way for the inaccurate use of freezing and confiscation tools. Obviously, the aim of freezing or confiscation is to enhance the effectiveness of criminal justice systems in the fight against any type of profit-driven (or high cost attempted) crime. However, the appropriateness of the asset freezing and confiscation measures defined under the terrorist financing regime in the fight against terrorist financing, where the money might not be the fruit of crime or not connected to any terrorist act, can be challenged in the light of human rights limitations. This may also

challenge the asset-freezing regime adopted and developed by the UN Security Council, which can be argued as insufficient to address these human rights concerns.

1.4.1 Vagueness and the rule of law

Based on the “traditional understanding of the rule of law doctrine”,¹⁶ this thesis claims that the penal measures on terrorist financing are unjustifiably vague and therefore in contradiction with the rule of law. Under this thesis, a law is vague when it fails to offer “guidance as to what the law is in relation to particular issues”,¹⁷ vague laws grant discretion “without standards for its exercise”,¹⁸ or without access to any “methodological tools” for its interpretation.¹⁹ Standards or methodological tools may “be available outside a law e.g. on the basis of general principles”.²⁰ Sometimes, the context of a law determines its meaning and application.²¹ Therefore, a law is not vague if the law takes an open form, but at the same time its “context” can be determined by existing standards and methodological tools, or by reference to its context. For example, the law that requires driving ‘reasonably’ is not vague,²² although it has an open form, if the law offers “a definite interpretation of the word reasonable”,²³ or provides guidance on how its vague form shall be filled, i.e. “how discretion is to be applied”.²⁴

The terrorist financing penal measures, however, do not fall within any of these exceptions. They pose two types of vagueness in the sense defined above (granting discretion without offering methods and standards for their exercises): ‘structural vagueness’ which refers to the vagueness of the structure of the terrorist financing offence under which it is not clear and determinable, when there is no terrorist act

¹⁶ Lutz-Christia Wolff “Law and Flexibility - Rule of Law Limits of a Rhetorical Silver Bullet” 2011 11 Journal Jurisprudence 549, at 559.

¹⁷ At 551.

¹⁸ P. S. Atiyah and Robert S. Summers *Form and substance in Anglo-American law : a comparative study of legal reasoning, legal theory, and legal institutions* (Clarendon Press, Oxford, 1987), at 74.

¹⁹ Wolff, above n 16, at 556.

²⁰ At 556.

²¹ *Grayned v. City of Rockford*, 408 U.S. 104 (1972) at 112. See also *Boos v. Barry*, 485 U.S. 312 (1988), at 332.

²² Robert S. Summers “How Law Is Formal and Why It Matters” 1997 82(5) Cornell Law Review 1165, at 1218.

²³ Wolff, above n 16, at 557.

²⁴ Lutz-Christia Wolff “Flexible Choice-of-Law Rules: Panacea or Oxymoron?” 2014 10(3) Journal of Private International Law 431, at 434.

planned, attempted or committed, where the criminality of financing activities can be derived from. Although the offence relies on the mental state of the accused in imposing criminal liability, in the absence of the existence or preparation of a terrorist act, what a financier should know or intend to be held criminally liable is not specified. Even if one finds a meaning for it, as will be argued in chapters 7 and 8, such an approach to criminalization is unjustifiable in terms of existing principles of criminal law, as will be discussed in chapter 9.

This structural vagueness also leads to confusion over the certainty and determinacy of the meaning and application of each elements of the offence. This vagueness is called by the thesis ‘definitional vagueness’. For example, as chapter 6 points out, it is not clear, in the absence of a connection between financing or funds and a terrorist act, whether and how providing legal advice to a terrorist group constitutes the terrorist financing offence.

The jurisprudential question is if vague law is permissible. To put it another way, how can the values of the rule of law be maintained when a law is vague? This is a very controversial topic of jurisprudence and it is beyond the scope of this research to include a comprehensive discussion on this jurisprudential matter. But it is important to clarify the stance of the thesis on this matter.

The debate around the permissibility or justifiability of vague laws has received significant attention mostly from Anglo-American realists since the first half of the last century.²⁵ Representing this school of thought, H.L.A. Hart, an English legal positivist, argues that

[w]hichever device, precedent or legislation, is chosen for the communication of standard of behaviour, these, however smoothly they work over the great mass of ordinary cases, will at some point where their application is in question, prove indeterminate. They will have what has been termed *open texture*. ... Uncertainty

²⁵ See Karl N. Llewellyn *The bramble bush : on our law and its study* (Oceana Publications, New York, 1951); Karl N. Llewellyn “Some Realism about Realism: Responding to Dean Pound” 1931 44(8) *Harvard Law Review* 1222. Felix Cohen “The Ethical Basis of Legal Criticism” 1931 41(2) *The Yale Law Journal* Andrew Dickinson “Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?” 2007 3(1) *Journal of Private International Law* 53.

at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact.²⁶

Going further, some argue in the favour of the benefits of vague law.²⁷ It is argued that there are some occasions when vague laws are needed; for example, when law makers intend to regulate “a diverse pattern of human conduct”²⁸ in a general way (e.g. the offence of driving in dangerous manner).²⁹ It is pointed out that the advantage of such a vague law is that it can be “interpreted reasonably when they are applied to situations and to types of problems that their authors did not foresee or could not have foreseen.”³⁰ However, the argument of this kind does not deal with the question of how vague laws and the rule of law should interact.

The formation of vague law is also regarded as a natural response to our current “social environment characterized by rapid economic, social and technological change”.³¹ Under this view, such a change in modern-late societies has resulted in “deep existential feelings of insecurity [in citizens], which are rooted in an unstable fluid, globalized capitalist world that glorifies a society of consumers presumed to be capable of endless reshaping and recreating their individual selves”.³² This condition of contemporary societies is argued to

provoke uncontrollable anxieties emanating from the experience of uncertain future and insecure present. These feelings, because of their undetermined and uncontrollable nature, are easily transformed into more palpable and controllable fears, fears related to the safety of one’s own body, family, home and possessions.³³

²⁶ H. L. A. Hart *The Concept of Law* (Oxford University Press, London, 1972), at 128.

²⁷ See for example Adam Gearey, Robert Jago and Wayne Morrison *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (Routledge-Cavendish, 2008). Roscoe Pound *An introduction to the philosophy of law* (Yale University Press, 1922). Ofer Raban “The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism” 2010 19(175) *Boston University Public Interest Law Journal* 175.

²⁸ Timothy Endicott “Vagueness and Law” in Geert Keil and Ralf Poscher (eds) *Vagueness and Law: Philosophical and Legal Perspectives* (Oxford University Press, 2016), at 178.

²⁹ Land Transport (Enforcement Powers) Amendment Act 2009 (New Zealand), Article 12.3

³⁰ Brian Bix *Law, language, and legal determinacy* (Clarendon Press, Oxford, 1993), at 8.

³¹ Mark Fenwick, Mathias Siems and Stefan Wrzka *The Shifting Meaning of Legal Certainty in Comparative and Transnational Law* (Hart Publishing, London, 2017), at 2. See also Hart, above n 26, at 126.

³² Michal Krolkowski and Erik Claes “The Limits of Legality in the Criminal Law” in Erik Claes, Wouter Devroe, and Bert Keirsbilck (eds) *Facing the Limits of the Law* (Springer, Belgium, 2009), at 95.

³³ At.

This has shaped a new pattern of thinking and reacting to threats, called a “culture of control”.³⁴ A culture of control aims “to respond to and control risks that poses a threat to safety”.³⁵ In other words,

A ‘culture of control’ is not just a series of practices that try to respond to the insecurities of contemporary life, it is also a complex of collective strategies through which original, existential anxieties are “recycled into panic-arousing threats to safety” and are subsequently managed through a broad range of social and political habits.³⁶

It is concluded that the emergence of a culture of control has resulted in cutting off “many legislators from their sense of legality and its guarantee-providing role”.³⁷ The example of this is the proliferation of new criminal offences which criminalize preparatory conduct which may criminalize a risk of harm even in the absence of a link to an actual criminal conduct. Many of these offences expand the scope of criminal law beyond its traditional boundaries by relaxing “the requirement of precisely formulating” a criminal offence.³⁸

Admitting vagueness is a potential or intrinsic component of law, some seek to resolve the issue of vagueness and indeterminacy of laws during the process of their application. According to this view, vague laws remain vague until they are applied to an individual case in particular circumstances.³⁹ Hart places a great emphasis on the role of legal “officials” (especially courts) in determining the meaning of a vague law.⁴⁰ He argues that

[t]he open texture of the law means that there are, indeed, areas of conduct which must be left to be developed by courts or officials striking a balance, in the light of

³⁴ David Garland *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, Oxford, 2001).

³⁵ Krolikowski and Claes, above n 32, at 94.

³⁶ At 95.

³⁷ At 96.

³⁸ At.

³⁹ Wolff, above n 16, at 565.

⁴⁰ Hart, above n 26, at 125-126. Jeremy Waldron “Vagueness in Law and Language: Some Philosophical Issues” 1994 82(3) *California Law Review* 509. Andrew Altman “Legal Realism, Critical Legal Studies, and Dworkin” 1986 15(3) *Philosophy & Public Affairs* 205. Günter Frankenberg “Down by Law: Irony, Seriousness, and Reason” 1989 83(I & 2) *Northwestern University Law Review* 360. Ronald Dworkin *A matter of principle* (Harvard University Press, Cambridge, Mass ; London, 1985).

circumstances, between competing interests which vary in weight from case to case.⁴¹

However, Hart does not clarify how his theory of “open texture” corresponds with the rule of law requirements, specifically legal certainty.⁴²

There are others who seek to reconcile the rule of law and what they regard as law’s potential vagueness. For example, Neil MacCormick, who emphasizes what he calls the “dynamic aspect” of laws, argues that

[t]here is a risk of misunderstanding the ‘Rule of Law’ as an ideal taken in isolation. Then, perhaps, we stress its more static aspects, centring on legal certainty and security of legal expectations. But it has a dynamic aspect as well, centring on rights of the defence, and the importance of letting everything that is arguable be argued. In this dynamic aspect, the arguable [or vague] character of law is no antithesis of the Rule of Law, but one of its components.⁴³

Similarly, Jürgen Habermas, associated with the Frankfurt School, admits that “all norms [laws] are inherently indeterminate”.⁴⁴ He argues that in the application of (vague) laws, that “procedural rights guarantee each legal person the claim to a fair procedure that in turn guarantees not certainty of outcome but a discursive clarification of the pertinent facts and legal questions”.⁴⁵ Nonetheless, these approaches towards reconciling vague laws and the rule of law are criticized for, in the case of MacCormick, failing to “explain what this exactly means for the rule-of-law doctrine”,⁴⁶ or for, in the case of Habermas, equating “procedural certainty and certainty vis-a-vis substantive law” which “stands in the centre of the traditional rule of law doctrine”.⁴⁷

⁴¹ Hart, above n 26, at 135.

⁴² Wolff, above n 16, at 556.

⁴³ Neil MacCormick *Rhetoric and the rule of law : a theory of legal reasoning* (Oxford University Press, Oxford, 2005), at 31. Similarly, Tamanaha argues that “when ambiguities and doubts exist in a given situation of rule application, they are resolved through reasoned analysis”. See Brian Z. Tamanaha *On the rule of law : history, politics, theory* (Cambridge University Press, Cambridge, New York, 2004), at 88.

⁴⁴ Jürgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press, Cambridge, 1996), at 217

⁴⁵ At 220.

⁴⁶ Wolff, above n 24, at 440.

⁴⁷ Wolff, above n 16, at 557.

For similar reasons, this thesis rejects any other arguments seeking to establish and justify a relationship between vagueness and the rule of law. In fact, a law cannot be made vaguely. Any vague law is inconsistent with the underlying values of the rule of law, especially those of legal certainty explained below. “Dismissing the notion of legal certainty would ... affect the rule of law doctrine at its core and nobody has convincingly explained why and how this could be justifiable”.⁴⁸

Defining the minimum requirements of acceptable and genuine laws, Lon L. Fuller regards legal certainty as “one of the most essential ingredients of” the rule of law”,⁴⁹ which embodies the “absolute supremacy of predominance of regular law”.⁵⁰ Fuller argues that failing to comply with any of the underlying values of the rule of law, including legal certainty, “does not simply result in a bad system of law; it results in something that is not properly called a legal system at all”.⁵¹

Legal certainty requires law to comply with some legal values such as “predictability, learnability of law, fair notice, the dignity and efficiency of citizen self-direction under law, equality before the law, [and] freedom from official arbitrariness”.⁵² In other word, legal certainty requires:

1- The conceptual content of a law be “specific and immediately intelligible”⁵³; thus, “those subject to the law must know what the law is so that they can abide by it and plan their lives accordingly”.⁵⁴

⁴⁸ At 560.

⁴⁹ Lon L. Fuller *The morality of law* (Yale University Press, United States of America, 1964), at 63.

⁵⁰ Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (8th Revised edition ed, Liberty Fund Inc, 1982), at 202.

⁵¹ Fuller, above n 49, at 39.

⁵² Summers, above n 22, at 1216.

⁵³ At 1217. A US court, in *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008), at [1846], held that a law is vague and therefore void when it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement”.

⁵⁴ James R. Maxeiner “Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?” 2007 15(2) *Tulane Journal of International and Comparative Law* 541, at 549. See also Takis Tridimas *The General Principles of EU Law* (2 edition ed, Oxford University Press, 2006), at 242.

2- A law must be “factually realisable”⁵⁵ in the sense that the facts on which it turns “are easily and readily determinable”.⁵⁶ It should “exclude other substantive considerations that could operate at point of application”.⁵⁷

3- A law should not call upon citizens to make judgment on their own as to what law may forbid or permits. “Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than [they would] if the boundaries of the forbidden areas were clearly marked.”⁵⁸

4- A law should accord citizens “the dignity and efficiency of self-direction without official intervention”;⁵⁹ such official intervention “would diminish the dignity and efficiency of citizen self-direction under law”. The concept of legal certainty is strongly linked to the main notion of the liberal jurisprudence according to which people should be able to predict the consequences of their action and therefore maximize their freedom of choice.

5- A law should promise equality before the law and still more freedom from official arbitrariness by reducing “the opportunities for officials to treat similar cases differently”.⁶⁰

Under such values, vague laws have no place in a rule of law-based legal system. In fact, a law which is not predictable, learnable, which does not give fair notice to citizens, or respect their dignity and efficiently of citizens self-directions, and which does not safeguard their equality before the law, and freedom from official arbitrariness is perhaps arguably void.

This thesis similarly rejects the position of those who attempt to bypass the-rule-of-law issue of vague laws by arguing that certain degrees of vagueness, or certain

⁵⁵ Robert S. Summers *The jurisprudence of law's form and substance* (Ashgate, Aldershot, 1999).

⁵⁶ Summers, above n 22, at 1217.

⁵⁷At.

⁵⁸ *Grayned v. City of Rockford*, 408 U.S. 104 (1972) at [109]. See also *Musser v. Utah*, 333 U.S. 95 (1948), at [9].

⁵⁹ Summers, above n 22, at 1217.

⁶⁰ *Kolender v. Lawson*, 461 U.S. 352 (1983).

degrees of certainty within vague law are permissible.⁶¹ As Lutz-Christian Wolff points out:

[t]he reference to degrees of flexibility [or vagueness] is, however, misleading. This is because the relationship between legal certainty and flexibility is a mutually exclusive one. Either there is legal certainty or there is rule-inherent flexibility. It is logically impossible to allow both at the same time, as legal certainty will necessarily disappear with the introduction of the tiniest element of flexibility. Moreover, allowing degrees of flexibility would in practice require the quantification of those degrees of flexibility that are allowable. And such quantification would be practically impossible.⁶² It also follows that the often quoted tension between flexibility and legal certainty does simply not exist. In fact, it cannot exist. Legal rules are either flexible [vague] or they provide for legal certainty. Rule-inherent flexibility is nothing else but an oxymoron.⁶³

Wolff elsewhere argues that

the requirement of legal certainty is absolute and does not allow bits of it to be sacrificed without giving up the concept altogether. In other words, legal certainty with some flexibility is not possible. It is either all or nothing.⁶⁴

Relying on the jurisprudential basis set out here, the thesis will test the penal measures on terrorist financing against the underlying values of the rule of law, especially those of legal certainty mentioned above. The discrepancies between these measures and the values of rule of law will be regarded as shortfalls of the counter-terrorist financing regime and consequently unjustifiable.

⁶¹ See for example, MO Chibundu “Globalizing the Rule of Law: Some Thoughts at and on the Periphery” 1999 7(1) *diana Journal of Global Legal Studies* 79; Symeon C. Symeonides “The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons” 2008 82(5) *Tulane Law Review* 1741; Edoardo Vitta “The Impact in Europe of the American ‘Conflicts Revolution’” 1982 30(1) *American Journal of Comparative Law* 1.

⁶² Wolff, in another paper, revisits this point. He argues that “in order to achieve a balance between flexibility [vagueness] and legal certainty or to allow (only) certain degrees of flexibility it is necessary to identify those factors which determine if and when flexibility and legal certainty are balanced. In other words, it must be established which degrees of flexibility are allowable and why. This is an impossible task in practice and nobody has consequently ever been able to explain how degrees of flexibility can be quantified. See Wolff, above n 24, at 439.

⁶³ See also Kirby. Joseph Singer claims that liberal legal theory requires substantial determinacy to satisfy the requirements of the rule of law.

⁶⁴ Wolff, above n 24, at 439.

1.5 Literature review and contribution of the thesis

Terrorist financing, adoption of effective measures to stop it and the implications that arises from the implementation of these measures have become increasingly attractive topics for many scholars of different fields. This research, nevertheless, will make reference to those legal studies whose focus is on the suppression of terrorist financing through criminal law.

There are numerous works on the nature and characteristics of the phenomenon of terrorist financing and its nexus with other crimes.⁶⁵ Also, there are detailed studies on the penal measures, introduced by the Terrorist Financing Convention, its diffusion and implementation.⁶⁶ Many of these works provide an explanation of the nature of the regime, its measures and their importance in maintaining safety and security. However, not much research has been undertaken to examine the credibility of the notions that the regime is based on; nor are there many works examining the criminalization or confiscatory measures in terms of their nature, scope and their clarity.

One of the few scholarly works which extensively details the creation, and substances of the offence of terrorist financing is conducted by Marja Lehto. She, in a chapter of her book titled *indirect responsibility*, seeks to decipher the meaning of the elements of the offence, introduced by the Convention, by making reference to the Rome Statute.⁶⁷ Although she brilliantly identifies how the “heavy reliance” on the mental element of the terrorist financing offence extends the scope of the notion of criminal liability accepted by the Rome Statute of the International Criminal Court, her research lacks specific discussion on what is the precise basis of criminality liability when there is vague, or no, connection between financing

⁶⁵ See for example Jodi Vittori *Terrorist Financing and Resourcing* (Palgrave Macmillan, New York, NY, 2011). Daniel Byman *Trends in Outside Support for Insurgent Movements* (Rand, Santa Monica, CA, 2001). Bruce Hoffman *Inside Terrorism* (Rev. and expanded ed, Columbia University Press, New York, NY, 2006).

⁶⁶ See for example Jae-Myong Koh *Suppressing Terrorist Financing and Money Laundering* (Springer, Berlin, 2006). Or Neil Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, UK, 2012), Chapter 6. Pierre-Laurent Chatain *Preventing Money Laundering and Terrorist Financing: A Practical Guide for Bank Supervisors* (World Bank, Washington, DC, 2009). Roberto Durrieu *Rethinking Money Laundering & Financing of Terrorism in International Law: Towards a New Global Legal Order* (Martinus Nijhoff, Leiden, 2013). Ilias Bantekas “International Law of Terrorist Financing” 2003 97(2) American Journal of International Law 315.

⁶⁷ Lehto, above n 14, chapter 6.

and an actual terrorist act. There are other shorter research projects (in the format of journal articles) undertaken;⁶⁸ however, similar to Lehto's research, they have missed the discussion on how the ambiguous, poorly-defined elements of the terrorist financing offence is perceived by states and implemented in their domestic law. They also did not identify the inconsistency of these measures with principles of criminal law, nor the human rights implications that arise from the implementation of the offence at national level; and they fail to examine the compatibility of these measures with the human rights and basic principles of criminalization.

With regard to the confiscatory measures, no research, to the best knowledge of the author, has been undertaken. However, there has been extensive research on asset-freezing regime created and developed by the UN Security Council.

This project seeks to bring out a unique study that has a fresh angle on the topic. It seeks to examine the notions on which the penal measures are based, the elements of the offence of terrorist financing, their meaning, and their application in domestic laws. It also seeks to identify the inconsistencies of these measures with principles of criminal law and the human rights issues that arise from their implementation in domestic jurisdictions. Relying on the basic and accepted principles of criminalization, at the heart of the research is the investigation on why the imposition of these measures have gone so wrong.

1.6 Structure of the thesis

This thesis consists of fourteen chapters, including chapter 1 (Introduction) and chapter 14 (Conclusion).

The first three chapters are concerned with the background to the issue of terrorist financing. Chapter 2 explores the nature and characteristics of terrorist financing, terrorists' and terrorist groups' needs and the way their needs are met and their

⁶⁸ See for example, Roberto Lavalle "The International Convention for the Suppression of the Financing of Terrorism" 2000 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 491. Anthony Aust "Counter-Terrorism - A New Approach; The International Convention for the Suppression of the Financing of Terrorism" 2001 5 *Max Plank Yearbook of United Nations Law* 285. Mark Pieth "Criminalizing the Financing of Terrorism" 2006 4(5) *Journal of International Criminal Justice* 1074.

activities are funded. The exploration in this chapter of how terrorists meet these needs provides a footing for the examination, in the rest of the thesis, of the credibility and reliability of the concept that underpins the expansive approach and broad legal measures taken to counter terrorist financing, with a very tenuous link to actual acts of terrorism.

Chapter 3 examines in detail the background of the Terrorist Financing Convention, the ideas on which the Convention was drafted and the nature of the negotiation discussions which led to its adoption. This entails an examination of how the drafters of the Convention encountered two main challenges: first, how to define terrorism, terrorist acts, terrorist 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. Chapter 4 examines the FATF's recommendation that terrorist financing should be criminalized as a predicate offence of money laundering. The FATF is of the opinion that due to the link and nexus between terrorism and organized crime, terrorist financing can be adequately targeted under already existing measures (anti-money laundering measures) established to prevent the financial aspect of (organized) criminal activities. This chapter will assess whether it is reasonable to legislate to prevent terrorist financing on the basis of analogies with money laundering.⁶⁹

The four chapters that make up the central part of the thesis scrutinize the elements of the introduced offence in great detail, engaging in a critique of its foundational elements. Chapter 5 examines the definition of terrorism, terrorist and terrorist group. The main question it confronts is whether the counter-terrorism financing regime provides a solid platform for a better understanding of what is terrorism, a terrorist act or a terrorist group financing of which is the subject matter. Chapter 6 will explore the *actus reus* of the offence, which consists of the collection and provision of funds. It will examine a very important question: when there is no connection between acts of financing or funds and an actual (or planned) terrorist

⁶⁹ This question has been also examined by Armand Kersten from a "methodological" perspective. See Armand Kersten "Financing of Terrorism - A Predicate Offence to Money Laundering?" in Mark Pieth (ed) *Financing Terrorism* (Kluwer, Dordrecht, 2002) 49-56.

act, whether, and if at all, and how, the *actus reus* of the offence should be interpreted in order for its criminalization to be justified.

Chapters 7 and 8 illustrate the key role of the mental element of the offence of financing terrorist acts defined by the Convention, FATF and the UN Security Council in imposing liability. They will discuss that the heavy reliance on poorly-defined and ambiguous fault elements (knowledge and intention) without linking to any (planned) terrorist act undermines the case for principled criminalization. Chapter 9 discusses the important question of how such criminalization has gone wrong. It examines the justifiability of the terrorist financing offence with regard to the principles and values that liberal criminal law is based on. The values of liberal criminal law are used as a yardstick because, as explained, the idea of criminalization of terrorist financing was proposed and developed mainly by Western liberal States. The diffusion of these criminalization measures has been overwhelmingly supported by those states or by the inter-governmental or international organizations backed by those states. It is apt, therefore to engage in a normative analysis of this offence against the values said to underpin liberal criminal law. For purposes of convenience, the chapter limits the scope of discussion of the issue to the context of Anglo-American criminal law.

The rest of the thesis examines the freezing and confiscation of the gathered funds, specific measures adopted by parties as a result of obligations in the Terrorist Financing Convention, the effective implementation of which depends on the way in which the offence is defined, the subject of preceding chapters. The UN Security Council has also adopted a number of resolutions which deal with freezing terrorist funds. The underlying question is how, in the presence of so many ambiguities in the definition of the terrorist financing offence, how are funds or property determined as terrorist funds, for the purpose of the application of these measures. In order to understand the complexity and function of modern forfeiture law, special attention needs to be devoted to the history of English law which has had a significant influence on the existing (now being globalized) laws on confiscation. For this reason, chapter 10 looks briefly at the historical concepts on which modern forfeiture law are based. It argues that the basis of current forfeiture laws is unfortunate reconstruction of some long abolished ancient concepts. Chapters 11

and 12 will discuss the human rights issues that arise from the adoption and implementation of seizure and confiscation provisions in the context of the European Union (EU). The EU and some of its Member States' approach towards seizure and confiscation of terrorist funds is used as a case study because the EU, as a value-based or human rights-based community, appears to have a strong commitment to fight against terrorism while maintaining fundamental principles, such as respect for the rule of law, good governance, fundamental freedoms and promoting human rights and democratic values. In addition, many of the EU's Member States have supported and are still supporting the creation and diffusion of the counter-terrorist financing regime.

Chapter 13 will examine the response of another regional community to the terrorist financing measures, namely the Association of Southeast Asian Nations (ASEAN). It does not examine why ASEAN or its Member States adopted and implemented the measures in a certain way, nor does it analyse the political or legal factors that shape their response to the measures. The main purpose in this chapter is to investigate and identify the possible problems that may arise from the application of the counter-terrorist financing measures introduced by the Convention, and diffused by FATF and its Western states' supporters in a non-Western environment.

Finally, chapter 14, the Conclusion, sums up the key findings of the thesis and the foundation for the thesis's hypothesis that the approach to criminalizing terrorist financing and confiscating terrorist funds irrespective of whether they are connected to any actual terrorist act is not only a deviation from principles of criminal law but also results in the violation of human rights and the miscarriage of justice.

1.7 Methodology

This thesis is a critical conceptual analysis of international and domestic laws on the criminalization of terrorist financing and confiscation and seizure of terrorist funds. It belongs to the category of doctrinal research as it is involved in identifying and analysing facts about terrorist financing (chapters 2 and 4), clarifying the law on terrorist financing (chapters 3 and 10), and determining human rights issues arising from its implementation (chapters 5, 6, 7, 8, 10, 11, 12 and 13). This is

carried out “by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources”,⁷⁰ and by understanding of rules and principles governing criminal liability, and by adopting “reasoning methods borrowing from philosophy and logic”.⁷¹ The thesis also engages in the interpretation of international law and recommendations on terrorist financing. This interpretation is, of course, limited by the rules of interpretation provided by the Vienna Convention on the Law of Treaties 1969. Article 31 of this convention states that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The thesis heavily relies on the supplementary means of the interpretation indicated by Article 32 the Vienna Convention;⁷² in particular, the thesis reviews the preparatory work of, and negotiations and discussion made by the State Parties on, the drafts of the Terrorist Financing Convention in order to determine the meaning of provisions at issue.

In addition, to show how the counter-terrorist financing regime has been diffused, the thesis examines states’ and regional parties’ subsequent practice when implementing the Convention particularly through the FATF and the Security Council as an interpretive tool. It specifically examines the approach of two influential regional communities, namely EU and ASEAN, to the adoption and implementation of the counter-terrorist financing measures (Chapters 10,11,12,13). As mentioned, the EU has been chosen because it is a value-based community which has a significant emphasis on the human rights and democratic values not only within the Europe but also in its dialogue with other states or regional communities. ASEAN has been chosen because its members are often accused of being authoritarian and not being in compliance with the human rights.

⁷⁰ Michael McConville and Wing Hong Chui *Research Methods for Law* (Edinburgh University Press, Edinburgh, 2007), at 4.

⁷¹ Terry Hutchinson “The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law” 2015 8(3) *Erasmus Law Review* 130, at 131.

⁷² Article 32 requires “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.”

Finally, the thesis also relies on the scholarly literature in interpreting the counter-terrorist financing measures and particularly the discussions on the conceptual underpinnings of criminalization of the terrorist financing as an independent offence. It examines the justifiability of these underpinnings with regard to the principles of liberal criminal law as recognised in Anglo-American states (chapter 9). It relies on the principles and values of liberal criminal law as a yardstick because the criminalization of terrorist financing was proposed and developed mainly by Western liberal States and are being diffused by the inter-governmental or international organizations backed up by them. It is apt, therefore, to engage in a normative analysis of this offence against the values said to underpin Anglo-American criminal law.

Chapter Two: What is terrorist financing?

2.1 Introduction

Before examining the legal tools adopted to counter terrorist financing, it is essential to understand, from a factual perspective, the nature and characteristics of terrorist financing as a transnational phenomenon. First, the process of terrorist financing will be examined in regard to the funding requirements of terrorists and terrorist groups, the sources of funds, and the methods and tools that terrorists use to raise, move and store their funds. Part 3 will address terrorism typologies on the basis of the strategies that terrorists apply to finance their activities. This chapter will not discuss the legal definition of terrorist financing, terrorism, terrorist acts or terrorist groups.

The discussions provided in this chapter will help to examine, in the following chapters, the credibility and reliability of the idea that underpins the approach and legal measures taken to counter terrorist financing, which does not require a link to the preparation or commission of specific acts of terrorism. As will be pointed out in chapter 3, a distinctive effort has been made by the international community to push this idea, although it is the submission of the thesis that it is fundamentally flawed partly because of ignorance of basic facts about the nature and characteristics of terrorist financing.

2.2 The financial needs of terrorists and terrorist groups

The first step in identifying the flow of funds to what is regarded as terrorists is to understand the funding requirements of terrorists.⁷³ Terrorists' requirements can be explained with regard to their activities or the nature of their needs.

In terms of terrorist activities, terrorists' financial needs can be divided into two categories. Terrorists need "operational resources" associated with conducting specific terrorist attacks; these include the costs of attacks, the salaries of individual operatives, communications, training, travel and logistics. Terrorists, in the case of a large group, also require resources for their "broad organizational requirements"

⁷³ Financial Action Task Force "Terrorist Financing" (29 February 2008) <<http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Terrorist%20Financing%20Typologies%20Report.pdf>>, at 7.

to create, maintain and develop a terrorism infrastructure.⁷⁴ Evidence shows that while the current operational costs of terrorist attacks are often very low relative to the damage they cause,⁷⁵ organizational costs are significantly higher.

Regarding the nature of funding requirements, terrorists' resources are classified into three categories: money and financial instruments, tangible and intangible resources.⁷⁶ "Money" and other negotiable and financial instruments are the most important resources required by terrorists.⁷⁷ Terrorists need money "to buy weapons, bribe local officials, pay operatives, write propaganda, provide a social network that builds a popular base and otherwise fill a myriad of purposes".⁷⁸ It is also a convenient means of storing wealth.

Tangible resources are also needed by terrorists. At the very least, terrorists need four types of tangible goods to carry out their operations.⁷⁹ "Life's necessities" including food, accommodation, clothing, travel cost and so on are the basic needs of members of terrorist organizations. Terrorist groups also need human resources: members and "personnel" to carry out their activities. In addition, terrorists need to have an effective communication system such as access to media, internet, cell phones and so on to communicate with each other, disseminate their information, justify and advertise their ideology and send their messages to their victims.⁸⁰ Tangible goods also include "operational resources", which are required to commit violence.⁸¹ They range from simple knives to very high-tech weapons, depending on the complexity of the terrorist operations and groups.

Terrorists also require "intangible instruments".⁸² "Operational space" or sanctuary is the time and space needed to plan, train for, and execute terrorist attacks.⁸³ A sanctuary can be a small house at the centre of a big city or a big camp or farm far from any prying eyes. "Operational security" resources are also needed to enable

⁷⁴ At 7.

⁷⁵ At 7.

⁷⁶ See Vittori, above n 65, at 13.

⁷⁷ At 13.

⁷⁸ Byman, above n 65, at 87

⁷⁹ Vittori, above n 65, at 15.

⁸⁰ See Hoffman, above n 65.

⁸¹ Vittori, above n 65, at 17.

⁸² At 18.

⁸³ Kim Cragin and Sara A. Daly *The Dynamic Terrorist Threat: An Assessment of Group Motivations and Capabilities in a Changing World* (RAND Corp., Santa Monica, CA, 2004), at 45.

terrorists to keep security forces from discovering their location, plans and the people involved in terrorist activities.⁸⁴ Furthermore, terrorists need “intelligence” to plan how, where and when they execute their terrorist activities. How much information is needed depends on the scope and complexity of operations.⁸⁵ Terrorist groups also need “publicity” to promote their ideology, to justify their violent actions and to encourage people to join them.⁸⁶ Without effective “leadership”, all of the resources might be useless; so, “command and control” mechanisms are needed to help terrorists to plan, coordinate and execute their attacks.⁸⁷ In essence then, it is obvious that terrorists do require different forms of support to carry out terrorist acts.

2.3 The sources of terrorist financing

Terrorists meet their funding needs in different ways, depending on the type and purposes of groups, the inherent capabilities of groups, the “opportunities at hand” and the types of resources needed.⁸⁸ Also, terrorists can be self-financing or sponsored by states or private actors, individuals, companies and organizations.⁸⁹ In either situation, funds can be derived from legal or illegal sources, or both.

2.3.1 Illegal sources

It is believed that because of the dramatic decrease of state-sponsored terrorism, terrorists have turned to alternative sources of funding, including criminal activities such as arms trafficking, extortion, credit card fraud, smuggling, robbery, cheque fraud, racketeering, kidnap-for-ransom and most importantly, drug trafficking or the sale of oil and gas.⁹⁰

⁸⁴ At 47.

⁸⁵ At 50.

⁸⁶ Vittori, above n 65, at 20-21.

⁸⁷ Cragin and Daly, above n 83, at 40.

⁸⁸ Vittori, above n 65, at 29. Also see 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, Stanford, CA, 2007), at 32.

⁸⁹ The case of state-sponsored terrorism is beyond the purview of the present paper, as it is available to small number of terrorist groups, and it has been decreasing over time. In addition, it is highly unlikely that such cases can be argued and solved through the anti-money laundering and terrorist financing regime. For more details, see Ilias Bantekas and Susan Nash *International Criminal Law* (3rd ed, Routledge-Cavendish, London, 2007), at 220.

⁹⁰ Financial Action Task Force, above n 73, at 15.

Drug trafficking is the most important and attractive source of funds for large terrorist groups.⁹¹ This phenomenon, called “narcoterrorism”, involves terrorist groups cultivating, refining and distributing narcotics across the world.⁹² This trend has been apparent since the 1990s. It usually takes place in countries where such groups control territories.⁹³ Evidence shows that, for example, the Revolutionary Armed Forces of Colombia, the Peruvian Shining Path, Taliban, Al-Qaida and Islamic Movement of Uzbekistan all used drug trafficking as an important source of terrorist funding.⁹⁴ The United Nations Al-Qaeda and Taliban Sanctions Monitoring Team’s assessments reported that, out of the total 2011-2012 budget of the Taliban of USD 400 million, “one third was raised from the poppy trade”.⁹⁵ Also, a 2007 United Nations report declared that the total value of the export of drugs from Afghanistan stood at around 4 billion USD divided up among insurgents, warlords and drug traffickers.⁹⁶ Opium production in Afghanistan has been rising in the last few years.⁹⁷ Although it is not clear how much those groups such as Taliban designated as terrorist groups “profit from the drug trade, but whether they do isn’t up for serious debate”.⁹⁸

2.3.2 Legal sources

Terrorism may be financed with considerable support and funding from and through legal sources, including donations and investment in legitimate businesses.

2.3.2.1 Donations and the role of non-profit organizations

Donations, which may come from individual donors or from charitable organizations, are a common means of terrorist funding.⁹⁹ An individual donor can be a wealthy person who directly donates huge sums of money to a terrorist group.

⁹¹ At.

⁹² Vittori, above n 65, at 36.

⁹³ Bantekas, above n 66, at 317

⁹⁴ LaVerle Bennette Berry *A Global Overview of Narcotics-Funded Terrorist and Other Extremist Groups; A Report* (Federal Research Division, Library of Congress, Washington, DC, 2002), at 52. Also see Ahmed Rashid *Jihad: The Rise of Militant Islam in Central Asia* (Yale University Press, New Haven, 2002), at 165.

⁹⁵ Financial Action Task Force *FATF Report : Financial Flows Linked to the Production and Trafficking of Afghan Opiates* (Paris, 2014), at 42.

⁹⁶ Vittori, above n 65, at 36.

⁹⁷ See United Nations Office on Drugs and Crimes *Afghanistan Opium Survey 2016; cultivation and production* (October 2016).

⁹⁸ Jonathan P. Caulkins, Jonathan D. Kulick and Mark A.R. Kleiman “Think Again: The Afghan Drug Trade” 2011 *Foreign Policy*.

⁹⁹ Vittori, above n 65, at 38.

A very famous example of a wealthy donor is Osama Bin Laden, who spent his estimated 20-30 million USD inheritance on funding Al-Qaeda. Also, it is claimed that Shad Sanders, a rich Tamil living in California, donated 4 million USD to the Tamil Tigers.¹⁰⁰

Donations can be also solicited from those who donate as part of their religious obligations such as Islamic “Zakat”. Zakat is 2.5 percent of one’s accumulated wealth, which is an example of donation. It might be collected by some Islamic charity organizations that are in contact with terrorism.¹⁰¹ Donations may be raised by diasporas who seek self-determination. Tamil diaspora was a noteworthy example of “as a people with common national origins who lives outside a claimed or an independent country”.¹⁰² Sri Lankan Tamil diasporas across the world provide and transfer considerable amount of money and materials to the Tamils people in Sri Lanka. It was high likely that while it existed, some part of the funds provided went to the Liberation Tigers of Tamil Eelam group, designated by some states such as the United States, the United Kingdom and EU as a terrorist group, which fought for Tamil self-determination against the Sri Lankan Government.

Donations are usually collected through non-profit organizations such as charities. Enjoying public trust, having a global presence that provides a framework to operate internationally and being subject to lighter regulatory requirements than other financial institution are characteristics of these organizations which make them attractive to terrorists.¹⁰³

Charities can be abused in different ways. Terrorists may take over an entire charity and use it as a front organisation. In such a case, called a “sham charity”, terrorists use the charity as a vehicle to perpetrate fraud against donors in order to raise and disguise funds for terrorism.¹⁰⁴ Terrorists may also infiltrate an established charity

¹⁰⁰ Peter L. Bergen *The Osama bin Laden I Know: An Oral History of al-Qaeda's Leader* (Free Press, New York, 2006), at 10. Also see Steve Kiser *Financing Terror: An Analysis and Simulation for Affecting Al Qaeda's Financial Infrastructure* (PhD thesis submitted to Pardee Rand Graduate School, Santa Monica, CA, 2005), at 35.

¹⁰¹ See Monte Palmer and Princess Palmer *At the Heart of Terror: Islam, Jihadists, and America's War on Terrorism* (Rowman & Littlefield, Lanham, MD, 2004), at 184. Or see Jimmy Gurulé *Unfunding Terror: The Legal Response to the Financing of Global Terrorism* (Edward Elgar, Cheltenham, UK, 2008), at 121.

¹⁰² See Byman, above n 65, at 57.

¹⁰³ Financial Action Task Force, above n 73, at 11.

¹⁰⁴ At 12.

by taking over some branches of a large charity and diverting some portion of the donations collected for humanitarian purposes to terrorists. For instance, in 2003, the Chief Executive Officer of the Benevolence International Foundation, an Illinois-based charity in the US, was convicted of diverting of US \$ 315,000 of charitable donations to terrorist groups.¹⁰⁵

Non-governmental organizations can also provide facilities for terrorists, such as a “shipping address[es], housing, employment, identity cards, [or] a recognized reason to be at a particular location”.¹⁰⁶ For example, Al-Qaeda members confessed that they received identification cards from the Kenya-based Mercy International Relief Organisation as they plotted the 1998 U.S. embassy bombings in Nairobi.¹⁰⁷

The role of non-profit organizations, companies and “sympathetic financial institutions” in transferring funds or logistical resources to terrorists is also considered important. For example, those entities can use their bank accounts to collect funds or to transfer those funds to any destination required.¹⁰⁸

2.3.3 Investment in legitimate business

Legitimate businesses are a complex and “versatile tool” for the financing of terrorism.¹⁰⁹ In its simplest form, terrorists can establish a local business and use its income for their purposes. They can also invest in stocks, bonds, real estate, construction companies, honey shops, tanneries, banks, agricultural commodity growers and brokers, trade businesses, bakeries, restaurants, and bookstores ... indeed in any business, local or international, open to such investment. Evidence shows that large terrorist groups like Al-Qaeda have invested in the past in various businesses such as wood and paper industries in Norway, hospital equipment in Sweden, real estate in London, and newspaper ink and honey in Middle East.¹¹⁰

Like non-profit organisations, such businesses and front companies can provide other facilities such as access to bank accounts and postal addresses. Furthermore,

¹⁰⁵ At.

¹⁰⁶ Vittori, above n 65, at 40.

¹⁰⁷ Jessica Stern *Terror in the Name of God: Why Religious Militants Kill* (Ecco, New York, NY, 2003), at 273.

¹⁰⁸ Financial Action Task Force *Report on Money Laundering Typologies 2002-2003* (Paris, 14 February 2003) at 9. See also Vittori, above n 65, at 42.

¹⁰⁹ Koh, above n 66, at 22.

¹¹⁰ Roland Jacquard *In the Name of Osama bin Laden: Global Terrorism and the bin Laden Brotherhood* (Duke University Press, Durham, NC, 2002), at 128.

the right sort of business can provide cover for the purchase and acquisition of explosives and chemicals needed for terrorist attacks.¹¹¹

Terrorism, in some cases, can also be financed by small amounts of funds, involving family or other non-criminal sources.¹¹² The amount of money to launch small attacks can be acquired by individual terrorists or their supporters “using savings, access to credit or the proceeds of businesses under their control”.¹¹³ An example of such financing is the 7 July 2005 attacks on the London transport system. The official report in this regard stated that “there is no evidence of external sources of income. Our best estimates are that the overall cost is less than GBP 8000. The bombs were homemade, that the ingredients used were all readily commercially available and not particularly expensive”.¹¹⁴

To sum up, it should be noted that there is no accurate data or evidence as to whether terrorists rely more on one of these sources than another.¹¹⁵ Resort to any of these sources depends on the type, size and purposes of groups, the opportunities at hand and the types of resources needed. For example, Al-Qaeda has at least five financial resources: investments and inheritances of Osama Bin Laden, funding from wealthy Arab supporters, contribution through charities, income from investments in legal businesses and criminal activities.¹¹⁶ Table I categorizes the sources of terrorist financing, mentioned above, in regard to their origin.

¹¹¹ Simon Reeve *The New Jackals: Ramzi Yousef, Osama bin Laden and the Future of Terrorism* (Northeastern University Press, Boston, MA, 1999), at 178.

¹¹² Financial Action Task Force, above n 73, at 14.

¹¹³ At 14.

¹¹⁴ At 14.

¹¹⁵ Koh, above n 66, at 24.

¹¹⁶ At 24.

Origin of sources	Self-financed sources	Sponsored sources
Lawful sources	State Sponsorship	Investment in legal businesses
	Individual and institutional sponsorship	Wealthy donors
	Fundraising initiatives	
Unlawful sources	Criminal activities	Proceeds from occupied territories

Table I: The lawful and unlawful financial sources of terrorists.

2.4 Methods and means of moving and storing terrorist funds

The literature on terrorist financing highlights the great “adaptability and opportunism” that terrorists or their supporters exploit to move and store their funds.¹¹⁷ In general, there are three main known methods by which terrorist funds are moved: formal and informal financial systems, physical movement of funds and value, and the international trade system.¹¹⁸

2.4.1 Financial System

The formal financial system is an attractive channel for the financing of terrorism because of the provision of services and products by which terrorists can move their funds, and the “speed and ease” with which funds can be transferred “efficiently and effectively between and within jurisdictions”.¹¹⁹ Money and value operations through formal financial systems enable terrorist financiers or terrorists to make an amount of money available to terrorists at another financial institution. The 9/11 Commission Report made clear that “wire or bank to bank transfers” were one of the main tools that Al-Qaeda used to fund the hijackers in the US.¹²⁰

¹¹⁷ Phil Williams “Warning Indicators, Terrorist Finances, and Terrorist Adaptation” 2005 IV(1) Strategic Insights, at 2.

¹¹⁸ Financial Action Task Force, above n 73, at 21.

¹¹⁹ Martin Runder “Hizbullah Terrorism Finance: Fund-Raising and Money-Laundering” 2010 33(8) Studies in Conflict & Terrorism 700, at 706.

¹²⁰ National Commission on Terrorist Attacks upon the United States, Thomas H Kean and Lee Hamilton *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (National Commission on Terrorist Attacks upon the United States, Washington, DC, 2004), at 245-254.

Formal financial institutions can also provide cover for terrorists to conduct transactions or conceal the origin of their funds. In the case of Al-Qaeda, it was discovered that Osama Bin Laden, while he lived in Sudan, opened different accounts under fake names in different countries, which guaranteed his privacy.¹²¹

In addition to formal financial systems, informal value transfer systems (IVTS) are deployed for financing terrorism. An informal method of money and value transfers refers to a trust-based mechanism through which money is ensured to be transferred to another geographic location by “using a series of informal, and often unlicensed, money exchanges”.¹²² In this mechanism, there may be no actual movement of cash; instead, value is transferred between two locations. Such financial arrangements, which are very well known in South Asia, the Middle East and parts of Africa, are known by different names: for example *hundi* in India, *fei chi'ien* in China, *phoe kuah* in Thailand and *hawala* in Muslim countries.¹²³ Hawala for example operates as follows:

- 1- [The] Originator gives currency to the Hawaladar [the agent] in Country A.
2. The Hawaladar in Country A provides the Originator with a payment code.
3. The Hawaladar in Country A notifies his counterpart in Country B by phone, fax or email of the transaction amount to pay the beneficiary, as well as the payment code.
4. The Originator contacts the beneficiary (in Country B) and provides the payment code to him/her.
5. The beneficiary goes to the Hawaladar in Country B, gives [them] the payment code and picks up the specified [amount] sent.¹²⁴

Informal methods are attractive to criminals, including terrorists, for their convenience, level of anonymity and rapidity.¹²⁵ Also, it is a reliable means to transfer money especially in countries with poor, corrupt or nonexistent banking

¹²¹ Kiser, above n 100, at 86.

¹²² Vittori, above n 65, at 45. See also Mohammed El Qorchi, Samuel Munzele Maimbo and John F. Wilson *Informal Funds Transfer Systems: An Analysis of the Informal Hawala System* (International Monetary Fund, Washington, DC, 2003), at 6.

¹²³ Kiser, above n 100, at 90.

¹²⁴ Dixon Hughes Goodman Risk Advisory “Understanding Informal Value Transfer System” (June 2015)

<https://m.dhgllp.com/Portals/4/ResourceMedia/publications/DHG_Views_RAS_IVTS.pdf>.

¹²⁵ Financial Action Task Force, above n 73, at 24.

systems.¹²⁶ Furthermore, such systems are subject to generally less strict regulatory control. It is reported that Hamas, the Jemaah Islamiya organization, and the Liberation Tigers of Tamil Eelam, as designated terrorist groups, either received or continue to receive funds through *hawala*.¹²⁷

2.4.2 Physical movement of funds

Terrorists may also use the traditional money laundering method of smuggling cash. Cash smuggling is attractive because smuggled money is completely fungible, anonymous, and more importantly, easy to convert into any other resources needed. Cases highlight that smuggled money can be transported either to where terrorist operations are to take place, or to where the cash can be deposited into financial systems with less risk.¹²⁸

Due to some of the disadvantages of cash smuggling, such as difficulties in concealing large quantities of cash or the danger of being detected or having the cash stolen, terrorists and their supporters may use precious metals and stones such as gold and diamonds, antiques or any other expensive items to move and store terrorist funds. While maintaining their value and liquidity, they are easy to conceal and untraceable.¹²⁹ These items can be converted into cash whenever needed. Al-Qaeda and Hezbollah are believed to have been active in this field.¹³⁰ Also, it has been reported that donations to the Taliban and Al-Qaeda from Saudi wealthy donors were made in gold.¹³¹

2.4.3 Trade system

The international trade system provides an opportunity for perpetrators to transfer value and goods through legitimate trade flows. This is the area in which enormous wealth can cross borders without raising suspicion “as the paperwork and shipments may look completely legitimate to outside inspection”.¹³² Over- and under-invoicing practices¹³³ are commonly used by launderers to transfer value across

¹²⁶ Vittori, above n 65, at 46.

¹²⁷ Passas, above n 88, at 29.

¹²⁸ Kiser, above n 100, at 91.

¹²⁹ Koh, above n 66, at 30.

¹³⁰ Douglas Farah *Blood From Stones: The Secret Financial Network of Terror* (1st ed. ed, Broadway Books, New York, NY, 2004), at 23, 47 and 55.

¹³¹ Douglas Farah “The Use of Gold, Diamonds and Other Commodities in Terrorist Finances” (March 18, 2004) <<http://www.douglasfarah.com/presentations/use-of-gold.php>>.

¹³² Passas, above n 88, at 31.

¹³³ Financial Action Task Force *Trade Based Money Laundering* (Paris, 2006), at 4.

borders. It is possible, although it has not been confirmed,¹³⁴ that terrorists or their supporters also use such methods to finance terrorism. For example, by selling and shipping a commodity at a lower rate than the actual value, a seller, as a terrorist financier, can provide funds for the buyer who sells the products at a higher price and keeps the difference for terrorist purposes.¹³⁵

2.5 Financing of terrorism and terrorism typologies

There are many different categories of terrorism. These categories help to differentiate terrorist groups according to specific criteria related to a specific field.¹³⁶ On the basis of the strategies that terrorists use to finance their activities, terrorism can be divided into seven groups: state sponsored, state sponsoring, shell state, franchise, bundled support, transnational corporation, and lone wolf.¹³⁷

A state-sponsored group receives substantial supports from a state which seeks particular political or ideological objectives. The state may find numerous ways to support terrorists such as supplying them with false documentation and passports, allowing them to travel safely within the nation or to other countries, and providing them with sanctuary and weapons.¹³⁸ The autonomy of groups in this category depends on how integrated they are into a particular state's command and control structures.¹³⁹ Terrorists may usefully receive support from states as long as that aid does not disturb their independence to pursue their own agendas. However, state sponsors may place requirements on groups for receipt of support in order to guide them in a specific direction. In such a case, in what are called "state-directed groups",¹⁴⁰ the groups exist as long as they are worthwhile for the sponsor states.

A state sponsoring terrorist group is one that is capable of providing facilities for a state sponsor in return for receiving support from that state.¹⁴¹ For example, the government of Sudan let Al-Qaeda have training camps in Sudan in exchange for

¹³⁴ Passas, above n 88, at 31.

¹³⁵ At 31.

¹³⁶ Terrorism Research "Categories of Terrorist Groups" <<http://www.terrorism-research.com/groups/categories.php>>.

¹³⁷ Vittori, above n 65, at 7.

¹³⁸ Terrorism Research "State Sponsored Terrorism" <<http://www.terrorism-research.com/state/>>

¹³⁹ Vittori, above n 65, at 7.

¹⁴⁰ Robert H. Deatherage *Terrorism Awareness* (Turtle Press, Santa Fe, 2008), at 31.

¹⁴¹ Vittori, above n 65, at 8.

money and building infrastructure.¹⁴² It is believed that terrorist-sponsoring groups have to have achieved a high level of capability to attract state sponsor attention.¹⁴³

In the case of “shell states”,¹⁴⁴ terrorists take control of a geographical area and exploit it for sanctuary and their needs.¹⁴⁵ An area can be as small as a few neighbourhoods or as large as a huge area in a country. The example of this type of terrorism is narcoterrorism, explained above. The Islamic State in Iraq and the Levant were other examples, which met their financial needs largely through “proceeds from occupation of territory, such as bank looting, extortion, control of oil fields and refineries, and robbery of economic assets and illicit taxation of goods and cash that transit” and so on.¹⁴⁶

In the franchise category, terrorist groups receive a large percentage of their support from one source, but their resources are diversified enough to remain independent.¹⁴⁷ In this case, if sponsors stop supporting them, although terrorist groups may weaken, they do not face extinction. For example, it is claimed that Hamas and Hezbollah are franchisees of Iran, from whom they receive much of their support,¹⁴⁸ but they also maintain their own network of charities, front companies and criminal networks to sustain their activities.¹⁴⁹

In the “bundled support” category, terrorists do not rely on one or few sponsors; instead, they receive a number of tangible and intangible resources from numerous non-state contributors.¹⁵⁰ The phenomenon of diaspora support, in which terrorists receive support from dispersed donors of the same ethnicity or nationality, is the prominent example of this category. Many small contributions from different

¹⁴² Daniel Byman *Deadly Connections: States That Sponsor Terrorism* (Cambridge University Press, Cambridge, 2005), at 187.

¹⁴³ Vittori, above n 65, at 8.

¹⁴⁴ Loretta Napoleoni *Terror Incorporated: Tracing the Dollars Behind the Terror Networks* (Seven Stories Press, New York, NY, 2005), at 65.

¹⁴⁵ Vittori, above n 65, at 8.

¹⁴⁶ Financial Action Task Force *Financing of the Terrorist Organisation Islamic State in Iraq and the Levant (ISIL)* (Paris, 2015), at 12.

¹⁴⁷ Vittori, above n 65, at 10.

¹⁴⁸ Iran and some countries consider Hezbollah as a legitimate resistance movement fighting for the liberation of Israeli occupied territories. See Ophir Falk, Henry Morgenstern and ebrary Inc. *Suicide Terror Understanding and Confronting the Threat* (Wiley, Hoboken, NJ, 2009), at 233.

¹⁴⁹ Matthew Levitt “Hezbollah Finances: Funding the Party of God” in Jeanne K. Giraldo and Harold A. Trinkunas (eds) *Terrorism Financing and State Responses: A Comparative Perspective* (Stanford University Press, Stanford, CA, 2007), at 134.

¹⁵⁰ Vittori, above n 65, at 114.

contributors give terrorist groups more autonomy than a state sponsored terrorist group. However, they receive support only so long as their actions satisfy their supporters.¹⁵¹

In the transnational corporation model, extensively used to describe Al-Qaeda, terrorist groups act on a global scale without any specific national identification. These groups, utilizing globalization,¹⁵² are highly sophisticated and complex in resourcing, membership and geographical operations.¹⁵³ Groups within this model are experts at using formal and informal financial systems, front companies, charities, money laundering and other criminal activities. They also have a high level of autonomy as they have access to various financial resources.

Lone wolf terrorism is carried out by terrorism groups (or individuals) which are not essentially involved in collective, organized activities.¹⁵⁴ Lone wolf terrorist groups are individuals or small groups which are identifiable by a particular ideology or grievance, and which carry out actions in support of their radical beliefs.¹⁵⁵ Unlike other types, lone wolf terrorist groups are small in size with few financial requirements, and limited capabilities. They are self-contained, free to choose their targets and tactics. Terrorism in this form is very cheap; but the impact can be significant. It is claimed that there is a considerable trend indicating the increasing frequency of lone wolf attacks by individuals with little or no connections to formal organizations.¹⁵⁶ Terrorist attacks in Germany in March 2011¹⁵⁷, in France in March 2012 and April 2017,¹⁵⁸ in Norway in July 2012,¹⁵⁹ and England in May 2017 are recent examples of lone wolf terrorism.

¹⁵¹ At 114.

¹⁵² Audrey Kurth Cronin “Behind the Curve: Globalization and International Terrorism” 2002-2003 27(3) *International Security* 30, at 45

¹⁵³ Vittori, above n 65, at 145

¹⁵⁴ R. F. J. Spaaij *Understanding Lone Wolf Terrorism: Global Patterns, Motivations and Prevention* (Springer, Dordrecht, 2012), at 15.

¹⁵⁵ Vittori, above n 65, at 115

¹⁵⁶ George Michael *Lone Wolf Terror and the Rise of Leaderless Resistance* (Vanderbilt University Press, Nashville, 2012), at 1.

¹⁵⁷ Fox News and Associated Press “Terrorism Eyed in Attack at German Airport That Killed 2 U.S. Airmen” (2011) <<http://www.foxnews.com/world/2011/03/02/shots-fired-bus-carrying-soldiers-germany/>>.

¹⁵⁸ Kurt Nimmo “French Terror Attack: All the Hallmarks of an Intelligence Psy-op and False Flag” (March 21, 2012) <<http://www.infowars.com/french-terror-attack-all-the-hallmarks-of-an-intelligence-psy-op-and-false-flag/>>

¹⁵⁹ Spaaij, above n 154, at 1.

2.6 Conclusion

This chapter has explored the nature and characteristics of terrorist financing. Terrorist financing can most narrowly be interpreted to mean financing planned, attempted or completed terrorist acts. In a broader sense, the terms financing terrorism, or financing terrorists or terrorist groups can be used to include any activities carried out to finance the activities of these individuals or groups. Action to finance these activities can include raising, moving and restoring funds allocated to carry out these activities.

Techniques and methods to raise, move and restore funds are also not necessarily carried out through illegal activities; In other words, terrorists and their activities can be funded by any means, legal or illegal, and by anyone, terrorists or non-perpetrators. Due to these particular nature and characteristics, it seems that the terroristic criminality of these financing activities can be only derived from their connection with terrorism or terrorist acts. Obviously, these features of terrorist financing should be taken into account in the adoption and implementation of any counter-terrorist financing measures. In the rest of the thesis, I seek to examine how the international community has responded to terrorist financing and whether its response is proportionate to the distinctive nature of the terrorist financing phenomenon.

Chapter Three: History of criminalisation of terrorist financing

3.1 Introduction: A brief history of efforts to adopt a convention on terrorist financing

It is difficult to determine precisely when and how the idea developed that countering terrorist financing could play a central role in the fight against terrorism.¹⁶⁰ Prior to the adoption of Terrorist Financing Convention, some Western states had adopted laws that deal with terrorist financing in a similar manner that Terrorist Financing Convention does. For example, in the US, the Violent Crime Control and Law Enforcement Act of 1994 prohibits “provision of material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out” specified offences regarded as terrorist activities.¹⁶¹

Internationally, the idea of expanding the scope of criminalisation to include terrorist-related activities seems to be around in 1994 when the UN General Assembly encouraged State Members to “to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter”.¹⁶² It appears that the idea of countering terrorist financing through the adoption of international measures originated in the G7 (now G8), which decided to take a leading role against terrorism. In 1995, 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”, and it seems that the first call for the adoption of measures to counter terrorist financing was officially issued at that meeting in Ottawa where it

¹⁶⁰ Michael Levi “Combating the Financing of Terrorism: A History and Assessment of The Control of ‘Threat Finance’” 2010 50(4) *British Journal of Criminology* 650, at 666.

¹⁶¹ Pub. L. 103-322, Sept. 13, 1994, 108 Stat. 1796 (*codified as amended at 18 U.S.C. § 2339A*).

¹⁶² UN, A/RES/49/60, 9 December 1994.

was agreed “to pursue measures aimed at depriving terrorists of their sources of finance”.¹⁶³

Following the G8’s statement of its interest in depriving terrorism of funding, in December 1996, the UN General Assembly adopted Resolution 51/210, establishing an *ad hoc* committee to “address means of further developing a comprehensive legal framework of conventions dealing with international terrorism”.¹⁶⁴ Using identical wording to that used in the G7/8 Agreement on 25 Measures for Combating Terrorism made at its meeting in Paris in July 1996, the General Assembly Resolution, also, called on all States to take steps to counteract terrorist financing by taking

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.¹⁶⁵

The Resolution additionally emphasized 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.¹⁶⁶

In the autumn of 1998, a draft of a convention on the suppression of the financing of terrorism,¹⁶⁷ a French initiative at a G8 summit,¹⁶⁸ was proposed to the United Nations. At the request of the UN General Assembly,¹⁶⁹ that draft was considered

¹⁶³ Foreign Affairs and International Trade, above n 8. For more information about the role of the G8 in the fight against terrorism, see Belelieu, above n 8.

¹⁶⁴ Raphael. Bossong *The Evolution of EU Counter-Terrorism: European Security Policy After 9/11* (Routledge, Abingdon, Oxon, 2013), at 8.

¹⁶⁵ UN, A/RES/51/210, 17 December 1996, s I (3)(f).

¹⁶⁶ At s I (3)(f).

¹⁶⁷ UN, A/C.6/53/9, 4 November 1998, above n 10.

¹⁶⁸ Ministry of Foreign Affairs Japan, above n 9. For more details on the French initiative at the Denver summit see Belelieu, above n 8; Michele Fratianni *New Perspectives on Global Governance: Why America Needs the G8* (Ashgate, Aldershot, UK, 2005).

¹⁶⁹ UN, A/RES/53/108, 26 January 1998 [12].

at a meeting of an *ad hoc* committee¹⁷⁰ and then a Working Group of the Sixth Committee.¹⁷¹ After an evaluation and some amendments to the proposed convention (the content and origins of which will be discussed in following chapters), the Sixth Committee recommended that the General Assembly adopt the proposed convention.¹⁷² On 9 December 1999, the Terrorist Financing Convention was adopted by the UN General Assembly and regarded as a significant contribution to the fight against terrorism.¹⁷³ The purpose of the Convention is set out in its preamble where it notes that “the financing of the terrorism is a matter of grave concern to the international community” and the international community is “convinced of the need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators”.

In general, the Convention followed the structure and standard provisions of the UN’s previous counter-terrorism conventions particularly the International Convention for the Suppression of Terrorist Bombing (hereinafter the Terrorist Bombing Convention).¹⁷⁴ The notable example of this structural similarity is Article 3 of the Terrorist Financing Convention, which limits its application to the cases involved with a transnational element.¹⁷⁵ The Convention is also inapplicable to a situation involving armed conflict, except for a situation when a terrorist attack is carried out against a civilian, or against any other person not taking an active part in the hostilities in a situation of armed conflict.¹⁷⁶ Similar to the Terrorist Bombing Convention, Article 20 of the Convention emphasizes that it must be applied “in a manner consistent with the principles of sovereign equality and territorial integrity of States, and that of non-intervention in the domestic affairs of other States”, while

¹⁷⁰ UN, A/54/37, 15 to 26 March 1999.

¹⁷¹ UN, A/C.6/54/L.2, 27 September to 8 October 1999.

¹⁷² UN, A/54/615, 30 November 1999.

¹⁷³ UN, A/54/PV.76; A/RES/54/109, 9 December 1999.

¹⁷⁴ The Terrorist Bombing Convention, above n 5. For more details see Johnson, above n 12, at 268. For more details see Clifton M. Johnson “Introductory Note to the International Convention for the Suppression of the Financing of Terrorism” 2000 39(2) International Legal Materials 268 at 268.

¹⁷⁵ This is similar to Article 3 of “The International Convention Against the Taking of Hostages”, Article 4 (4) of “The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation”, Article 4 of “The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation”.

¹⁷⁶ Article 2 (b). This is identical to Article 12 of the The International Convention Against the Taking of Hostages and Article 19 of Terrorist Bombing Convention, above n 5.

Article 22 reaffirmed the exclusivity of the territorial jurisdiction of the State Parties.¹⁷⁷

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 FATF¹⁷⁸).¹⁷⁹ 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. From early in the 1990s, G7/8 had continuously emphasised the possible link between terrorism and organized crime, particularly drug trafficking.¹⁸⁰

However, the drafters needed to define the offence of terrorist financing in such a way that could be justifiable to, and implementable by, prospective State Parties. This chapter will present the arguments that arose during the negotiation on draft of the convention; it will give some examples of how states have been implementing it. It seems that unlike the wording of the Convention and the insistence of the FATF, which focuses on the promotion and development of policies aimed at countering money laundering and terrorist financing, some countries have resisted adopting the offence as an independent offence, probably because it is not compatible with their criminalization principles.

3.2 Negotiations on the structure of the offence of terrorist financing

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 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 have been favoured when the

¹⁷⁷ This is similar to Articles 17 and 18 Terrorist Bombing Convention, above n 5.

¹⁷⁸ The FATF is an inter-governmental body established by the G7/8 in 1989 to counter money laundering.

¹⁷⁹ Johnson, above n 174, at 269.

¹⁸⁰ For example, see UN, A/RES/49/60, 9 December 1994. Or see UN, 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.

Convention has been applied at national levels. These three approaches will be discussed in this part.

3.2.1 Terrorist financing as an ancillary offence

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. It was argued that having an ancillary nature, the financing of any of the existing offences defined by the previous counter-terrorism conventions called ‘sectoral conventions’¹⁸¹ would constitute participation or complicity in that offence, and the provisions on accomplices in the sectoral conventions were enough to cover such financing.¹⁸² The aim of the sectoral conventions is to target specific threats, such as hostage taking or hijacking, implicitly regarded ‘terrorist’, without attempting to define or even apply the term terrorism. Using the traditional principles of criminal law, these treaties consist of a set of provisions defining the scope and elements of these offences by referencing specific types of acts (e.g. hostage taking or hijacking). In other words, creation of an independent offence of terrorist financing was argued to be unnecessary because of general provision for complicity in criminal law could serve the same purpose of providing a means to repress actions of helping in the commission of a terrorism offence by financing it.

This reservation was not taken into account by the drafters of the Convention. However, similar reasons have been given by some jurisdictions to refuse to establish an independent offence of terrorist financing. Aruba, for example,

¹⁸¹ 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.

¹⁸² Aust, above n 68, at 188.

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.¹⁸³ In addition, it was argued that a separate and independent offence might overlap with some of existing crimes under its law. Aruba has since amended its law to satisfy the FATF’s requirements and introduced a new independent offence of terrorist financing.¹⁸⁴ 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).

A slightly different objection related to the use of general principles of inchoate criminality to serve the same function of reaching terrorist financiers. In some jurisdictions, terrorist financing may 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. Unlike the law of complicity which targets conduct which helped, in some way, the principal to commit a crime, the law of inchoate crime aims at reaching earlier acts, in the sequence of events, which do not necessarily have an effect on the actual crime of terrorism. 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.¹⁸⁵ 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 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”.¹⁸⁶ 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.¹⁸⁷ However, in spite of these objections, the Netherlands amended

¹⁸³ Financial Action Task Force and Caribbean Financial Action Task Force *Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism; Aruba, Kingdom of the Netherlands* (Paris, 2009), at [150].

¹⁸⁴ See Financial Action Task Force *8th Follow-Up Report Mutual Evaluation of Aruba, Kingdom of the Netherlands* (Paris, 2014), at [11].

¹⁸⁵ Financial Action Task Force *Mutual Evaluation Report: anti-money laundering and combating of the financing of terrorism; the Netherlands* (25 February 2011), at [251].

¹⁸⁶ At [254].

¹⁸⁷ At [270].

its law in 2013 to meet the FATF's requirements by criminalizing the financing of terrorist acts as an autonomous offence.¹⁸⁸

I will revisit this matter further and in close detail in chapter 9 where I discuss, from a criminal law perspective, whether it is justifiable to criminalize terrorist financing as an independent offence.

3.2.2 Criminalization of financing terrorist organizations

A minority of delegations tried a different approach which was not adopted in the Convention but has had some subsequent impact, and thus deserves more detailed treatment here. They tried to restrict the scope of the offence of financing only to terrorist organisations.¹⁸⁹ They argued that a mere preparatory act cannot be criminalised as an independent offence, unless the act is of a “particularly dangerous nature”. According to these delegations, in the context of the Convention, a “particularly dangerous” act should include “only” the financing of terrorist organizations. 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.¹⁹⁰

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. However, they did not provide reasons as to how reliance on the dangerousness of a terrorist group could justify criminalization of financing of that group when the connection between financing or funds and terrorism, from which the criminality of the financing is derived, may be tenuous. I will discuss this matter in greater detail in chapter 5.2 and chapter 9.

Such a reference to terrorist organisations also caused a further problem; it required the introduction of precise and detailed elements for the definition of

¹⁸⁸ Financial Action Task Force *Second Follow-up Report Mutual Evaluation of the Netherlands* (Paris, 2014), at 17.

¹⁸⁹ See for example Austria's proposal in UN, A/AC.252/1999/WP.11, reproduced in UN, A/54/37, above n 170, at 29.

¹⁹⁰ At 29.

‘organization’.¹⁹¹ Most of the proposed definitions of ‘organization’ emphasized the hierarchical structure of a group of persons with common objectives,¹⁹² and the drafters began to raise doubts over the usefulness of defining ‘organization’.¹⁹³ The Convention was finalised and the drafters avoided including a definition of ‘organisation’ on the view that the definition of ‘organization’ may vary from one case to another.¹⁹⁴ Thus the minority position that sought to link terrorist financing to terrorist organisations had no impact on the Convention itself.

Even the UN Security Council, which has engaged in the suppression of the financing of groups associated with Al-Qaida and Da’esh, 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.¹⁹⁵ What the Security Council has done is that it has identified groups (so far Al-Qaida and Da’esh) regarded by it as terrorist groups. The Security Council in Resolution 1267 (1999) established a committee,¹⁹⁶ namely the Al-Qaida Sanctions Committee, and gave it a mandate to create and update a list individuals, groups, undertakings and entities regarded to be associated with them. These designated individuals and organizations are subject to severe sanctions: states should freeze all of their assets, “prevent their entry into or the transit through their territories” and prevent the supply, sale and transfer of arms and weapons or technical advice and assistance related to military activities.¹⁹⁷ The Security Council in Resolution 2253 (2015) provides a list of activities, (such financing, supplying arms to, or recruiting for these groups) indicating “an individual, group, undertaking or entity is associated” with identified groups.¹⁹⁸

¹⁹¹ UN, A/54/37, Annex IV, at [11].

¹⁹² 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.

¹⁹³ Lehto, above n 14, at 312.

¹⁹⁴ UN, A/C.6/54/WG.1/CRP.35/Rev.1, reproduced in reproduced in UN, A/C.6/54/L.2, 27 September to 8 October 1999, at 51

¹⁹⁵ Koh, above n 66, at 97.

¹⁹⁶ UN, S/RES/1267, 15 October 1999, at [6].

¹⁹⁷ UN, S/RES/1390, 16 January 2002, at [2]; UN, S/RES/1989, 17 June 2011.

¹⁹⁸ UN, S/RES/2253, 17 December 2015, at [3].

Having regard to the information provided by the Member States and regional organizations,¹⁹⁹ 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.²⁰⁰ 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”.²⁰¹

Designating an individual or group as terrorist without instituting criminal proceedings has also been 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.²⁰² 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”.²⁰³ 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 assets.²⁰⁴ In fact, this approach reduces the degree of judicial control of the designation process, and, instead, risks politicizing the targeting process,²⁰⁵ which in turn 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”.²⁰⁶ This approach will be examined in great detail in chapter 12.

¹⁹⁹ UN, S/RES/1390, 16 January 2002, at [5 (a)].

²⁰⁰ UN “Guidelines of the Committee for the Conduct of its Work” (2013) <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/guidelines_of_the_committee_for_the_conduct_of_its_work.pdf>, at 2.

²⁰¹ *Italy V. Abdelaziz and Ors*, Final Appeal Judgment, No 1072; ILDC 559 (IT 2007).

²⁰² US Department of State “Foreign Terrorist Organizations” (2012) <<http://www.state.gov/j/ct/rls/other/des/123085.htm>>.

²⁰³ At.

²⁰⁴ Bossong, above n 164, at 48.

²⁰⁵ 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.

²⁰⁶ 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), at [50].

The absence 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.²⁰⁷ In this regard, it is instructive to compare the list of states' and international organizations' blacklist of terrorist organizations since "there are notable omissions".²⁰⁸

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 the Member States of the 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".²⁰⁹ Similar to the definition of "organized criminal group" provided by the 2000 United Nation Convention against Transnational Organized Crime (hereinafter the Palermo Convention),²¹⁰ 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 to commit terrorist offences".²¹¹ 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".

²⁰⁷ The EU-US friction is a good example in this regard. While the US and Israel pressurises EU 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.

²⁰⁸ 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, NY, 2011), at 350.

²⁰⁹ EU Council Framework on Combating Terrorism, (2002/475/JHA), Article 2 (2) (a) and (b).

²¹⁰ *UN Convention Against Transnational Organized Crime* (Palermo, 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."

²¹¹ EU Council Framework on Combating Terrorism, (2002/475/JHA), Article 2 (1).

The Framework Decision is applied by EU Member States, but using somewhat different interpretations.²¹² For instance, the financing of a terrorist organization in the Netherlands comes close to the notion of inchoate crime²¹³ but 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 planned or completed terrorist act is not necessary.²¹⁴ In other words, the Netherlands criminalized 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 was regarded as “the preparatory acts of entering into and maintain a long-lasting collaboration, which is aimed at commission of the crime”.²¹⁵ 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.²¹⁶ According to the Dutch case law, an ‘organization’ was “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.²¹⁷ 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 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”. Unlike

²¹² See Commission of the European Communities *Report from the Commission Based on Article 11 of the Council Framework Decision of 13 June 2002 on Combating Terrorism* (Brussels, 2007).

²¹³ Caroline M. Pelsler “Preparation to Commit a Crime: The Dutch Approach to Inchoate Offences” 2008 4(3) *Utrecht Law Review* 57, at 70.

²¹⁴ At 70.

²¹⁵ At 70.

²¹⁶ Financial Action Task Force, above n 185, at [280].

²¹⁷ Financial Action Task Force *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism; Spain* (FATF, Paris, 2006), at [113 -124].

the approach taken by Spain, some Ibero-American countries do not establish an independent offence of terrorist financing. Argentina, for example, classifies terrorist financing as “illicit association” to a terrorist organization (Article 210 of the Argentine Criminal code).²¹⁸ Colombia, in Article 340 of the Colombian Criminal Code, treats terrorist financing as an agreement to commit crimes,²¹⁹ which is similar to the concept of conspiracy in common law countries.

Such a reference to “association” or “agreement” definitely requires the proof of a stronger connection between acts of financing or funds and terrorism from which the criminality of the terrorist financing offence must be derived. Such a requirement was not, however, added to the proposal of the delegations who asked for limiting the scope of the terrorist financing offence to financing terrorist organizations, nor to the recommendations provided by FATF.

The FATF recommends the criminalization of the financing of any kind to a terrorist group as an independent offence. It provides a wider definition of terrorist group in the sense that it does not require of a terrorist organization some measure of structure or existence for a particular time.²²⁰ 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.

3.2.3 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

²¹⁸ 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, 2009), at 198.

²¹⁹ At.

²²⁰ Financial Action Task Force International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (February 2012), General Glossary, at 122.

financing.²²¹ The idea that the provisions on accomplices in the sectoral conventions were sufficient to cover all aspects of terrorist financing was rejected. 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.²²² It was argued that the financing of commission or preparation of a terrorist act, in and of itself, is as serious an offence as the actual terrorist act.²²³ 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”.²²⁴

In other words, the injurious and dreadful consequences of terrorism served an important function in the construction of terrorist financing as an independent offence.²²⁵ 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”.²²⁶ As terrorist financing allows terrorism to become real, the act of financing terrorism poses *ex ante* threat to those values too. It is also argued in the scholarly literature 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 to expose various people.²²⁷ The argument goes that solid resources enable terrorist groups such as the FARC and Al-Qaeda to recruit members, to supply themselves with adequate weapons and to launch and expand their activities anywhere in the world. So, it was concluded that the financiers of terrorism should be treated independently (even in the absence of a link to a terrorist act) and punished as severely as those who commit terrorism.²²⁸ 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

²²¹ UN, A/54/37, above n 170, Annex IV, at [84].

²²² Lehto, above n 14, at 274.

²²³ Aust, above n 68, at 288.

²²⁴ The Terrorist Financing Convention, preamble.

²²⁵ Lehto, above n 14, at 264

²²⁶ Soto, above n 218, at 200.

²²⁷ Koh, above n 66, at 66.

²²⁸ Aust, above n 68, at 288.

to the preparation or commission of terrorism.²²⁹ But the question that this thesis seeks to answer is: whether, and how far, criminal law can (or should) be stretched to accommodate the terrorist financing offence whose criminality is derived from terrorism to which it does not need to be linked?

3.2.3.1 Criminalization of terrorist financing by analogy with organized crimes

But before examining this question, it is worth noting that criminalization of terrorist financing should be regarded as a part of “a larger shift in criminal justice from an offender-oriented towards a proceeds-oriented” approach²³⁰ specifically developed in the fight against organized crime because of producing large profits for criminals. The main justification for the adoption of this approach is its “possible deterrence value”.²³¹ It is believed that attacking the root of all economically motivated crimes would remove the incentive of perpetrators to commit those crimes.²³² 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.²³³

The criminalization of money laundering is considered the key component of this approach since criminals may hide the proceeds with third parties²³⁴ or give them a legitimate appearance to the extent that confiscation is not possible.²³⁵ So, for the sake of the confiscation of such proceeds, criminalizing laundering can provide a legal tool for law enforcement authorities to tackle suspicious assets either in the hands of third parties or those of the real owner²³⁶ without requiring the prosecution to prove the guilt of the criminals of the predicate crime beyond a reasonable doubt.²³⁷ That is, confiscation is possible by proving the charge of money laundering conduct or the “ownership” of the proceeds. In addition, the fight against

²²⁹ Compare Article 101.2 with Article 102.6 of the Criminal Code Act 1995 (Australia).

²³⁰ Guy Stessens *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, Cambridge, UK, 2000), at 85.

²³¹ 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.

²³² Ethan. A Nadelmann “Unlaundering Dirty Money Abroad: US Foreign Policy and Financial Secrecy Jurisdictions” 1986 18(1) *Inter-American Law Review* 33, at 34.

²³³ Levi, above n 231, at 228.

²³⁴ Frank Verbruggen “Proceeds-Oriented Criminal Justice in Belgium: Backbone or Wishbone of a Modern Approach to Organised Crime?” 1997 5(3) *European Journal of Crime, Criminal Law and Criminal Justice* 314, at 318

²³⁵ Koh, above n 66, at 39.

²³⁶ Stessens, above n 230, at 86.

²³⁷ Koh, above n 66, at 43.

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.²³⁸ 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 are derived.

Regardless of how effective the application of this approach has been in the fight against organized crime,²³⁹ the question is whether the logic of this argument fits the case of terrorist financing; or whether, terrorism and terrorist financing are equivalent to organized crimes and money laundering to the extent that the same approach can be adopted to counter them? Although the examination of these questions falls outside the scope of this research, it is worth addressing them very briefly here and in the next chapter, because the approach taken by the Terrorist Financing Convention and developed by FATF and UN Security Council to counter terrorist financing independently of terrorism is heavily reliant on an analogy with organized crimes and money laundering. However, this analogy is inaccurate and may be ineffective for the following reasons.

Firstly, it should be noted that terrorism is not a crime necessarily committed for the purpose of monetary gains. It is a “politically motivated act of violence”²⁴⁰ with two distinctive financial characteristics: 1) terrorists need less operational money to commit, or prepare to commit, terrorist acts than those criminals who seek to maximise their financial gains;²⁴¹ 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”.²⁴² As long as there is a desire for politically

²³⁸ Stessens, above n 230, at 86.

²³⁹ 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, 2003). See also Peter Alldridge “The Moral Limits of the Crime of Money Laundering” 2002 5(1) *Buffalo Criminal Law Review* 279.

²⁴⁰ Robin Morgan *The Demon Lover: The Roots of Terrorism* ([Updated ed, Piatkus, London, UK, 2001), at 40.

²⁴¹ 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, UK, 2008), at 267.

²⁴² Raphael Perl “Anti-Terror Strategy, The 9/11 Commission Report, and Terrorism Financing: Implicating for U.S. Policy Makers” in Jeanne K. Giraldo and Harold A. Trinkunas (eds) *Terrorism*

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".²⁴³ Michael Levi argues that

Terrorists need and want less money than do those who seek to maximize economic gains. Furthermore, profit-seeking criminals will usually come around gain and their individual crimes will make little impact upon levels of criminality, creating more incentives to patient investigation of nodal figures. By contrast, the aim of anti-terrorist policy is to minimize the chances and consequences of violence on every possible occasion, so patience is more costly. However, if they have any effect at all, controls on licit sources of finance may displace terrorist finance from legal into illegal channels. Without verifiable evidence on how many attacks were prevented, it seems plausible that tighter financial and precursor controls ultimately reshape rather than resolve terrorism risks, reducing the capacity to cause spectacular harms in jurisdictions that are more expensive to reconnoitre. As in organized crime, it then remains moot whether it is better or worse to have a widely distributed set of independent [for example] al-Qa idah-inspired attacks compared with a more centrally regulated and perhaps more individually damaging set of attacks.²⁴⁴

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".²⁴⁵ The US *9/11 Commission report* makes a valid point that if a terrorist group is "replaced by smaller,

Financing and State Responses A Comparative Perspective (Stanford University Press, Stanford, CA, 2007), at 255.

²⁴³ Levi, above n 160, at 662.

²⁴⁴ At 662. See also National Commission on Terrorist Attacks upon the United States, Kean and Hamilton, above n 120, at 383. Or see United Nations 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)* (2004), at 6.

²⁴⁵ Passas, above n 88, at 32-33.

decentralized terrorist groups, the premise behind the government's efforts that "terrorists need a financial support network" may become outdated".²⁴⁶

Lastly, 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".²⁴⁷ 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".²⁴⁸ While money laundering offences are premised on predicate offences like drug trafficking having already taken place, the principal offence of terrorist financing in most cases is not committed or even attempted yet if the financing itself is prosecuted as a separate offence. As will be discussed in chapter 7 and 8, criminalisation thus depends on a hypothesis of future criminal activity. In addition, freezing such funds appears to be much more difficult than freezing funds in money laundering cases as the law enforcement agencies again need to establish a hypothetical link between the suspicious funds and a possible terrorism connection, rather than relying on an existing or supposed connection with an existing predicate offence.

In the absence of an actual and clear connection between financing activities/funds and terrorist activities, it makes more sense to prosecute the financial criminal activities of terrorists, terrorist groups or their supporters as "various forms of transnational crime" addressed by conventions on money laundering and organized crimes.²⁴⁹ It is worth noting that the effectiveness of these conventions in the fight against money laundering and organized crimes are questioned.²⁵⁰

3.3 Conclusion

Terrorist financing was adopted as an independent crime globally through the Terrorism Financing Convention. The drafters of the Convention were determined

²⁴⁶ National Commission on Terrorist Attacks upon the United States, Kean and Hamilton, above n 120, at 382. See also John Roth, Douglas Greenburg and Serena Wille *Monograph on Terrorist Financing Staff Report to the Commission* (National Commission on Terrorist Attacks upon the United States, Washington, DC, 2004), at 29.

²⁴⁷ Passas, above n 88, at 36.

²⁴⁸ Boister, above n 66, at 106.

²⁴⁹ Ben Saul "The Legal Relationship between Terrorism and Transnational Crime" 2017 17(3) *International Criminal Law Review*, at 451.

²⁵⁰ Perl, above n 242, at 251. See also Levi, above n 160, at 662.

to introduce an offence with a very broad scope to the extent that it includes financing of activities which may not be connected to preparation or commission of any terrorist act. But the question is whether and how far criminal law can justifiably be expanded to include such an offence. This is the question that this thesis seeks to answer in chapters 5 onwards.

It has been argued that the counter terrorist financing measures including criminalization and confiscation measures have been adopted by a close analogy with the measures adapted to counter organized crimes and money laundering. Regarding the nature and characteristic of terrorism and terrorist financing, such an adoption is inaccurate and seems to be ineffective. Although this thesis is not designed to examine the effectiveness of the expansion of anti-organized crimes or anti-money laundering tools to counter terrorist financing, the examination of some of the notions on which this analogy is based seems to be important as they play a significant role in justifying the idea that terrorist financing can be addressed independently. For example, relying on the notion that terrorism and terrorist financing is so closely connected to organized crimes and money laundering, FATF recommends the criminalization of terrorist financing as an independent offence and a predicate crime of money laundering. The following chapter will examine this recommendation, which has had a considerable role in the diffusion of the criminalization approach adopted by the Terrorist Financing Convention.

Chapter Four: Is terrorist financing a predicate offence of money laundering?

4.1 Introduction

Following the adoption of the Terrorist Financing Convention, the FATF now emphasizes the criminalization of terrorist financing as an independent offence; but referring to “the close connection between international terrorism and, *inter alia*, money laundering”,²⁵¹ it additionally pushes countries to criminalize terrorist financing as a predicate crime to money laundering.²⁵² Examination of this recommendation provides a convenient way to analyse some of the assumptions built into terrorist financing, and how certain ideas appear to have been borrowed from the theory of anti-money laundering.

The recommendation suggests (although it is difficult to prove) that the underlying approach of the FATF’s policy makers may have been to resolve the problem of terrorist financing by analogy with their existing solutions to money laundering. Whether or not this is the case, there are, nonetheless, some uncertainties about the scope of this FATF’s 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? There is no doubt that some terrorist acts such as hijacking or hostage taking, criminalized by UN conventions annexed to the Terrorist Financing Convention, may generate money which needs to be laundered. But terrorism in its generic sense refers to the use of violence against civilians which results in bodily injuries for the purpose of intimidating or coercing.²⁵³

Does the recommendation imply that financing of terrorism is another form of money laundering, which can be included by the anti-money laundering regime? It is the submission of this chapter, that terrorist financing logically does not fit into the money laundering scheme. This chapter will examine whether it is reasonable

²⁵¹ 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.

²⁵² At 13.

²⁵³ The Terrorist Financing Convention, above n 6, art 2 (1).

to legislate to criminalize terrorist financing on the basis of analogies with money laundering. It is argued that while terrorist funds can be processed by the same tools used by launderers, none of those elements involved in money laundering by organized crime are necessarily engaged in the process of terrorist financing. Even if terrorist financing is involved in money laundering, labelling them as terrorist financing without linking it to terrorism or terrorist activities is problematic.

4.2 The role of money laundering in terrorist financing

Money laundering is internationally defined as the process of conversion or transfer, concealment or disguise, and possession or use of any income or property derived from illegal activities (hereinafter “predicate crimes”).²⁵⁴ The origin of the term *money laundering* arose in the US in 1920s when mafia groups owned and used laundrettes to gain a legitimate appearance for “proceeds” generated from their criminal activities.²⁵⁵ Later, with the explosion of drug trafficking in 1980s, money laundering became an important part of any serious criminal enterprise, especially “organized crime” activities, from which huge profits are generated.²⁵⁶ The main purpose of money laundering operations is twofold: to hide the predicate (often organized) crimes from which the proceeds are obtained, and to guarantee that criminals can enjoy their proceeds by using or investing in the legal economy.²⁵⁷

To fulfil these goals, launderers use various and complex techniques to launder their proceeds. These techniques very briefly may include using financial institutions as deposit-taking institutions, “non-bank financial institutions”, non-financial institutions, or other informal methods such as the purchase of art treasures and

²⁵⁴ *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (Vienna, 20 December 1988), art 3 (b) and (c). “Predicate crimes” refer to any crime as a result of which proceeds have been generated, see UN Convention Against Transnational Organized Crime, above n 210, art 2 (h).

²⁵⁵ Stessens, above n 230, at 82. According to Article 2 (e) of the Palermo Convention, “proceeds” mean “any property derived from or obtained, directly or indirectly, through the commission of an offence”.

²⁵⁶ William C. Gilmore *Dirty Money: The Evolution of Money Laundering Counter-Measures* (2nd ed, Council of Europe Press, Strasbourg, 1999) at 9. “Organized criminal group” has been defined by Palermo Convention 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”.

²⁵⁷ Stessens, above n 230, at 83.

jewellery, techniques of illegal money importation, techniques of smurfing or nominal partnerships, gambling, techniques of overpayment on tax accounts, techniques related to real estate, the buying of gift vouchers, assuring real estate credit, establishing fictitious business organisations, fictitious transactions, creating a cover company, techniques of over-or under-charging, methods of acquisition and selling of companies, acquisition of sports clubs, gold purchase, barter trade systems and so on.²⁵⁸

The involvement of these techniques in laundering is too complex to explain in detail here. However, it has become common to illustrate the process of laundering, especially those involved with drug money, by utilising a three-stage framework:²⁵⁹

- 1- Placement stage: proceeds at the first step need to either enter a financial system or be used to buy an asset.²⁶⁰
- 2- In the “layering stage” a launderer, through some financial transactions, tries to conceal and disguise the source of the money. This step can be done by breaking down the money to small amounts and transferring it to different financial institutions.
- 3- In the final stage, ‘integration’, the money is assimilated along with all other assets in the system in order to make the money appear as if it were obtained legally.

Regarding the nature of the crime, money laundering can be described as a “legitimation-oriented concept”²⁶¹ which contains the following features:

- The money involved in the process of money laundering is, in all cases, derived from illegal activities.
- Money laundering is a derivative crime or an output of predicate crimes.
- The main purpose in money laundering is to disguise the origin of proceeds in order for criminals to enjoy their ill-gotten gains.²⁶²

²⁵⁸ Gilmore, above n 256, at 30-40.

²⁵⁹ At 29.

²⁶⁰ At 29.

²⁶¹ Koh, above n 66, at 26.

²⁶² Stessens, above n 230, at 84.

- Money laundering takes place when principal crimes (predicate crimes) have already been committed. The necessity of laundering makes detecting criminals by chasing the proceeds of their illegal activities more possible.

However, in regard to financing terrorism, there is a different story. Terrorist financing can be divided into “a framework with three levels”: activities done to make and raise funds for terrorist purposes,²⁶³ strategies used to move the funds whence they have been collected to where they need to be held, and methods used to move funds to frontline terrorists.²⁶⁴ It seems that terrorist financing is a phenomenon which begins with fund-raising and ends by distributing the funds to terrorist cells.

The emphasis, in such a case, is not on the legitimization and accumulation of funds, but making funds available to terrorist cells; so, terrorist funds do not inevitably need to go through those money laundering stages by which the proceeds of organized crime are processed. However, money laundering can be a part of terrorist financing process in some cases, as illustrated in Diagram II.

Regarding the nature and characteristics of terrorist financing, terrorist funds can be processed under three scenarios:

Scenario one: when the funds have been derived from legal sources, nothing appears illegal except the future use of the money. The funds, in this case, can be transferred by non-criminal individuals or legal entities like charities and front companies, and through the legal financial system.

Scenario two: terrorists are involved with criminal activities in order to generate funds for their terrorist purposes. So, they may need to launder the proceeds of their crime if they wish to invest proceeds to produce regular revenue. If the funds come under scrutiny at this stage, there may be no connection with terrorist activities. Also, after having been laundered, the disguised origin of money might not be identifiable because the connection

²⁶³ The term “funds” refers to “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.” See the Terrorist Financing Convention, art 2(1).

²⁶⁴Vittori, above n 65, at 26.

between the funds and their illegal source has already been interrupted; as a result, the funds have a legitimate appearance.

Scenario three: the proceeds of crime are directly (without being laundered) used by terrorist cells. In this case, terrorists do not need to launder the money, because the amount of money on the move may be small.

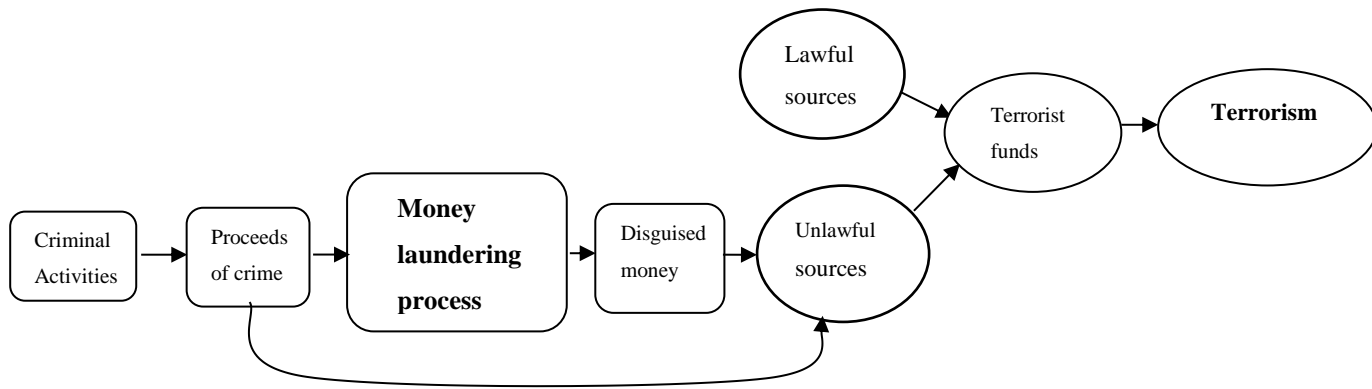


Diagram II. illustrates how terrorist financing can be processed.²⁶⁵

In comparison with money laundering, the main characteristics of the terrorist financing process are:

- Unlike money laundering the subject matter of which is money derived from the commission of crime, in terrorist financing “funds” is defined very broadly. They include “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”.²⁶⁶
- Terrorist financing involves preparing funds for the commission of another crime. So, it is an input into terrorism, and preparatory in its nature.

²⁶⁵ Hamed Tofangsaz “A New Approach to the Criminalization of Terrorist Financing and its Compatibility with Sharia law” 2012 15(4) Journal of Money Laundering Control 396, at 401.

²⁶⁶ The Terrorist Financing Convention, above n 6, art 1.

- When terrorist financing occurs the principal crime (terrorism) has not been committed or even attempted yet; so, the relationship between the funds and terrorist activities may or may not be identifiable.
- The purpose in terrorist financing is not accumulation, but distribution. In result, the amount of funds on the move may often be very small.²⁶⁷
- The attempt in terrorist financing is to hide the destination of the funds.

4.3 Discussion on the relationship of terrorist financing and money laundering

There has been a continuing argument about whether the measures provided to counter money laundering are able to prevent and counteract terrorist financing. Those who support the integration of terrorist financing into anti-money laundering measures base their argument on two inaccurate assumptions: the link and nexus between terrorism and criminal activities,²⁶⁸ and the involvement of terrorist financing in money laundering.²⁶⁹

4.3.1 Terrorists' involvement in criminal (organized) activities

The first assumption, which emphasizes and exaggerates the involvement of terrorists in criminal (especially organized) activities as the main source of terrorist financing,²⁷⁰ considers terrorism as a criminal activity potentially resulting in proceeds in regard to which money laundering may occur. From a logical perspective, this approach assumes that terrorism as a criminal activity, which produces proceeds, precedes money laundering.²⁷¹ The reflection of this argument can be explicitly seen in the Council of the European Communities Directive of 10 June 1991 on prevention of the financial system for the purpose of money laundering where it provides that

Since money laundering occurs not only in relation to the proceeds of drug-related offences but also in relation to the proceeds of other activities (such as organized crime and terrorism), the Member States should, within the meaning of their

²⁶⁷ Bantekas, above n 66, at 321.

²⁶⁸ Loretta Napoleoni *Modern Jihad: Tracing the Dollars Behind the Terror Networks* (Pluto, London, UK, 2003) at 40. See also Leslie Holmes *Terrorism, Organised Crime and Corruption: Networks and Linkages* (Edward Elgar, Cheltenham, UK, 2007), at 25.

²⁶⁹ Financial Action Task Force, above n 12, at 28.

²⁷⁰ R. T. Naylor *Wages of Crime: Black Markets, Illegal Finance, and the Underworld Economy* (Cornell University Press, Ithaca, NY, 2002), at 10.

²⁷¹ Kersten, above n 69, at 301.

legislation, extend the effects of the Directive to include the proceeds of such activities, to the extent that they likely to result in laundering operations justifying sanctions on that basis.²⁷²

This assumption is to some extent based on reality. Regarding the evidence and studies on terrorist financing typologies mentioned in chapter two, it has been proved that terrorist groups, in some cases, are involved in criminal activities such as hostage-taking for ransom. However, complete reliance on the assumption to justify the inclusion of terrorism into the instruments related to repression of organized crime (and as result, inclusion of terrorist financing into anti-money laundering measures) can be problematic for the following reasons.

First of all, it is a category error to presume that terrorism is a crime for the purpose of making money. Terrorists are generally motivated by ideology greater than personal impulses or material benefits.²⁷³ Their engagement in crime to fund their activities needs to be considered as an instrumental purpose.²⁷⁴ This feature distinguishes it from other criminal acts, especially organized crime, which are not afforded any kind of excuse as criminals seek personal or financial gains.²⁷⁵ More importantly, terrorist funds can be acquired from legal sources. This considerably differentiates terrorist financing from organized criminal activities.

In addition to the distinct motivations, terrorists measure their conduct against the standards and “codex” of the ideology that they follow.²⁷⁶ So, even though an act is unlawful according to the law of a state or to international law, it might be legitimate and appropriate from the terrorists’ perspective. Emphasizing the significant consequence of this feature, some argue that “standard criminology” cannot apply to the case of terrorism since “the notion of deterrence is largely irrelevant, with the

²⁷² Charles Goredema “Money Laundering in East and Southern Africa: An Overview of the Threat” 2003 2003(69) Institute for Security Studies 20, at 78.

²⁷³ Terrorist may be motivated by various factors such as secession, insurgency, and regional retribution and so on. See Alex Conte *Human Rights in the Prevention and Punishment of Terrorism* (Springer, Dordrecht, 2010), at 10.

²⁷⁴ Yvon Dandurand and Vivienne Chin *Links Between Terrorism and Other Forms of Crime: A Report Submitted to Foreign Affairs Canada and the United Nations Office on Drugs and Crime* (Vancouver, 2004), at 5.

²⁷⁵ Bantekas, above n 66, at 318.

²⁷⁶ Conte, above n 273, at 11.

language of terrorists often entirely divorced from that of the normal criminal offender”.²⁷⁷

Moreover, it is impossible to estimate the extent and spread of terrorists’ involvement in criminal (organized) activities.²⁷⁸ In 2003, in the US, it was reported that 14 of the 36 groups designated as terrorist organizations on the US Department of State list were engaged in drug trafficking.²⁷⁹ This fact was applied to argue that the war on drugs and the war on terrorism need to continue to be linked. However, this conclusion was correctly criticized as “there are hundreds of terrorist organizations and drug trafficking groups, but it is usually the same dozen or so groups that get identified as being involved in both types of activities”.²⁸⁰

From an international law perspective, the inclusion of the concept of terrorism within the scope of international instruments relating to organized crime is also problematic. The problem lies in the nature and definition of terrorism. While there is not a consensus on a concrete definition of terrorism, and on the designation of groups as terrorist groups, certain characteristics of organized crime have been at least identified over the course of time.²⁸¹ With regard to this fact, the inclusion of terrorism in instruments related to organized crime has the potential to “divide parties to a treaty and make it unworkable”.²⁸² It might be the reason why the authors of the Palermo Convention avoided the inclusion of terrorist acts in the definition of organised crime²⁸³ in spite of acknowledging the involvement of terrorists in criminal activities.²⁸⁴ This will be discussed in great detail in chapter 5.

By exemplifying the practices of few terrorist groups, it is also argued that “terrorist groups are now turning gradually into a big business ... and enjoy the unexpected

²⁷⁷ At.

²⁷⁸ Dandurand and Chin, above n 274, at 18.

²⁷⁹ United States Senate Committee on the Judiciary *Narco-Terrorism: International Drug Trafficking and Terrorism, a Dangerous Mix: Hearing Before the Committee on the Judiciary, United States Senate, One Hundred Eighth Congress, First Session, May 20, 2003* (U.S. G.P.O., Washington, DC, 2003).

²⁸⁰ Dandurand and Chin, above n 274, at 12.

²⁸¹ Tom Obokata *Transnational Organised Crime in International Law* (Hart, Oxford, UK, 2010), at 14.

²⁸² Bantekas, above n 66, at 318.

²⁸³ UN *Replies Given on 22 March 1999 by the Observer of the International Committee of the Red Cross to the Questions Asked by the Delegations of Belgium and Mexico Regarding the Implications of Article 2, Paragraph 1 (B), (A/AC.252/1999/INF/2)* (26 March 1999).

²⁸⁴ Financial Action Task Force *Follow-Up Report to the Mutual Evaluation Report of Greece* (Paris, 28 October 2011).

fruits of their way of life”.²⁸⁵ However, regarding the paucity of available data, it does not make sense to claim that such transformation is a typical or common pattern for all terrorist groups.²⁸⁶ Moreover, from a criminal law perspective, if a terrorist group is transformed into some sort of a criminal organization, it can no longer be considered as a terrorist group.

To end this, it is worthwhile to note the result of the questionnaire administered by the United Nations Office on Drug and Crime (UN Terrorism Prevention Branch) indicating that²⁸⁷

Terrorist groups are frequently involved in other crime, particularly illegal drug trafficking, smuggling of migrants, falsification of illicit travel and identity documents, trafficking in firearms and other exploitation of illicit markets. However, the responses did not provide strong evidence of organizational links between terrorist groups and organized criminal groups. There was no indication either that criminal groups were becoming more involved in terrorist acts.²⁸⁸

Even if there is a strong link between terrorist groups and organized criminal groups, why are not they prosecuted under ordinary criminal law? Why is it so important to make a doctrinal link between terrorism and in some way amalgamate those activities?

4.3.2 Terrorists’ involvement in money laundering

Unlike the first assumption which emphasises inaccurately and exaggeratedly the illegal sources of terrorist funds, the second assumption focuses on the tools and methods which terrorists use to conceal the flow of their funds.²⁸⁹ This assumption acknowledges that although terrorist funds can be derived from both legal and illegal sources, terrorists process their funds – “that is, move them from the source

²⁸⁵ Koh, above n 66, at 21. See also Chris Dishman “Terrorism, Crime and Transformation” 2001 24(1) *Studies in Conflict & Terrorism* 43, at 43.

²⁸⁶ Dandurand and Chin, above n 274, at 5.

²⁸⁷ United Nations Office on Drugs and Crime *Result of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries* (2002).

²⁸⁸ In September 2003, pursuant to the UN General Assembly Resolution 58/136, the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime sent a questionnaire to Member States of the United Nations regarding the “Nature and links between Terrorism and other Forms of Crime”. The above quote is the part of analysis of the replies to the questionnaire done by Dandurand and Chin, above n 274, at 32.

²⁸⁹ Financial Action Task Force *Report on Money Laundering Typologies 2000-2001* (Paris, 1 February 2001), at 19.

to where they will be used” – in the same way that non-terrorist criminals launder funds.²⁹⁰

In other words, terrorists are involved in either money laundering or “reverse money laundering”. If terrorists are involved with criminal activities, they need to use the same methods as criminals to conceal the origin of proceeds. If terrorist funds have a legitimate origin, then terrorists must engage in “reverse money laundering”,²⁹¹ which is the application of the same methods and tools used by launderers to hide the destination of funds. In this regard, it has been noted that:

Terrorists use the same professional money network, they use the same convoluted transactions to hide the location of the money or where it’s going. They can use the same clandestine shipment of cash to avoid paper-trails. They can engage in the same international shell games as they move money from this account to that, disguised as legitimate funds for some lawful purpose when it really is to finance new crime and new criminal enterprises ... The source of the money doesn’t matter, it is the deadly purpose the money was intended to fund.²⁹²

As a result of this analogy, it is concluded that there is significant room for anti-money laundering measures to deal with the phenomenon of terrorist financing. Therefore, terrorist financing is considered as a sub-category of money laundering, or a predicate crime to money laundering which potentially can be detected, investigated and prevented by the already existing measures.²⁹³

The logic of this assumption is not compelling for the following reasons. Most of all, it is questioned whether money laundering counter-measures can be a ‘one size fits all’ solution for all crimes in which offenders may use the same money network as launderers use to conceal the origin of their funds. The point is that these measures have been designed to prevent drug offences or offences²⁹⁴ whose purposes are the legitimization and accumulation of a huge amount of money generated from criminal activities. However, in regard to terrorist financing, none

²⁹⁰Financial Action Task Force, above n 108, at 3. See also Paul Allan Schott, World Bank and International Monetary Fund *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism* (2nd ed, The World Bank: International Monetary Fund, Washington, DC, 2006).

²⁹¹ Stefan D. Cassella “Reverse Money Laundering” 2003 7(1) *Journal of Money Laundering Control* 92 at 93.

²⁹² Nick Kochan *The Washing Machine* (Duckworth, London, UK, 2006), at 245.

²⁹³ Financial Action Task Force, above n 289, at 28.

²⁹⁴ Stessens, above n 230, at 3.

of these elements are necessarily involved. While cloaking money may be important, transmission to point of use is a much more pressing need for terrorists.

With regard to the accumulation element, while the basic requirement in money laundering operations is to launder and accumulate a large amount of money, not only does terrorist financing end by distributing funds to terrorist cells, but also “terrorism can, and does, operate on a shoestring”.²⁹⁵ This affects the volume of the money circulated in terrorist-related transactions. The 9/11 Commission Report provides an interesting insight into how easy it was for the 11 September hijackers to carry out their transactions. For example, it is reported that they mainly operated through wire transfers, using sums not exceeding \$10,000 each time. The members of groups were on student visas and appeared to be receiving money from their parents or in the form of grants for their studies.²⁹⁶ It is also emphasised that none of the hijackers’ transactions were “extraordinary or remarkable”.²⁹⁷

In terms of the legitimization element, when terrorists are involved in crime to finance their activities, the quick response is that they are involved in money laundering. Of course, terrorists wish to hide the illegal sources of their funds.²⁹⁸ However, regarding the fact that the purpose in terrorist financing is to make funds available to terrorists on the ground, not to integrate funds into financial systems,²⁹⁹ the question is whether the funds necessarily need to go through those complex money laundering stages and processes to become usable. The answer is positive if terrorists intend to invest proceeds to produce regular revenue.

Looking at the evidence, it is argued that while the movement of “terrorist-related funds” and transactions does not generally resemble normal transactions, it does not include complex processes used in money laundering.³⁰⁰ In addition, the result of a study on money laundering activities in the East and Southern African Anti-Money Laundering Group countries shows that although it was more likely that terrorist

²⁹⁵ For example, the cost of two current terrorist attacks, 9/11 US attacks and the Madrid bombings in 2004, cost \$ 500,000 and \$10,000 respectively. Peter Lilley *Dirty Dealing: The Untold Truth About Global Money Laundering, International Crime and Terrorism* (2nd ed, Kogan Page, London, UK, 2006), at 129.

²⁹⁶ National Commission on Terrorist Attacks upon the United States, Kean and Hamilton, above n 120, at 237.

²⁹⁷ At 528.

²⁹⁸ Dandurand and Chin, above n 274, at 14.

²⁹⁹ Lilley, above n 295, at 150.

³⁰⁰ Bantekas, above n 66, at 321.

funds in this region originate from illegal sources rather than legal sources, no indication as to the link between money laundering activities and terrorist groups had been found.³⁰¹

What radically challenges the assumption of the inclusion of money laundering counter-measures to terrorist financing is the fact that proceeds derived from criminal activities are not the main source of funds for terrorists.³⁰² As mentioned earlier, terrorist funds may have a legal origin. In such a case, if terrorists, for whatever reason, try to conceal funds or their origin, it does not mean that they are engaged in money laundering.³⁰³ Even if they apply similar tools and methods used by criminals to move and transfer their money, they do not necessarily involve laundering in the normal sense of the word.³⁰⁴ In fact, unlike money laundering, where terrorist financing takes place there is no crime that precedes the endeavour to conceal the origin or movement of funds from scrutiny.³⁰⁵ Of course, there is criminal intent, but it does not make sense to deem the funds intended to be used for terrorist purposes “as the proceeds of that criminal intent”.³⁰⁶

4.4 Conclusion

Terrorism is not a crime committed for money; however, terrorists need resources to sustain their activities. This gives terrorist financing a multivariate nature; that is, terrorism can be financed by any means, legal or illegal, and by anyone, terrorists or non-perpetrators. This feature also considerably differentiates terrorist financing from all those (organized) crimes which end in money laundering. The role and purposes of money laundering are to gain a legitimate appearance for the proceeds derived from illegal (often organized) activities, and to accumulate them into the legal economy. This necessitates that criminal activities from which proceeds are derived precede money laundering.

³⁰¹ Charles Goredema *Money laundering in East and Southern Africa: An overview of the threat* (Pretoria, South Africa, 2003), at 16.

³⁰² Alex Peter Schmid, Eithne Boland and Rebekah Grindlay *Countering Terrorism Through International Cooperation: Proceedings of the International Conference on "Countering Terrorism Through Enhanced International Cooperation": Courmayeur Mont Blanc, Italy, 22-24 September 2000* (ISPAC, Milano, Italy, 2001).

³⁰³ Mark Pieth *Financing Terrorism* (Kluwer Academic Publishers, Dordrecht, 2002), at 123.

³⁰⁴ United States Senate Committee on the Judiciary, above n 279, at 88.

³⁰⁵ Dandurand and Chin, above n 274, at 18. See also Lilley, above n 295, at 188.

³⁰⁶ Kersten, above n 69, at 306.

None of these elements are necessarily involved in most terrorist financing cases as the financial flows in terrorist financing go in a different direction. Terrorist financing begins with the gathering of funds and ends by distributing funds to terrorists. In such a process, there is no need for legitimization especially when the funds have a legal origin. Even if terrorist funds have an illegal background, money laundering cannot play a leading role because the purpose in terrorist financing is not the accumulation of funds in financial systems.

Similar to money laundering in which the attempt is to conceal the origin of proceeds from detection, the effort in financing terrorism is to hide the funds and their origin devoted to pursuing terrorist activities from scrutiny. This similarity has been used to draw an analogy between money laundering and terrorist financing, reasoning that terrorists and their supporters resort to similar tools and techniques to those used by launderers in organized crime to move terrorist funds.³⁰⁷ Nonetheless, where terrorist financing takes place, there often is no criminal offence that precedes the endeavour to hide the movement of funds from detection.³⁰⁸ Although there is criminal intent, it is not reasonable to consider the funds “as the proceeds of that criminal intent”.³⁰⁹

To sum up, FATF claims that because “there is a close connection between terrorism, *inter alia*, and money laundering”, terrorist financing should be criminalized as a predicate money laundering.³¹⁰ The analysis of this chapter, however, indicate that the crime-terrorism nexus assumption is not accurate as there are fundamental differences between terrorism and organized crimes, and between terrorist financing and money laundering. This raises serious doubt as to the effectiveness of the expansion of anti-money laundering measures to counter terrorist financing (although as noted the examination of such an expansion is beyond the scope of this research).

But relying on the crime-terrorism nexus assumption seems to have paved the way for the diffusion of the Terrorist Financing Convention’s approach that has an

³⁰⁷ Cassella, above n 291, at 92.

³⁰⁸ Dandurand and Chin, above n 274, at 18.

³⁰⁹ Kersten, above n 69, at 306.

³¹⁰ Financial Action Task Force *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (2012), at 37.

emphasis on treating terrorist financing independently of terrorism. In other words, while this approach to countering terrorist financing, preparatory in its nature, is not tenable in terms of in terms of existing notions of criminalisation, the emphasis on the assumption that terrorist financing is closely and heavily involved in criminal activities has provided a more convincing, but inaccurate, argument in support of criminalizing terrorist financing as an independent offence even when there is no link between terrorist financing and an actual terrorist act for which financing is carried out. In the following chapters, the implication of this approach to the criminalization of terrorist financing will be examined.

Chapter Five: Ambiguity in the definition of terrorism

5.1 Introduction

In the absence of an international consensus on the definition of terrorism, it seems that the effectiveness of the convention depends, among other things, on a common understanding of what constitutes terrorism, terrorist acts or terrorist groups, the financing of which should be countered. In other words, unlike other counter-terrorism conventions in which certain classes of terrorist-type conduct such as aircraft sabotage, hostage taking or hijacking are addressed without need to define or even apply the term terrorism, the drafters of the Terrorist Financing Convention could not define the new crime of terrorist financing without precisely clarifying the scope of the definition of terrorism. The aim of this chapter is to examine whether the counter-terrorism financing regime provides a solid platform for understanding who should be considered terrorists or what constitutes terrorism, terrorist acts and terrorist groups. The reason for such an examination is self-evident: the financing of terrorism is the subject matter of the counter-terrorism financing regime, and it rests on the definition of terrorism.

In the next section, the peculiarities of the nature of terrorism will be illustrated. In section 3, the attempt of the drafters of the Terrorist Financing Convention to define the elements of terrorism, terrorist acts and terrorist groups will be examined. The main argument of this chapter is that, with the exception of certain classes of offences regarded as terroristic, there is a difficulty with the nature of the concept of terrorism in relation to criminal law, which makes a consensus of opinion as to what it means unlikely. Even the drafters of the Terrorist Financing Convention and others such as the FATF and the UN Security Council involved in the fight against terrorist financing have provided a poor basis for a shared understanding of what is terrorism. In other words, they have left vague³¹¹ all of those controversial aspects of terrorism which hinder reaching an agreement on a convention on terrorism. This may jeopardize the purposes that the convention has in view as there is no common or clear understanding of, or guidance on, whose money or, more accurately, financing for what purpose should be countered.

³¹¹ Vagueness is defined in chapter 1.4.1.

5.2 The peculiarities of the nature of the concept of terrorism

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 have made not only all attempts to reach an agreement on the definition of 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.³¹² The less-discussed question is whether the underlying act of terrorism encompasses any unlawful conduct, including violent conduct, “repressive acts”³¹³ and even minor criminal conduct like vandalism. While some believe that the underlying acts of terrorism only (need to) include serious offences or “violence”,³¹⁴ in providing a generic definition on terrorism, some regional agreements even go so far as to include “any act which is a violation of the criminal laws of a State Party”.³¹⁵ This seems to cover all kinds of criminal conduct. The 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”.³¹⁶ “One may wonder when serious damage (rather than non-serious damage) to a place of public

³¹² Robert Cryer *An Introduction to International Criminal Law and Procedure* (2nd ed, Cambridge University Press, Cambridge, UK, 2010), at 289. Ben Saul *Defining Terrorism in International Law* (Oxford University Press, Oxford, UK, 2006), at 59-60. Also see Ben Saul “Terrorism as a Transnational Crime” in Neil Boister and Robert J. Currie (eds) *Routledge Handbook of Transnational Criminal Law* (Routledge, Abingdon, UK, 2015), at 406.

³¹³ 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.

³¹⁴ UN Human Rights Council *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin Addendum Mission to Spain* (16 December 2008), at [6]. See also Cryer, above n 312, at 289.

³¹⁵ Organization of African Unity *OAU Convention on the Prevention and Combating of Terrorism* (14 June 1999), art 1 (3). See also League of Arab States *Arab Convention on the Suppression of Terrorism* (Cairo, 22 April 1998), art 1 (2). Organization of the Islamic Conference *Convention of the Organisation of the Islamic Conference on Combating International Terrorism* (1 July 1999), art 1 (2).

³¹⁶ UN *Draft Comprehensive Convention against International Terrorism, A/59/894*, (12 August 2005), art 2.

use occurs”.³¹⁷ The question can be also raised as to whether lawful conduct which may terrorise people can be an underlying act.

The most peculiar feature of terrorism, as the (in)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”.³¹⁸ That is, terrorism, unlike other transnational crimes, is not an 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 conduct or the use of violence are unlawful and unjustifiable but excusable, or unlawful but justifiable, or even lawful.³¹⁹ 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.³²⁰ In some regional agreements, however, some of these circumstances have been taken into account by being exempted from the definition of terrorism.³²¹ Nonetheless, what law should govern such exempted acts,³²² 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.³²³

³¹⁷ Thomas Wiegand “The Universal Terrorist; The International Community Grappling with a Definition” 2006 4(5) *Journal of International Criminal Justice* 912, at 928.

³¹⁸ Jenny Teichman “Terrorism” in C. A. Gearty (ed) *Terrorism* (Dartmouth, Aldershot, England, 1996), at 5.

³¹⁹ 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 [etc.], 1996), at 151-152. M. Cherif Bassiouni *International terrorism and political crimes* (Thomas, Springfield, Ill., 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.

³²⁰ Boister, above n 66, at 63.

³²¹ Article 3(1) of Organization of African Unity *OAU Convention on the Prevention and Combating of Terrorism* exempts “the struggle waged by peoples ... for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and dominion by foreign forces” from being labelled as terrorist acts. See also Article 2(a) of League of Arab States *Arab Convention on the Suppression of Terrorism*. Art 2 (a) of Organization of the Islamic Conference *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*.

³²² For more details about the countries positions on this issue see Antonio Cassese *International Criminal Law* (2nd ed, Oxford University Press, Oxford, 2008), at 167-168.

³²³ Saul, above n 312, at 128.

To solve the problem of how to label terrorist-type conduct, 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 relation 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.³²⁴

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”³²⁵ includes various forms of damage to property and interference with or disruption of essential utilities and infrastructure.³²⁶ Others restrict this definition by requiring that such property damage needs to be “likely to endanger human life”.³²⁷ 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”.³²⁸ Although the property damage element is included in the UN Draft Convention definition of terrorist acts,³²⁹ it is neither in the list of the acts drawn by the Resolution 1566 of the Security Council on the condemnation of terrorism,³³⁰ 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

³²⁴ Cryer, above n 312, at 290.

³²⁵ 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), at 40.

³²⁶ See for example section 1 (2)(b),(e) of Terrorism Act 2000 (UK) or section 100.1(2)(b) of Criminal Code Act 1995 (Australia).

³²⁷ Section 5(3) (d) of Terrorism Suppression Act 2002 (New Zealand).

³²⁸ Article 1(1) of “EU Council Framework Decision 2002/475/JHA on Combating Terrorism”. See also Article 1 (2) of Convention of the Organisation of the Islamic Conference on Combating International Terrorism.

³²⁹ Article 2(b) and (c) of UN Draft Comprehensive Convention against International Terrorism, above n 316.

³³⁰ UN, S/Res/1566, 8 October 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”.

terrorism.³³¹ The concern expressed is that while such inclusion can capture conduct of a terrorist nature, it is likely to target “conduct with no bearing at all to terrorism”.³³² A protest against the WTO, for instance, would be a terrorist act if it resulted in property damage.³³³

With regard to the special intent of terrorism, the League of Nations 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”.³³⁴ In this definition, it is not clear whether intimidation is the primary purpose of the terrorists or whether it is a means to an ulterior end. A number of recent definitions broaden the element by (relying on the British approach) 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”.³³⁵ The difficulty is that it is not clear what degree of intimidation or compulsion needs to occur for an act to be considered terrorism:³³⁶ mere intimidation³³⁷ or serious intimidation?³³⁸ In 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.³³⁹ In the Boston marathon bombings in 2013, for example, it has not been plainly announced what the perpetrators intended to prompt the US government to do or to 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

³³¹ Martin. Scheinin *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* (28 December 2005) at [36-38].

³³² At.

³³³ Cryer, above n 312, at 291.

³³⁴ 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).

³³⁵ Article 2(1)(b) of the Terrorist Financing Convention, above n 6.

³³⁶ See discussion in Saul, above n 312, at 60.

³³⁷ Section 1(b) of Terrorism Act 2000 (UK) considers an act as terrorism if it merely influences a government or an international organization.

³³⁸ Article 1(1) of EU Council Framework Decision 2002/475/JHA 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”.

³³⁹ Geoffrey Levitt “Is Terrorism Worth Defining?” 1986 13 Ohio Northern University Law Review 97, at 111.

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,³⁴⁰ others exclude any terrorist-type conduct with a private motive from a definition of terrorism.³⁴¹ 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”.³⁴² It is argued 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.³⁴³ Similarly, an aggravated bank robbery may end with 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).³⁴⁴

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 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”.³⁴⁵ This may also help “satisfy public indignation”, “better express community condemnation”, “placate popular (but reasonable) demands for justice” and send “a symbolic message that certain kinds of violence cannot be tolerated in plural, secular democracies”.³⁴⁶

³⁴⁰ 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, above n 319, at 564.

³⁴¹ Cassese, above n 322, at 169

³⁴² Saul, above n 312, at 61.

³⁴³ Cassese, above n 322, at 168.

³⁴⁴ At 198.

³⁴⁵ 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), at 29-30.

³⁴⁶ At 30 and 37.

On the other hand, the opponents of this definition of the offence built 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.³⁴⁷ Criticizing the inclusion of motive requirement imposed by some states,³⁴⁸ 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,³⁴⁹ arousing and disseminating “suspicion and anger” of anyone who seems to belong to a religious, ideological or political group connected to a terrorist act,³⁵⁰ 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.³⁵¹ 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.³⁵² The difficulty with this approach is that if motive is not part of the definition of terrorism, why not simply call it murder or assault? As a solution, this also seems deficient as it is not clear what after all is the definition of ‘innocent civilians’ in peacetime or 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”.³⁵³

³⁴⁷ 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), (Federation Press, N.S.W., 2007), at 42.

³⁴⁸ 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 (New Zealand); 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).

³⁴⁹ *R v Khawaja* (2006) 214 C.C.C. (3d) 399, (Ontario Superior Court of Justice) at [45, 80 and 73].
³⁵⁰ At [58].

³⁵¹ 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.

³⁵² Roach, above n 325, at 40.

³⁵³ Ted Honderich *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, 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 the innocent in the Second World War by the US.

5.3 The Terrorist Financing Convention and the definition of terrorism

The impossibility of reaching an agreement on a generic and authoritative definition of terrorism, until the adoption of Terrorist Financing Convention, had led initially to the adoption of a “thematic approach” to condemn and suppress terrorist acts.³⁵⁴ 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.³⁵⁵ 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,³⁵⁶ 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.³⁵⁷

Unlike the sectoral conventions, the drafters of the Terrorist Financing Convention felt they could not define the new offence by simply reference to a particular type of act,³⁵⁸ rather, they would need to define terrorism, the financing of which the Convention was going to criminalize. So, the Convention adopted a “two-fold” approach:³⁵⁹ a listing of offences and “a mini definition of terrorism”.³⁶⁰ With regard to the former, the Convention prohibits the financing of those acts within the

³⁵⁴ Cryer, above n 312, at 285.

³⁵⁵ 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.

³⁵⁶ Levitt, above n 339, at 101.

³⁵⁷ Cryer, above n 312, at 237.

³⁵⁸ Aust, above n 68, at 291.

³⁵⁹ UN, *Measures to Eliminate International Terrorism*, A/C.6/54/L.2, 26 October 1999, Annex III, at 62.

³⁶⁰ Aust, above n 68, at 291.

scope of the sectoral conventions and any further ones.³⁶¹ 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.³⁶² It seems that the establishment of an independent offence of terrorist financing was to some extent superfluous because all those sectoral conventions have provisions which address aiding and financing of the criminal conduct addressed by the conventions.

Despite the support for the deletion of any definition of terrorism,³⁶³ 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.³⁶⁴

Although this definition was endorsed for the purpose of the Convention and for defining a new offence of terrorist financing,³⁶⁵ 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.³⁶⁶

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

³⁶¹ Article 2 (1)(a).

³⁶² 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, at [6].

³⁶³ A/C.6/54/L.2, 26 October 1999, Annex III, at [81].

³⁶⁴ The Terrorist Financing Convention, Article 2 (1)(b).

³⁶⁵ Aust, above n 68, at 298.

³⁶⁶ For example, Article II (1)(b) of Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, above n 355, 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”.

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,³⁶⁷ 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 other person, other than in armed conflict ... ”.³⁶⁸ 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”.³⁶⁹ 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”.³⁷⁰ Instead, it was proposed that the provision be amended to protect any person, whether civilian or not, 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”³⁷¹ because some may insist on excluding the use of violence in those circumstances from being labelled as terrorism.³⁷²

³⁶⁷ UN, A/C.6/53/9, 4 November 1998, above n 10, art 21 (2).

³⁶⁸ 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*, art 2(1)(b).

³⁶⁹ 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, at [102].

³⁷⁰ At [101].

³⁷¹ Koh, above n 66, at 65.

³⁷² UN, *Measures to eliminate international terrorism*, A/C.6/54/L.2, 26 October 1999, above n 359, at [2].

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”.³⁷³ The United States, for example, interprets this phrase to include an assault on off-duty military personnel in time of armed conflict.³⁷⁴ In this regard, it might be controversial as to how to deal with combatants of various kinds, either as terrorists or combatants.

It is also significant to note that the Convention is silent on what the definition of ‘civilian’ is. There remains a great deal 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 acts of terrorism.³⁷⁵

The attempt of the authors of the Convention to specify the intention or purpose of the crime is also subject to criticism for its breadth. According to the definition, it may suffice for an act to be classified as 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.³⁷⁶ 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,³⁷⁷ 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

³⁷³ At.

³⁷⁴ 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* (U.S. G.P.O., Washington, DC, 2000), at VII.

³⁷⁵ Michael Walzer *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3rd ed, Basic Books, New York, NY, 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.

³⁷⁶ 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, above n 359, at [87].

³⁷⁷ Aust, above n 68, at 298.

controversial) to rely on motive to differentiate private from public violence³⁷⁸ and they preferred to stick with the traditional criminal principle that “no motive can excuse an intentional crime”.³⁷⁹ 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.”

5.4 Conclusion

Unlike many other crimes, terrorism is not an easy concept to define. It is mainly because the concept of terrorism is elusive and subject to different understandings.³⁸⁰ As a result, a number of international conventions were agreed on certain classes of offences implicitly regarded as terrorist offences without trying to define or even apply the term terrorism. While this approach seems to be successful in addressing terrorist-type conduct, the emphasis on tackling terrorist financing required the provision of a clear definition of what constitutes terrorism, terrorist acts and terrorist groups the financing of which needs to be tackled. Unfortunately, the counter-terrorist financing regime has failed to define precisely the scope of the elements of terrorism. This may endanger the implementation of the counter-terrorist financing measures simply because those actors engaged in the fight against terrorist financing do not have a clear or common understanding of whose money or what financing they are expected to look for. More importantly and in contradiction with the values of the rule of law discussed in chapter 1.4.1, citizens are left struggling to define what kinds of activities or what groups they should not support financially on pain of prosecution. This matter will be revisited in the following chapters.

³⁷⁸See United Nations Office on Drugs and Crimes *Guide for the legislative incorporation and implementation of the universal anti-terrorism instruments* (2006), at [31].

³⁷⁹Roach, above n 325, at 42.

³⁸⁰George P. Flercher “The indefinable concept of terrorism” 2006 4(5) *Journal of International Criminal Justice* 894.

Chapter Six: The material elements of the offence

6.1 Introduction

There are four elements to the *actus reus* of the offence of terrorist financing. Under the definition of the offence provided by the Convention, a person is criminally liable when that person a) unlawfully b) collects c) or provides d) funds. What each of these elements means, how they were placed in the Convention and how they are interpreted and implemented by states will be discussed in this chapter.

As will be illustrated, there are so many ambiguities over the definition of these elements. But, the main challenge here is, when there is no connection between each of these elements and a criminal terrorist act, how the *actus reus* of the offence should be interpreted in order for its criminalization to be justified. The next chapter shows that the offence relies heavily on the mental element of the offence, from which where the criminality of terrorist financing is assumed to be derived; but as it will be shown here, the criminalization of acts of financing, or collecting or providing funds, without connecting them to an actual terrorist act, makes the *actus reus* elements ambiguous and causes confusion on the implementation of the Convention.

For example, as illustrated in the final part of this chapter on the definition of ‘funds’, the Convention’s vague reference to ‘funds’ without the requirement to link them to any actual terrorist activities has led some states to criminalize financing of anything (US’s approach is an example will be examined here). This chapter discusses how such a broad interpretation has violated free speech rights in the US. Although, a narrower definition of funds (as it is practiced in Germany and Japan) does not contain vague terms, it suffers from a similar problem; that is, a narrower definition restricts only the scope of the offence, and consequently the scale of abuse of the law; but it does not really address the structural issue of where the criminality of the offence originates from.

6.2 The link between the *actus reus* of the offence 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 by implementing

State Parties 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 but at the same time emphasise the one was separate from the other. 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.³⁸¹ While the language of this definition, which refers to the commission of subsequent terrorist acts, seemed to suggest that the act of financing needs to 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.³⁸² 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 money has been used to finance the commission of a particular terrorist attack.

On the other hand, those delegations which tried to restrict the scope of the offence to the financing of an organization, found this reasoning inapplicable to the case of the financing of individuals.³⁸³ 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 in the Convention as agreed because the draft sponsors wished the offence to have a broader scope.

After the failure to define terrorist groups, the drafters deleted the references to both a person and organization, and the distinction between financing individuals and financing organisations that the objecting delegations were trying to make collapsed. The Convention was reformulated with a direct reference to terrorist acts, which do not necessarily need to be committed or attempted; that is, the

³⁸¹ UN, A/C.6/53/9, 4 November 1998, above n 10, art 2.

³⁸² Aust, above n 68, at 296-297.

³⁸³ UN, A/AC.252/1999/WP.12 reprinted in A/54/37, above n 170.

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’s main sponsor, 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”.³⁸⁴ 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 proof of the mental elements, that the collected or provided funds “should be” or “are to be used” for terrorist purposes. So, the criminality of the offence relies heavily on the mental element that a financier may have. This will be discussed in detail in the next chapter.

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.³⁸⁵ 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”.³⁸⁶

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

³⁸⁴ UN. A/54/37, “working paper prepared by France on article 1 and 2.

³⁸⁵ UN, A/AC.252/1999/WP.12 reprinted in A/54/37, above n 170.

³⁸⁶ At.

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.³⁸⁷ Similarly, in Germany, the financing of terrorist acts and financing of individual terrorists may be prosecuted using the participatory offence of “assisting another to commit a crime.”³⁸⁸

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,³⁸⁹ 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 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,³⁹⁰ 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 Finland³⁹¹ and Sweden³⁹², 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.

³⁸⁷ Financial Action Task Force *Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism, Kingdom of Denmark* (Paris, 2006), at [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 at 150.

³⁸⁸ International Monetary Fund *Germany: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism* (Washington, DC, 2010), at [210].

³⁸⁹ Lavalley, above n 68, at 501.

³⁹⁰ For more information about national and international debates on multiple convictions see *the Prosecutor v. Zejnir DELALIC, Zdravko MUCIC* (20 February 2001), Case No. IT-96-21-A, the Appeals Chamber, at [405- 412].

³⁹¹ Financial Action Task Force *Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism, Finland* (Paris, 2007), at [153]. See also Financial Action Task Force *9th Follow-Up Report; Mutual Evaluation of Finland* (Paris, 2013).

³⁹² Section 5 of Act on Criminal Responsibility for the Financing of Particularly Serious Crime in some cases, 2002:444 (Sweden).

In the following parts, I will examine the impact of this approach on the four elements of the *actus reus*.

6.3 ‘Collection’ and ‘Provision’

Defining the material act of the new offence is not as easy as one may imagine. This 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 other words, the difficulty was (and still is) whether, and if so, how to criminalize every link in the chain of supply from production of the funds, through transfer to reception and possession and whether each link could be said to be part 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.”³⁹³ However, such a definition provoked serious differences of opinion among the delegations.

The most controversial issue in this regard was whether the act of financing should include “the reception of funds in addition to their transfer”.³⁹⁴ 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”,³⁹⁵ and “to provide a broader scope for the term financing beyond the technical connotation of transfer”.³⁹⁶

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

³⁹³ UN, A/54/37, Annex II, Working document submitted by France on the draft international convention for the suppression of the financing of terrorism, art 1(1).

³⁹⁴ UN, A/C.6/54/L.2, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman at [32].

³⁹⁵ At [35].

³⁹⁶ UN, A/54/37, Annex IV, Informal summary of the discussion in the Working Group, prepared by the Rapporteur, at [2].

“the passive act of receiving”.³⁹⁷ 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”.³⁹⁸

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”.³⁹⁹ 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 are 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.⁴⁰⁰ A relative suggestion was proposed in favour of the criminalization of the act of reception “as a separate offence to transferring”.⁴⁰¹ 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, the objective element of the offence was defined to mean the unlawful provision or collection of funds.⁴⁰²

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 Palermo Convention in which the possession of proceeds is regarded as one of the material elements of money laundering,⁴⁰³ 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 where the mere possession of funds does not constitute criminal liability,⁴⁰⁴ the UK in Section 16 of Terrorism Act (2006)

³⁹⁷ UN, A/C.6/54/L.2, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, at [37].

³⁹⁸ At [37].

³⁹⁹ At [38].

⁴⁰⁰ At [39].

⁴⁰¹ At [40].

⁴⁰² Article 2 (1).

⁴⁰³ UN Convention Against Transnational Organized Crime, above n 210, art 6 (1)(b)(i).

⁴⁰⁴ See Financial Action Task Force *Third Mutual Evaluation Report; Anti-Money Laundering and Combating the Financing of Terrorism; Japan* (Paris, 2008), at [224].

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”.⁴⁰⁵ Under this approach, the link between the act of collection and a terrorist act is necessary. 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.⁴⁰⁶

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”.⁴⁰⁷ 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”.⁴⁰⁸ 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 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”,⁴⁰⁹ 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

⁴⁰⁵ Financial Action Task Force *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism; Portugal* (Paris, 2006), at 183.

⁴⁰⁶ Financial Action Task Force, above n 217, at [121].

⁴⁰⁷ Lavalley, above n 68, at 498.

⁴⁰⁸ At 498.

⁴⁰⁹ 18 U.S.C. §§ 2339 C (e) (4) and (5).

engaged in terrorist activity” or charity fronts may create criminal liability under the US law.⁴¹⁰

It is worthy of note that in some jurisdictions, the illegality of an act of collection depends on the identity of the financiers. In Japan, for example, the collection of funds for terrorist purposes does not create criminal liability if the collectors are not terrorists.⁴¹¹ Their acts will not be punishable unless and until they provide the collected funds to terrorists.⁴¹² In other words the crime is never inchoate; only choate.

6.4 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”.⁴¹³ 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”.⁴¹⁴ 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.⁴¹⁵ 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;⁴¹⁶ however, such a justification cannot be applied in the case of terrorist financing since collecting or providing funds for use in carrying out terrorist acts cannot be legal in any event.

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 scope of the application of the Convention financing cases such as “ransom payments”,⁴¹⁷ or cases which “might have the

⁴¹⁰ R.T. Naylor *Economic Warfare: Sanctions, Embargo Busting, and Their Human Cost* (Northeastern University Press, Boston, 2001), at 588.

⁴¹¹ Financial Action Task Force, above n 404, at [217].

⁴¹² It should be noted that from the Convention perspective, it does not matter who collects the funds. In other words, “any person” who supplies funds with terrorist purposes.

⁴¹³ Article 2 (1) the Terrorist Financing Convention.

⁴¹⁴ UN, A/AC.252/1999/WP.26, reprinted in UN, A/54/ 37, above n 170.

⁴¹⁵ Article 2 (1) of The Terrorist Bombing Convention, above n 5.

⁴¹⁶ Lavalle, above n 68, at 500.

⁴¹⁷ UN, A/C.6/54/L.2, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, at [67].

unintended result of aiding the commission of” terrorist acts⁴¹⁸ such as the provision of material assistance to groups believed to pursue terrorist offences as well as humanitarian activities.⁴¹⁹ 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.⁴²⁰ It is also cited that the term “unlawfully” might be retained by the drafters to refer to “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”.⁴²¹

Regardless of what the drafters intended 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 and terrorist acts in such a way as to be distinguishable from the acts committed by freedom fighters in furtherance of a struggle against oppression and foreign occupation.⁴²² 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 as terrorist and unlawful.⁴²³ For example, Switzerland⁴²⁴ and Austria⁴²⁵ have introduced, in a vague manner, an exclusion of criminality for an act of financing directed to the establishment or re-establishment of a democratic and constitutional regime or the

⁴¹⁸ UN, A/54/37, Annex IV, at [17].

⁴¹⁹ Aust, above n 68, at 294.

⁴²⁰ 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), at [4]. See also UN, above n 283.

⁴²¹ *Council of Europe Convention on the Prevention of Terrorism* (16 May 2005), at [82].

⁴²² UN, A/C.6/54/L.2, Annex III, at [2 and 81].

⁴²³ Lavalley, above n 68, at 501.

⁴²⁴ Criminal Code of the Swiss Confederation 1937, art 260 *quinquies*(3).

⁴²⁵ Criminal Code of the Republic of Austria 1974, art 278c (3).

exercise or protection of human rights.⁴²⁶ However, how and on what basis the legitimacy of people who resort to violence to establish a democratic situation or to protect human rights should be determined, if determinable at all, may vary from one state to another, depending on whose side a state would be on (funding different sides in the civil war in Syria is the obvious 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”.⁴²⁷ Other states, such as New Zealand,⁴²⁸ 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, the rules on financing of terrorism can be applied to the financing of armed groups involved in a situation of armed conflict, including freedom fighters.

6.5 Definition of ‘funds’

Another fundamental element of the design for an independent and generic crime of terrorist financing is the concept of ‘funds’ gathered to be used for terrorist purposes. During the negotiation of the Convention, there was not much argument on the definition of the term “funds”. The first⁴²⁹ and revised draft⁴³⁰ of the Convention used a non-specific definition of the term ‘funds’ which encompassed “any form of pecuniary benefit”.⁴³¹ The drafters, however, decided to stretch the

⁴²⁶ 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, above n, at [60].

⁴²⁷ Pieth, above n 303, at 1081.

⁴²⁸ Terrorism Suppression Act 2002 (New Zealand), Section 5(1)(c) and 4 (1).

⁴²⁹ 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.

⁴³⁰ UN, A/54/37, Annex II, art 1(1).

⁴³¹ At, Annex IV, at [10].

meaning of the term ‘funds’ beyond its dictionary meaning in its agreed version. The Convention thus 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.⁴³²

The Convention does not clarify what the expression “but not limited to” refers to. It has been left to the implementing states to define in their own law. Under a broad interpretation, funds can include “anything under the sun”, from “animals, buildings, or vehicles of any kind” to any other objects which have pecuniary value.⁴³³ The implication of this broad interpretation is not clear. As illustrated in the discussion below, which examines a very broad approach to interpreting ‘funds’ and ‘funding’, the apparent breadth of this definition, which may seem functional in abstract proves, however, to be controversial when it is applied at national levels. This definition is also served for functional reasons to stretch the scope of the offence in a way that would have a negative impact on its legitimacy as criminal law.

A narrower interpretation of the term ‘funds’ is also possible, although it is not clear whether a narrower definition reduces the negative impact. The following discussion examines the broad approach interpretation adopted by the US contrasting it with the narrower approach used in German and Japan to defining the term funds.

6.5.1 A broad but controversial interpretation of definition of the term “funds”

From a US perspective, which applies a very broad definition of support, the term ‘funds’ means support beyond pure funding. That is, the US law prohibits providing “material support or resources” to terrorists and foreign terrorist organizations.⁴³⁴ The term “material support or resources” contains not only funds and tangible

⁴³² The Terrorist Financing Convention, above n 6, art 1 (1).

⁴³³ Lavalley, above n 68, at 496.

⁴³⁴ 18 U.S.C. §§ 2339 A and B.

goods, but also “training”, “personnel”, “transportation”, “service” and “expert advice or assistance”, “except medicine or religious materials”.⁴³⁵

However, the precise scope of the “material support and resources” 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”.⁴³⁶ In the complicated 12-year long Humanitarian Law Project litigation, in which a non-profit organization sought to promote the peaceful resolution in violent conflict by supporting groups designated by the US government as terrorist groups, namely the Tamil Tigers and the Kurdistan Workers’ Party, the plaintiffs, among other things, claimed that prohibitions against providing “material support and resources” to foreign designated terrorist organizations were “unconstitutionally vague”.⁴³⁷ Specifically, the plaintiffs sought to enjoin enforcement against the ban on providing “training, expert advice or assistance (when derived from “specialized knowledge”), service and personnel”.

Despite the clarifying explanations of these terms added to the material support provisions,⁴³⁸ the District Court and the Court of Appeals ruled that these terms (except the term “personnel”)⁴³⁹ were impermissibly vague and in contradiction with the values of the rule of law discussed in chapter 1.4. With regard to the term

⁴³⁵ 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 Representatives “Terrorism Prevention Act”, (15 April 1996), < https://www.fas.org/irp/congress/1996_rpt/h104518.htm>. See also 18 U.S.C. § 2339A (b)(1).

⁴³⁶ *Humanitarian Law Project v. Reno*, 9 F.Supp.2d 1176, (C.D. Cal. 1998) at [1180].

⁴³⁷ Steven Strasser and Craig R. Whitney *The 9/11 Investigations: Staff Reports of the 9/11 Commission: Excerpts From the House-Senate Joint Inquiry Report on 9/11: Testimony From Fourteen Key Witnesses, Including Richard Clarke, George Tenet, and Condoleezza Rice* (Public Affairs, New York, 2004), at 1185.

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

⁴³⁹ The US court in the case of *Humanitarian Law Project v. Gonzales*, 380 F.Supp.2d 1134, (C.D. Cal. 2005) at 1152 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”.

“training” which is defined as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge”,⁴⁴⁰ the Court of Appeals 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’”.⁴⁴¹ The Court of Appeals 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.⁴⁴²

With regard to the term “expert advice or assistance” defined as imparting “scientific, technical or other specialized knowledge”,⁴⁴³ 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”;⁴⁴⁴ so, “they must now guess whether their expert advice constitutes specialized knowledge”.⁴⁴⁵ 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 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.⁴⁴⁶

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

⁴⁴⁰ 18 U.S.C. § 2339A(b)(2)

⁴⁴¹ *Humanitarian Law Project v. Mukasey* 552 F.3d 916, (9th Cir 2009), at [929].

⁴⁴² At [929].

⁴⁴³ 18 U.S.C. § 2339A(b)(3).

⁴⁴⁴ *Humanitarian Law Project v. Gonzales*, above n 439, at [1152].

⁴⁴⁵ At [1152].

⁴⁴⁶ *Humanitarian Law Project v. Gonzales*, 380 F.Supp.2d 1134, (C.D. Cal. 2005) at [1151].

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.⁴⁴⁷ 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”.⁴⁴⁸ Adopting the District Court’s reasoning and its holding, the Court of Appeals 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”,⁴⁴⁹ and because “it is easy to imagine protected expression that falls within the bounds’ of the terms ‘service’”.⁴⁵⁰

The Supreme Court, however, reversed the Court of Appeals’ decision on what I argue are insufficient and controversial grounds. It found that the lower courts inappropriately merged the plaintiffs’ vagueness challenge with their First Amendment concerns.⁴⁵¹ 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. While acknowledging that “the material-statute may not be clear in every application”,⁴⁵² the Supreme Court upheld that most of the activities in which the plaintiffs wish to engage are clearly banned by the provisions.⁴⁵³ That is, a reasonable person would realize that training the Kurdistan Workers’ Party’s (PKK’s)⁴⁵⁴ 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

⁴⁴⁷ At [1151- 1152].

⁴⁴⁸ At [1152].

⁴⁴⁹ At [1152].

⁴⁵⁰ *Humanitarian Law Project v. Mukasey*, above n 441, at [930].

⁴⁵¹ *Holder v. Humanitarian Law Project*, 561 U.S. 130 S.Ct. 2705, (2010), at [2719].

⁴⁵² At [2720].

⁴⁵³ At [2719].

⁴⁵⁴ The Kurdish Workers’ Party (the PKK) in turkey is designated as a terrorist in the US. See US Department of State, above n 202.

a “specific skill”, not “general knowledge”.⁴⁵⁵ The court found that political advocacy on behalf of the PKK or the Liberation Tigers of Tamil Eelam (LTTE)⁴⁵⁶ may also be 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,⁴⁵⁷ which consists of advocacy “that is not directed by, or coordinated with, a designated terrorist organization.”⁴⁵⁸ 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? Must the relationship have any formal elements, such as an employment or contractual relationship? What about a relationship through an intermediary?”⁴⁵⁹ The court found these questions too “hypothetical” to be considered.⁴⁶⁰

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.⁴⁶¹ Favours urgent political demands,⁴⁶² the court recited the government’s concerns that foreign terrorist organizations are so tainted by their criminal conduct that training and coordinated support 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.⁴⁶³ They may “lend legitimacy to foreign terrorist groups ... that makes it easier for those groups to persist, to recruit members and to raise funds”.⁴⁶⁴ 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.⁴⁶⁵ Terrorist groups acquainted with the United Nations’ human rights bodies might

⁴⁵⁵ *Holder v. Humanitarian Law Project* above n 451, at [2720].

⁴⁵⁶ The Liberation Tigers of Tamil Eelam. See US Department of State, above n 202.

⁴⁵⁷ *Holder v. Humanitarian Law Project* above n 451, at [2721-2].

⁴⁵⁸ Owen Fiss “The World We Live In” 2011 83(2) Temple Law Review 295 at 299.

⁴⁵⁹ *Holder v. Humanitarian Law Project*, above n 451, at [2722].

⁴⁶⁰ At.

⁴⁶¹ At [2725].

⁴⁶² At [2724].

⁴⁶³ At.

⁴⁶⁴ At [2725-2726].

⁴⁶⁵ At.

use also the information to “threaten, manipulate and disturb”.⁴⁶⁶ 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”.⁴⁶⁷

The 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.⁴⁶⁸ The threat that the court considers that the law seeks to prevent is potential (or perhaps more accurately fictional) not actual. The court only prohibited coordinated advocacy, advocacy that occurs in coordination with, or at the direction of, a designated terrorist organization. Nevertheless, the court’s reasoning is questionable: if the harm of political advocacy is adequate to justify the prohibition, why is it not sufficient to justify the ban on ‘independent’ advocacy? Independent advocacy might, one assumes, free resources, legitimize groups or give terrorists the opportunity of exploiting it for their illegal purposes.⁴⁶⁹ Moreover, both types of advocacy (coordinated and independent) undermine free speech.

The court’s reasoning also raised the concern that if the government does not intend to suppress particular advocacy for particular groups designated as terrorist groups, whether the provision of “job training” to other groups such as gangs should be banned on the assumption that the skills 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?⁴⁷⁰ 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 of the Supreme

⁴⁶⁶ At [2729].

⁴⁶⁷ At [2729].

⁴⁶⁸ At [2730-2340] (Justice Breyer, dissenting).

⁴⁶⁹ Fiss, above n 458, at 302.

⁴⁷⁰ David Cole “The First Amendment’s Borders” the Place of Holder v. Humanitarian Project in First Amendment Doctrine” 2012 6(1) Harvard Law & Policy Review 147, at 157.

Court in *Humanitarian Law Project*, the answers to these questions may be yes, although they differ from question to question to which the court was applying itself.⁴⁷¹

In a similar case,⁴⁷² the US Court of Appeals complicated the issue by holding that the First Amendment does not permit the government to proscribe advocacy coordinated with a “domestic” terrorist organization. Although it applied the *Humanitarian Law project* decision, the court reasoned that advocacy for a designated “domestic” group whose assets had already been frozen could not free up the group’s assets for its illegal purposes.⁴⁷³ Nor does it endanger the US relationship with its allies as it is domestic. However, neither the court nor the statute defined the term “domestic”.⁴⁷⁴

To sum up, what the US approach teaches us is that the lack of requirement to connect funds to any terrorist act means the offence depends heavily on the mental element of the offence as a tainting element. Moreover, the vague wording of the Convention, which seems to permit the term ‘funds’ to include almost anything, leads to the impingement of the basic rights such as free speech as discussed in *Humanitarian Law Project* case. The question discussed in the next part is whether a narrower definition can remedy this impact.

6.5.2 A narrower definition of the term “funds”

Unlike the US and the other states that broadly define the term “funds”,⁴⁷⁵ some states define funds to include only pecuniary resources or funds of a certain value.

⁴⁷¹ 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, (1996) at 448. Or in *De Jonge v. Oregon* 299, U.S. 353, (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.

⁴⁷² In *Al Haramain Islamic Foundation, Inc. v. US Department of Treasury*, 660 F.3d 1019 (9th Cir 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.

⁴⁷³ At [1053].

⁴⁷⁴ 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 At [1052].

⁴⁷⁵ In Article 421-2-2 of the Criminal Code of the French Republic, 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.

Following its proposal in the negotiations on the Convention, in which Japan proposed the use of the generic definition of “funds” such as “any form of pecuniary benefits”,⁴⁷⁶ 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”.⁴⁷⁷ 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”.⁴⁷⁸ Japan however “criminalises the financial support of terrorist acts without the need to establish a link with a specific terrorist act or the need to prove that the funds were actually used to further a terrorist act”.⁴⁷⁹

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 evaluation, they have made a greater than merely insubstantial contribution to the preparation of a serious violence act endangering the state”.⁴⁸⁰ It seems that the German legislators intended to narrow the scope of the offence to financing conduct whose contribution to a violence act endangering the state is “substantial”, and whose substantiality can be determined with regard to that violent conduct which has been committed or attempted. But, section 89a (2) does “not require the actual act endangering the state to be committed or attempted, nor the funds to be linked to a specific act”. So, it is not clear when a violent act endangering the state is not committed or attempted, how the substantiality of funds should be determined. If the substantiality of funds

⁴⁷⁶ UN, A/AC.252/1999/WP.10 reproduced in UN, A/54/37, above n 170, at 28.

⁴⁷⁷ Financial Action Task Force, above n 404, at [219].

⁴⁷⁸ At [221].

⁴⁷⁹ At [224].

⁴⁸⁰ International Monetary Fund, above n 388, at [207].

is determined based on their market value, then it seems that the acts of financing is only limited to the collection or provision of funds of certain value.

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 act, and therefore also all types of provision of funding referred to under the [Terrorist Financing] Convention”.⁴⁸¹ However, the definition of a terrorist group within the meaning of the Section 129 is narrower than the definition provided by the FATF.⁴⁸²

While the German approach has been criticised by the FATF,⁴⁸³ 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”.⁴⁸⁴

Again, the question arises as to whether narrowing the definition of funds to include specified things (monetary instruments according to Japanese law or substantial support under the German law) will remedy the problems arises from a broad interpretation that occurs in the US. In the absence of access to any case, it is hard to judge the scope of the offence in the way Japan and Germany interpret the Convention. But on a literal interpretation of the statute, what is obvious is that a narrower definition may limit the scope of the offence to include financing of certain things but not necessarily justify the criminalization of the offence, or prevent the abuse of the law.

⁴⁸¹ At [221].

⁴⁸² 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.

⁴⁸³ 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, above n 388, at [208].

⁴⁸⁴ UN, A/54/37, Annex IV, at [14].

6.6 Conclusion

The main challenge of the drafters of the Convention was how to define the connection between acts of financing and a terrorist act from which criminality of terrorist financing is derived but at the same time emphasize the former is separate and independent from the latter. To make sure that the scope of the offence could expand to include financing of any terrorist offences, a paragraph, suggested by the drafts' main sponsor, France, was added to the Convention; this paragraph emphasizes that in order to convict a person for an offence "it shall not be necessary to prove that the funds were in fact used to prepare for or to commit a specific offence".⁴⁸⁵ Therefore, it does not matter how remote the act of collection or provision of funds is from the actual commission of subsequent terrorist offences; similarly the definition of funds could be expanded to include anything as they do not need to necessarily be used for the commission or preparation of a terrorist act. What is important for an act to be considered as a terrorist financing offence is proof of the mental elements, that the collected or provided funds "should be" or "are to be used" for terrorist purposes. So, the criminality of the offence relies heavily on the mental element that a financier may have, which will be discussed in detail in the next chapter. But such an approach has negative impact on the definitional elements of the *actus reus*.

There are four elements defined for the *actus reus* of the offence: 1) unlawful 2) collection or 3) provision 4) funds. The definition and scope of each of these elements have been discussed. It has been shown that how ambiguous these elements are, and how their ambiguity has resulted in different understanding among implementing states. Some of the ambiguities with regard to acts of 'collection' and 'provision', discussed in this chapter, are that it is not clear whether they include the possession of funds, and whether the act of collection is prerequisite to the act of provision, or there are two different, but successive offences. Different approaches have been adopted by different states.

The inclusion of the qualifier "unlawfully" has also left a gap in the Convention, which is open to different interpretations. It has been argued that in the presence of ambiguity over the definition of terrorist act and terrorist group, the term

⁴⁸⁵ UN, "Working paper prepared by France on article 1 and 2", A/54/37, above n 170.

“unlawfully” can be used to exclude the financing of acts and groups that a state does not wish to label as terrorist and unlawful.⁴⁸⁶

The Convention expands the definition of ‘funds’ beyond its dictionary meaning in its agreed version; it has been left to the implementing states to define the scope of the term funds. Interpreting the term funds to include almost everything is the approach adopted by the US. It has been discussed how, in the absence of a requirement to connect funds to any terrorist act, such a broad interpretation have led to the impingement of the basic rights such as free speech.

The approach of Japan and Germany to defining the term has been also discussed; however, it is doubted whether and how, in the absence of any link between funds and an actual act terrorist act, this approach can prevent the abuse of the law, as seen in the US. Theoretically, what is obvious is that a narrower definition of funds, which under the Japanese law, is restricted to monetary instruments, or according to the German law includes only substantial support (if the substantiality of the support is measured based on its market value), may limit the scope of the offence to include financing of certain things but not necessarily give citizens fair notice of what they are forbidden from doing. I assume there would still be potential for citizens to become deprived of their rights, such as deprivation of free speech in the US, for being involved in the collection or provision of a narrower category of things regarded as funds. It may be that the drafters of the Convention hoped that the reliance on the mental element of offence, which permits and justifies the criminalization of the collection or provision of funds when they are carried out with the intention or knowledge that the funds are to be used for terrorist purposes, could narrow the scope of the offence and both justify the offence and fix this problem.

⁴⁸⁶ Lavallo, above n 68, at 501.

Chapter Seven: The key role of the subjective element in the construction of the new offence

7.1 Introduction

As mentioned, to establish an independent offence of terrorist financing, the drafters of the Convention did not require the proof of any connection between the act of financing and a specific terrorist act. Such a requirement would limit the crime of financing to the equivalent of inchoate offences. To avoid this, the drafters formulated the offence in a way that relies heavily on the mental element of the financier; that is, this is the financier's intention or knowledge that the funds collected or provided are to be used for a terrorist act makes the act of financing criminal. However, when there is no requirement to link the act of financing to a specific terrorist act, what should the financier know or intend to be held criminally liable?

In the following part, I will explore how and why the drafters of the Convention formulated the mental element of the offence in the way drafted, and discuss whether the mental element embedded in the Convention is per se clear. Pointing out why the answer to the latter is negative, I will look at the approach of two jurisdictions (Australia and Canada) to defining and interpreting the scope and structure of the mental element. The analysis of the decisions in *Lodhi* and *Khawaja*, dealing with the mental element of the offence, illustrates how in practice, any requirement other than actual knowledge or intention as to a specific act causes confusion and ambiguity over the structure and scope of the mental element of the offence. Of course, such an ambiguity is inconsistent not only with the values of the rule of law discussed in chapter 1.4.1, but also with many principles of criminal liability and basic citizens' rights.

7.2 History of the negotiations on the mental element of the 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 to 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.⁴⁸⁷

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.⁴⁸⁸ “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 financier 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 terrorist act. A suggestion was also made to lower the *mens rea* standard to negligence, 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.⁴⁸⁹

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

[a]ny 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 one of the Conventions listed in the Annex ...
- or
- b) ...

⁴⁸⁷ 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.

⁴⁸⁸ 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, above n 170.

⁴⁸⁹ UN, A/AC.252/1999/WP.20, reprinted in UN, A/54/37, above n 170.

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.⁴⁹⁰

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”.⁴⁹¹ In fact, the proposers tried to introduce a filter in the definition in order to exclude from the scope 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 remote from its subsequent act could be independently criminalized. The language “committing or attempting to commit” also implied that the financier had to be aware of the material causality between his or her provision of the funds and an attempted or committed act.

Another proposal sought to exclude from the ambit of the Convention the financing of offences listed to the Annex, and which are not “serious”.⁴⁹² The goal of this proposal was to avoid the scope of the application of the Convention to “trivial offences”.

None of these proposals were taken into account as they appeared to place too much emphasis on the knowledge and intention of the financier in relation to the commission or preparation of a specific terrorist act. This would have restricted the scope of the new offence to an act of complicity in, 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 (preparatory forms of complicit in) terrorist acts, including the financing of attempts and participatory offences as proposed, might have endangered the effectiveness of the Convention. Imposing the proposed limitations would have made proof difficult because in many instances it would have required the prosecution to infer the

⁴⁹⁰ UN, A/AC.252/1999/WP.49, reprinted in UN, A/54/37, above n 170.

⁴⁹¹ At.

⁴⁹² See UN, A/C.6/54/L.2, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, at [71].

knowledge or intention of a financier 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)”.⁴⁹³ 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 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 intrinsically criminal or terroristic nature of the act, but the malicious intent of the financier. With the inclusion of paragraph 3, the fault element of the crime acquires a “hypothetical” nature as the financier who does not know about an actual terrorist act will violate the law if they carry out the material elements on the assumption or in the

⁴⁹³ The Terrorist Financing Convention, above n 6, art 2 (3).

acceptance 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,⁴⁹⁴ it would be more precise to speak of the financing of “terrorist purposes” or “terrorist activities”.⁴⁹⁵

This conception of the offence in which the intention or the knowledge of the financier in regard to future conduct or a possible harm is relied on but that conduct itself does not necessarily have to occur is “ground-breaking” in the law on terrorist offences.⁴⁹⁶ While all of the prior terrorist-related conventions target harmful, self-supporting 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 or knowledge of others’ purposes that a financier has.

The criminalization of terrorist financing as an independent stand-alone offence extends the scope of criminal law in a way not previously seen in the most modern liberal criminal justice systems. 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.⁴⁹⁷ Under this approach, the scope of inchoate crimes has been extended to include “encouraging and assisting” offence(s) that “will be committed”.⁴⁹⁸ This new 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 must believe, without any significant doubt, that the principal offender will commit the anticipated offence(s) with the relevant intent element.⁴⁹⁹ The inchoate offender

⁴⁹⁴ Criminal Code (Canada), s 83.04(b); Terrorism Act (UK) 2000, s 16(2).

⁴⁹⁵ Lehto, above n 14, at 263.

⁴⁹⁶ At 269.

⁴⁹⁷ 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, Oxford, UK, 2008), at 142.

⁴⁹⁸ Serious Crime Act 2007 (UK), s 44-47.

⁴⁹⁹ Andrew Ashworth *Principles of Criminal Law* (6th ed, Oxford University Press, Oxford, 2009), at 460-461.

must also believe that any circumstances or consequences specified in the anticipated offence(s) will be fulfilled. The prosecution must therefore specify the offences that the inchoate offender's act might have assisted or encouraged.⁵⁰⁰ In contrast, the terrorist financing offence takes one step further; it does not need to 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 financier assumes or accepts the recipient of the funds will commit.⁵⁰¹

7.3 Where does it come from?

It has been argued that the autonomous criminalization of preparatory acts including terrorist financing should be considered within the context of the shift towards "preventive" approach,⁵⁰² where "the post-crime orientation of criminal justice is increasingly overshadowed by the pre-crime logic of security".⁵⁰³ Under this approach, states are licensed to criminalize "abstract endangerment" acts that pose the risk of certain harms.⁵⁰⁴ These acts are criminalized not because they are "wrongful or harmful" in themselves, but because they create an opportunity for the commission of future dangerous acts.⁵⁰⁵ The typical examples of these acts are possession offences: possession of weapons,⁵⁰⁶ of illegal drugs,⁵⁰⁷ and burglarious instruments.⁵⁰⁸ 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".⁵⁰⁹ 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".⁵¹⁰ It is also pointed out that possession offences extend the scope of criminal

⁵⁰⁰ At.

⁵⁰¹ Lehto, above n 14, at 287.

⁵⁰² See Carol S. Steiker "The Limits of the Preventive State" 1988 88(3) *Journal of Criminal Law & Criminology* 771.

⁵⁰³ L. Zedner "Pre-crime and Post-Criminology?" 2007 11(2) *Theoretical Criminology* 261, p. 263.

⁵⁰⁴ A. P. Simester and Andrew Von Hirsch *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart, Oxford, UK, 2011), at 57.

⁵⁰⁵ Ashworth, above n 499, at 38.

⁵⁰⁶ See for example Prevention of Crime Act 1953 (UK).

⁵⁰⁷ Misuse of Drugs Acts 1977 (UK), s 5 (2). Or Criminal Code (Canada), s 88.

⁵⁰⁸ Theft Act 1968 (UK), s 25.

⁵⁰⁹ C. Slobogin "A Jurisprudence of Dangerousness" 2003 98(1) *Northwestern University Law Review*, at 56.

⁵¹⁰ Ashworth, above n 499, at 97.

law beyond the inchoate crimes, sweeping too wide in the sense that “[t]hey encompass cases where there is no potential social harm”.⁵¹¹

Regardless of whether the criminalisation of remote harms is justifiable, it seems that there are substantial differences between these offences and the terrorist financing offence introduced by the Convention in terms of the risks that flow from them, the objects involved, and the 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),⁵¹² the risk of harms in the terrorist financing offence is even more remote. Indeed, it is far too remote and/or ‘fictional’ as the financier need only assume or admit that the funds collected or provided will be used (by the financier or others) for terrorist purposes. Terrorist financing has a greater similarity with the rare cases when a state, for example, prohibits certain public demonstrations because of what they may prompt others to do in response, than with many other preventative crimes.

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 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),⁵¹³ 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 financier’s intention or knowledge that a terrorist act will occur or be attempted, seems difficult (if not impossible) and, furthermore, according to the Convention, unnecessary. In other words, unlike remote harm offences in which the fault element is the intent in relation to the act that the

⁵¹¹ George P. Fletcher *Basic Concepts of Criminal Law* (Oxford University Press, New York, NY, 1998), at 176.

⁵¹² Ashworth, above n 499, at 38.

⁵¹³ Theft Act 1968 (UK), s 25(1).

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.

Now I turn to examine the very important question of what constitutes the mental element of the offence.

7.4 Examination of the fault elements of the offence of terrorist financing

The question which the drafters left unanswered is that if there is no need to link the acts of financing to any actual terrorist act, and if financing alone can hardly provide a solid basis for prosecution or conviction, what should the financier know to be held criminally responsible? How should the intention be read where the act of the financier is potentially very remote from any subsequent act?

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. Let us recap:

- 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 a great deal of 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 attempts 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 existing law of attempts.

Drawing on states' legislation on terrorist financing and cases, this section examines whether the fault element of an independent offence of terrorist financing can be adequately defined and whether such criminalization can be justified using traditional justifications for criminalization. The most practical way of clarifying this, it is suggested, is to test the offence's fault element in the sorts of circumstances within which financing may actually 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, which will be discussed in this chapter.
- 2- Financing of a group or a person who is designated as terrorist or is involved or has been involved in terrorist activities. This will be discussed in chapter 8.

7.5 Financing of a terrorist act

This scenario includes the situation where a financier 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 financier's conduct with a terrorist act, the imposition of guilt on the financier is justifiable and compatible with the basic principles that underlie the criminal law? According to the Convention, the financier 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".⁵¹⁴ Three objections to criminalizing the financing of a terrorist act as an independent offence, however, stand out.

First, normal principles seem not to support such liability: if financing carried out to support the commission of a particular offence is independently criminalized

⁵¹⁴ International Monetary Fund "Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting" (2003) IMF <<http://www.imf.org/external/pubs/nft/2003/sfth/>>. See also Koh, above n 66, at 66.

without the requirement to prove the financier knew of or intended to fund a specific violent act the occurrence of which depends on a further decision by the financier or by another, such intervening criminalization might relieve the original actor of the subsequent offence of criminal responsibility, and so it is the financier who should be punished. If the financier is to perform the subsequent offence, such an approach does not treat the financier as an independent agent capable of deciding to abandon his criminal enterprise. This point will be revisited in chapter 9.

Second, this brings the potential for injustice. The fault element of the financier 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 financing. Yet under the Convention, any contribution seems to suffice for liability, no matter how small and no matter whether the contribution has any actual impact on the commission of the subsequent offence.⁵¹⁵ So, financiers 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,⁵¹⁶ in Germany, an "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 a population or compelling a government or an intentional organization to do or to abstain from doing an act? That is, should

⁵¹⁵ The Convention does not differentiate between minor or major cases of terrorist financing.

⁵¹⁶ Financial Action Task Force *Mutual Evaluation Report; Anti-Money Laundering and Combating the Financing of Terrorism; Germany* (Paris, 2010), at [210].

a financier know or intend that the funds collected or provided to be used to bring about these purposes?

7.5.1 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 acts “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 constitutional principles of the Federal Republic of Germany.⁵¹⁷

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.⁵¹⁸ While it is not 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.

⁵¹⁷ Criminal Code of the Federal Republic of Germany 1971, s 89a (1).

⁵¹⁸ Criminal Code of the Swiss Confederation 1937, art 260 quinquies (3).

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.⁵¹⁹ 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 advance 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.⁵²⁰ As will be explored in great detail in the next section, 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.⁵²¹

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

7.5.2 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.⁵²² The Rome Statute of the International Criminal Court, as Lehto argues,⁵²³ provides a good illustration of how the fault element can be demonstrated in respect of each material element of a crime.⁵²⁴ Setting out the requirements of knowledge and intention for the purposes of creating criminal liability, 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

⁵¹⁹ *Lodhi v The Queen* (2007), 179 A Crim R 470, at [91].

⁵²⁰ Criminal Code Act 1995 (Australia), s 100.1

⁵²¹ *R v Lodhi* (2006), NSWSC 468 reprinted in Mcsherry above n 497, at 148.

⁵²² Lehto, above n 14, at 285.

⁵²³ At 285.

⁵²⁴ UN *Rome Statute of the International Criminal Court*, (A/CONF.183/9, Adopted on 17 July 1998).

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”⁵²⁵ 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 be 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 financier 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.⁵²⁶ This was not what the drafters of the Convention intended; they intended to criminalize terrorist financing, as an independent offence, even when there is no connection between financing and a terrorist act or when a financier does know about, or intend commission or preparation of any terrorist act. But the question is what, then, does the financier need to know or intend in order to be liable. It appears fair to conclude that the drafters failed to establish a clear mental element for the offence.

At the national levels, this seems to lead to confusion and controversy over the intent that must be proved, which I will explore in the rest of the chapter.

⁵²⁵ Lehto, above n 14, at 283.

⁵²⁶ At.

7.5.2.1 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 case, *R v Lodhi*,⁵²⁷ where the court tried to determine the necessary fault element for independent preparatory terrorism offences in Australian law which are analogous in many ways to the terrorism financing offence in the Terrorism Financing Convention.⁵²⁸ *Lodhi* provided a test case for interpretation of these preparatory terrorism offences, which do not define a clear fault element in relation to the physical element of these 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.⁵²⁹

The accused explained that his obtaining of the maps had nothing whatsoever to do with any terrorist act or part of any plot to carry out a terrorist act against the Electricity Supply System.⁵³⁰ In fact, he said that he wanted them for a business of an electrical nature he was proposing to establish. He gave similar explanation for the seeking a price list of chemicals. He stated that he had contemplated a business venture, which would involve the exporting of certain chemicals from Australia.⁵³¹ Regarding the possession of the materials containing information about making explosives, he gave evidence that many years earlier, he had seen them on a

⁵²⁷ (2006) NSWSC 468.

⁵²⁸ 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.

⁵²⁹ *R v Lodhi* (2006), 199 FLR 364, (Whealy J).

⁵³⁰ At [15].

⁵³¹ At [30].

computer when he was studying some architectural subjects at the University of Sydney.⁵³²

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.⁵³³ The prosecution argued that there was found in Lodhi’s possession a significant amount of material which threw considerable light on his intention in relation to these offences. The material included a CD-Rom which was described, throughout the trial, as the “jihadi CD”.⁵³⁴ The prosecution also alleged that Lodhi was in contact with a French terror suspect while he was in Sydney.

Lodhi explained that he had never seen the “jihadi CD” and that he could not explain its presence in the material found at his home.⁵³⁵ Although he acknowledged the existence of some of the other material containing exhortations to violent jihad, 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”.⁵³⁶ 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 to stranger travelling in a new country at the behest of a mutual friend.⁵³⁷

The court was left to decide on this circumstantial evidence whether it could establish the criminal intent of the accused in the absence of the subsequent offence for which the preparatory acts were to be carried out, and 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.⁵³⁸

⁵³² At [41].

⁵³³ At [17].

⁵³⁴ At [18].

⁵³⁵ At [19].

⁵³⁶ At [19].

⁵³⁷ At.

⁵³⁸ At [51].

It read the offence as not requiring the prosecution to prove that the accused intended to facilitate either a specific or general terrorist act.⁵³⁹ The judge said that such offences “will have been committed by a person in a preliminary way ... even where no final decision has been made over the final target.”⁵⁴⁰ This makes it clear that knowledge that terrorism is to be committed or planned is not required.

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.”⁵⁴¹ Indeed, 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.⁵⁴²

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”.⁵⁴³ 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.⁵⁴⁴

However, the court ruled that it did not matter that the evidence could not prove that Lodhi had determined “when, how, where or by whom a terrorist act might be carried out”.⁵⁴⁵ 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

⁵³⁹ McSherry, above n 497, at 149

⁵⁴⁰ *R v Lodhi*, above n 521, at 149.

⁵⁴¹ *R v Lodhi*, above n 529, at 21.

⁵⁴² *Lodhi v the Queen* (2007) 179 A Crim R 470), at [20].

⁵⁴³ *R v Lodhi*, above 529, at [26].

⁵⁴⁴ At [44].

⁵⁴⁵ *Lodhi v the Queen*, above 542, at 207.

the circumstances of all three offences, really one continuing uninterrupted course of conduct centring upon an enterprise to blow up a building or infrastructure”.⁵⁴⁶ 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 accused’s intention in relation to the circumstances surrounding the obtaining of the maps and the enquiries he made of the chemical supply company.⁵⁴⁷

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, while it acknowledged that there was no evidence to indicate what the French suspect’s role was to be in relation to any terrorist act.⁵⁴⁸ 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”.⁵⁴⁹ 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.⁵⁵⁰

However, the court’s interpretation of the mental element of the offence is subject to criticism for being unjustifiable in terms of the traditional notions of criminalization, for imposing unfair burden of proof on the accused, and for being vague. With regard to the unjustifiability of this interpretation of the mental element, if the fault requirement, as the court ruled, is 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 a terrorist act, any preparatory act which is

⁵⁴⁶ *R v Lodhi*, above 529, at 44.

⁵⁴⁷ At 45.

⁵⁴⁸ At 11.

⁵⁴⁹ At 20.

⁵⁵⁰ *Lodhi v Regina* (2007) NSWCCA 360.

presumed to be connected to some sort of unplanned and unforeseen terrorist act (or acts), falls within the scope of the offence. This is a “significant extension of concepts of criminal liability”⁵⁵¹ as it imposes liability and heavy punishment on a person with unclear criminal intent, who possesses jihadi videos, perhaps watches them, meets someone who a foreign state (France) regarded as a suspect terrorist, proceeds with the collection or possession of materials such as collecting a map, asks for prices of chemicals or possesses 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 (though perhaps politically suspicious) conduct as a serious offence at a very early and incoherent stage.

This mental element cannot be justified from a purely subjectivist approach,⁵⁵² 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 impossible.⁵⁵³ 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”.⁵⁵⁴ So, there is a great risk that 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”.⁵⁵⁵ Such a fault requirement, would not be supportable by a subjectivist approach. This point will be explored in greater detail in chapter 9.3.

⁵⁵¹ 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.

⁵⁵² McSherry, above n 497, at 154.

⁵⁵³ See Antony Duff *Criminal Attempts* (Clarendon Press, Oxford, UK, 1996) at 191-192.

⁵⁵⁴ Kent Roach “Terrorism Offences and the Charter: A Comment on R. V Khawaja” 2007 11(3) *Canadian Criminal Law Review* 271, at 286.

⁵⁵⁵ At.

In addition, this loose interpretation of the mental element appears to unfairly reverse the evidential 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.⁵⁵⁶

The shifting of the evidential burden is also of concern because of the breadth with which the fault element is identified by the *Lodhi* 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".⁵⁵⁷ The Court clearly drew an inference about Lodhi's states of mind based on what he had in his possession even though it is not entirely clear what precise state of mind they required.

In other words, the offence is vague about what precise state of mind in regard to what crime the prosecution should have to prove and what kind of evidence a suspect financier should adduce to prove his innocence and to escape liability. 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 bomber⁵⁵⁸ 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.

Despite these criticisms, the presumption of innocence seems to be becoming so insignificant (at least in a liberal democratic country such as Australia) to policy-makers, legislators and courts that they do not even consider it as necessary to give

⁵⁵⁶ Lynch and Williams, above n 551, at 20.

⁵⁵⁷ At 20-21.

⁵⁵⁸ 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.

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.⁵⁵⁹

7.5.2.2 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 to any specific terrorist act, a Canadian court held in *R v. Khawaja*⁵⁶⁰ that 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, 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, 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”.⁵⁶¹

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

⁵⁵⁹ Senator Chris Ellison, reprinted in Lynch and Williams, above n 551, at 19.

⁵⁶⁰ (2010) ONCA 862, at [253].

⁵⁶¹ *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, at [34].

terrorist act (the British fertilizer bomb plot).⁵⁶² 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”.⁵⁶³ There seems “to be little or no *mens rea* at the time the *actus reus* of facilitation was committed”.⁵⁶⁴

The court, however, accepted the prosecution’s argument that these qualifiers seems designed to address cases where a member of a terrorist cell may not know the specific nature of the terrorist act that is going to carry out until the last moment.⁵⁶⁵ 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”.⁵⁶⁶

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.⁵⁶⁷ 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”.⁵⁶⁸ 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

⁵⁶² At [31].

⁵⁶³ At [34]. The court referred to the article written by Roach, Kent, *The New Terrorism Offences in Canadian Criminal Law*, (2002) 14 *New Criminal Law Journal* 115, at 124.

⁵⁶⁴ At [34].

⁵⁶⁵ At [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.”

⁵⁶⁶ At [39]. This interpretation of the mental element was approved by the Canadian Supreme Court. See *R v. Khawaja* (2012) 3 SCR 555, at [46].

⁵⁶⁷ McSherry, above n 497, at 151.

⁵⁶⁸ Roach, above n 554, at 286.

provided with intent that a particular serious crime sooner or later will be carried out”.⁵⁶⁹

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 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 in the same way as those who are directly involved in the facilitation of that terrorist act.⁵⁷⁰ 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.⁵⁷¹

But does ‘knowingly’ here refer to the knowledge form of a guilty mind, called indirect or oblique intent, according to which a person must be found guilty when the person embarks on the course of conduct to bring about a desired result, appreciating or realizing that another (harmful) result would be a “virtually certain” consequence of his or her action.⁵⁷² It appears that the mental requirement suggested by the *Khawaja* court requires a *mens rea* element closer to recklessness or negligence than a knowledge requirement. That is, if an accused does need to know the specific terrorist act for which the financing is carried out, he cannot be

⁵⁶⁹ Financial Action Task Force *Third Mutual Evaluation/Detailed Assessment Report; Anti-Money Laundering and Combating the the Financing of Terrorism; Sweden* (Paris, 2006), at [134].

⁵⁷⁰ 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, 2001), at 305.

⁵⁷¹ At.

⁵⁷² See for example the English case *R v Woollin* (1999) AC 82. A consequence is ‘virtually certain’ when the probability of its being foreseen is “little short of overwhelming.”

absolutely or virtually certain that his funds or donation will be used for the commission of the terrorist act; he may be reckless. 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.”⁵⁷³

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.”⁵⁷⁴ 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.⁵⁷⁵ Concern has also been raised that it would be unjust to expose “negligent and intentional assisters of terrorism to the same liability and punishment”.⁵⁷⁶

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-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 circumstantial 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 the accused on the basis of his knowledge about the upcoming act, not on the basis of his knowledge or intention

⁵⁷³ Rutherford J, see *R. Khawaja*, above n 561, at [36].

⁵⁷⁴ Roach, above n 554, at 286.

⁵⁷⁵ At.

⁵⁷⁶ At 286.

that raised funds will be used for the commission or preparation of the upcoming act, is unfair and in violation of the criminal law principle of *mens rea* which requires the imposition of liability on people “only for events or consequences which they intended or knowingly risked”.⁵⁷⁷ 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 avoid.

7.6 Conclusion

The offence of terrorist financing 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 specific terrorist act. But in the absence of preparation or commission of a terrorist act, the Convention has not clarified what a financier needs to know or intend, in order to be criminally liable. The mental elements of the offence can be examined in two circumstances within which acts of financing may take place: financing of a terrorist act and financing of a terrorist group. In this chapter, the mental element of the offence has been examined in circumstances when financing is carried for the purposes of financing a terrorist act.

By analysing the Australian case of *Lodhi* and the Canadian case of *Khawaja*, in which awareness of a circumstance or general knowledge of a terrorist act was regarded as a sufficient ground for imposing liability, 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 scope of not only completed substantive offences but also the traditional inchoate offences; it might impose liability on the innocent, on people who are remotely and indirectly linked to a terrorist act, or on people with an unclear criminal intent. It might also result in an unfair reversal of the burden of proof as it is vague what state of mind the

⁵⁷⁷ Ashworth, above n 499, at 75.

prosecution should prove and with regard to what criminal terrorist act a suspect financier should adduce evidence to escape liability. While it seems necessary to require proof of an actual intention or awareness as to the subsequent terrorist act, the drafters of the convention avoided such a requirement in order not to limit the crime of financing to the equivalent of inchoate offences.

The vague mental element of the offence becomes more problematic and controversial when the offence is read to include financing of terrorists or terrorist groups. This is the matter that needs a special examination, so it will be discussed in the next chapter.

Chapter Eight: The fault element of the offence of financing terrorist organizations

8.1 Introduction

Despite the fact that the Convention failed to define a terrorist or terrorist organization, cutting off financial resources of terrorist organizations has become a lately much-used method of addressing terrorism financing. FATF and the UN Security Council have developed a sharp focus on countering financing terrorists and terrorist organizations. Relying on the wording of the Convention, FATF asks states to extend the scope of the terrorist financing offence defined by the Convention to include

any person who wilfully provides or collects funds or other assets by any means, directly or indirectly, with the unlawful intention that they should be used, or in the knowledge that they are to be used, in full or in part...(b) by a terrorist organisation; or (c) by an individual terrorist.⁵⁷⁸

The UN Security Council repeatedly requires states to prevent any form of support, active or passive, to entities or persons involved in terrorist acts,⁵⁷⁹ and more broadly to criminalize “the financing of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act”.⁵⁸⁰ 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 in chapter six, 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

⁵⁷⁸ Financial Action Task Force, above n 13, at 8.

⁵⁷⁹ UN, S/RES/1373, 28 September 2001, at [2].

⁵⁸⁰ UN, S/RES/2253, 17 December 2015, art [17].

is no need to prove the link between financing and a terrorist act. Therefore, in the case of financing of an individual terrorist or a terrorist organization, it is not clear what the requirement of intention that the funds should be used to carry out a terrorist act, or the knowledge that funds are to be so used, actually refers to. What can be inferred from the wording of the Convention is that the Convention should not be read to mean that the mental state of a financier 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 financier and the illegal activities of a group has been the cause of some confusion: is it enough if a financier knows the identity of the recipient of funds as a designated terrorist group or a group which is involved in terrorist activities? What if the financier knows the recipient is a terrorist group, but intends to further the lawful purposes of the group? Does the offence need specific intent? Or does it only require recklessness? These questions will be examined in this chapter. 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, in this chapter, to whether and how the political process of designating a group as terrorist may impact the criminalization of terrorist financing; this matter will be discussed in chapters ten and twelve.

8.2 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. However, application of this fault element can be challenged for being inconsistent with principles of criminal law, for being arbitrary and for historically being unprecedented.

From a criminal law perspective, 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' status, 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 associate that criminalizes these acts. Consequently, the actual intent of financiers appears to be irrelevant.

While the principle of legality seeks to punish criminal conduct or participation in a criminal act "not criminal types",⁵⁸¹ 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",⁵⁸² it is possible to argue that applying a status-based approach to terrorist group-related offences is "neither novel, nor extraordinary".⁵⁸³ The criminal law has after all long included "status offences", such as consorting with criminals, which penalize people "on the basis of whom they know and associate with".⁵⁸⁴ 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.⁵⁸⁵ In contrast, terrorist organization and association offences are classified as serious offences which carry hefty sentences⁵⁸⁶ and which inflict heavy damage to an accused's reputation if they are convicted.

It seems that in order to satisfy the principle of personal guilt, it is necessary to introduce a higher intent requirement than convicting a person for the provision of funds to a group on the grounds that he or she knows the group is a designated group or that it is involved in criminal activities. In fact, if the focus of the criminalization of terrorist group offences is on the donation and how a group might use the

⁵⁸¹ McSherry, above n 497, at 157.

⁵⁸² Ashworth, above n 499, at 75.

⁵⁸³ Simon Bronitt "Australia's legal response to terrorism: neither novel nor extraordinary?" in *Australia's legal response to terrorism: neither novel nor extraordinary?* (Dec 2003).

⁵⁸⁴ J. McCulloch and S. Pickering "Pre-Crime and Counter-Terrorism" 2009 49(5) *British Journal of Criminology* 268, at 633.

⁵⁸⁵ 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 drugs, 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* (LBC Information Services, Sydney, 2001), at 162.

⁵⁸⁶ McCulloch and Pickering, above n 584, at 633.

donation, the evidence should be sufficiently strong in demonstrating that the donation is substantial enough in its value or in 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 or her substantial donation would contribute to the achievement of the criminal aims of the group.

From a practical point of view, this knowledge requirement - convicting a person for the provision of funds to a group on the grounds that he or she knows the group is a designated group or that it is involved in criminal activities - causes some concerns in terms of sweeping up both guilty and non-guilty mental states. In *United States v. Al-Arian*,⁵⁸⁷ a US court tested several hypothetical situations against the knowledge requirement in section 2339B(a)(1) of the US Criminal Code, which 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...⁵⁸⁸

The Court explained:

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 some time 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.

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 activities of a group is not strong enough to impute guilt to the

⁵⁸⁷ *United States v. Al-Arian*, 308 F.Supp.2d 1322, (M.D. Fla. 2004).

⁵⁸⁸ At [1337-1338].

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".⁵⁸⁹ 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), 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.⁵⁹⁰

Concern also arises that such a knowledge requirement imposes liability on well-intentioned financiers. That is, because a financier 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.⁵⁹¹ This has a chilling effect on those who seek to provide material resources to "the non-violent humanitarian and political activities" of designated groups.⁵⁹² It also has a tragic effect on the provision of humanitarian aid to the disaster and war zone controlled by designated terrorist groups.⁵⁹³ In addition, this seems to be in contrast to the intent of the drafters of the Terrorist Financing Convention who desired to criminalize only financing cases carried out "unlawfully". As mentioned earlier, the

⁵⁸⁹ *United States v. Al-Arian*, 329 F. Supp. 2d 1294, (M.D. Fla. 2004), at [1300].

⁵⁹⁰ At [1300].

⁵⁹¹ 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.

⁵⁹² *Humanitarian Law Project v. United States*, 352 F.3d 382 (9th Cir 2003), at [385].

⁵⁹³ Halimuddin Sandi "U.S. Counterterrorism Laws Block International Humanitarian Aid" (2013) *The World Policy Institute* <<http://www.worldpolicy.org/blog/2013/12/19/us-counterterrorism-laws-block-international-humanitarian-aid>>.

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.”⁵⁹⁴

Historically, it was also unprecedented in liberal democratic states to apply such an approach to the *mens rea* of criminal organization and association offences. For example, in the US, courts 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.⁵⁹⁵

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”,⁵⁹⁶ 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”.⁵⁹⁷ This approach was later applied to civil cases where, for example, the Supreme Court held that:

Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts 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.⁵⁹⁸

⁵⁹⁴ UN, A/C.6/54/L.2, Annex III, Informal summary of the discussions in the Working Group, prepared by the Chairman, at [67].

⁵⁹⁵ *Scales v. United States*, 367 U.S. 203, 205, (4th Cir 1961), at [224-225].

⁵⁹⁶ At [226].

⁵⁹⁷ At [226].

⁵⁹⁸ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, (1982), at [920].

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.⁵⁹⁹ 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 that he intended to contribute to those criminal activities by paying dues and attending some meetings.⁶⁰⁰

With regard to terrorism offences, there was a controversy on whether such a fault requirement can be applied to terrorist financing. US 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 terrorist functions of that group.⁶⁰¹ However courts in subsequent cases took the position that the Communist Party court’s decisions are not applicable to terrorist financing. It was 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”.⁶⁰² 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.⁶⁰³

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.⁶⁰⁴ So, because all contributions can be directly or indirectly used for terrorism, it does not matter what a financier 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.

⁵⁹⁹ *Gastelum-Quinones v. Kennedy*, 374 U.S 469, (1963), at [476-77].

⁶⁰⁰ At [477-480].

⁶⁰¹ See for example *United States v. Al-Arian*, 329 F. Supp. 2d 1294, (M.D. Fla. 2004).

⁶⁰² *Humanitarian Law Project v. Reno*, 205 F. 3d (9th Cir 2000), at [1133].

⁶⁰³ At.

⁶⁰⁴ At [1136].

However, this reasoning, which Jonakait calls, an “action-membership distinction” was criticized for following reasons.⁶⁰⁵ 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”.⁶⁰⁶ Also US courts used to apply 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”.⁶⁰⁷ In addition, membership is a way 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.⁶⁰⁸ Moreover, the US 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.⁶⁰⁹ It 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 donating their money, services or goods”.⁶¹⁰ 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.”⁶¹¹

Similarly to the US courts’ approach to the offences related to the Communist Party, the Palermo Convention, in establishing criminal group and association offences, introduces a specific mental element far greater than the knowledge of the identity of a criminal group. According to article 5 (1)(a) of the Convention, the offence of

⁶⁰⁵ Randolph N Jonakait “The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization” 2004 56(3) Baylor Law Review 861, at 905.

⁶⁰⁶ At.

⁶⁰⁷ *Humanitarian Law Project v. United States*, 352 F.3d 382 (9th Cir 2003), at [395].

⁶⁰⁸ At.

⁶⁰⁹ See for example *NAACP v. Claiborne Hardware Co*, above n 598, at [886].

⁶¹⁰ Jonakait, above n 605, at 901.

⁶¹¹ David Cole “The New McCarthyism: Repeating History in the War on Terrorism” 2003 38(1) Harvard Civil Rights-Civil Liberties Law Review 1, at 15.

“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”⁶¹²- the Convention introduces an additional requirement: “knowledge that such involvement will contribute to the achievement of a criminal aim of the group”.⁶¹³ 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 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”.⁶¹⁴

However, the imposition of a specific intent requirement, such as the one required by Palermo Convention, was 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,⁶¹⁵ 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:

[I]f 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

⁶¹² See 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* (New York, NY, 2004), at 24.

⁶¹³ UN Convention Against Transnational Organized Crime, above n 210, art 5(a)(ii)(b).

⁶¹⁴ The Canadian Criminal Code, art 467.11.

⁶¹⁵ See *United States v. Aref*, 553 F.3d 72, (2nd Cir 2008). In this case, the court found the defendants guilty of multiple counts arising out of money laundering conspiracy intended to support a sting operation of the secret importation of a missile for a terrorist group. The court argued that there is no need for the prosecution to prove the specific intent of the defendants. 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.

terrorism. But, whether the donor intended to aid terrorism or not, the check could be used for many other projects, including illicit ones.⁶¹⁶

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 donations can flow into the hands of terrorists.⁶¹⁷

8.3 Reckless financing of a terrorist group

In order to close this loophole and to avoid legal challenges resulting 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.⁶¹⁸ Under the recklessness requirement,⁶¹⁹ 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.⁶²⁰

It is argued that the structure of the terrorist financing offence defined by the Convention gives support to such a mental requirement.⁶²¹ The Convention does

⁶¹⁶ Pendle, above n 591, at 804.

⁶¹⁷ R. M. Chesney “The sleeper scenario: Terrorism-support laws and the demands of prevention” 2005 42(1) Harvard Journal on Legislation 1, at 70-1.

⁶¹⁸ Lehto, above n 14.

⁶¹⁹ 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 financier 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 financier was reckless about the terrorist end use of the funds. Instead, it is sufficient for the prosecution to show that the financier 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, at [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”.

⁶²⁰ Pendle, above n 591, at 805.

⁶²¹ Lehto, above n 14, at 291.

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; thus, 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 financier intends a terrorist end use of his funds, it is not the financier but the recipient of the funds “whose actions may bring about the intended result at a later, unspecified point of time”.⁶²² The financier also does not have control over the decision of the recipient; nor can there be “absolute certainty” that the funds will be used for such purposes⁶²³ 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 financier is far “too removed from” terrorist acts that the recipient may carry out “in terms of time and knowledge”.⁶²⁴ 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 financier 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”.⁶²⁵ In the both cases, the financier 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, is foreseen but ignored or 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 who disguise their intention or foolish faith through, for example, a statement in the memo of a cheque.⁶²⁶ Unlike the knowledge requirement in which the donor can be convicted for merely knowing that the group is a terrorist group

⁶²² At 283.

⁶²³ Lavalley, above n 68, at 499.

⁶²⁴ Lehto, above n 14, at 292.

⁶²⁵ At 293.

⁶²⁶ Chesney, above n 617, at 70-71.

(regardless of his intention), the recklessness requirement would 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.⁶²⁷

However, it is doubtful whether a recklessness requirement provides a convincing and viable alternative as a mental element for the offence for following reasons. 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 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.⁶²⁸ 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 accidentally or negligently”.⁶²⁹

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,⁶³⁰ 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 previously mentioned 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

⁶²⁷ At.

⁶²⁸ 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, printed in UN, A/54/37, above n 170.

⁶²⁹ Aust, above n 68, at 295.

⁶³⁰ Pendle, above n 591, at 804.

supports the use of violence by the group, to use his property, 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 liable for letting a terrorist friend use his property if A foresees the possibility that B may use his property for raising funds, and if B may give the funds to the group, and if the group may use the funds for terrorist purposes. Raising funds is not wrongful or harmful. Also, there is nothing wrong with giving the money to the group. The risk that the funds may be spent by the group (if B gives the group the funds) for terrorist purposes should not be taken.

But is it really what the concept of recklessness implies? According to the many common law jurisdictions, a person is 'reckless' if the person "foresees that a certain consequence *could well follow* from his action, not just a remote risk".⁶³¹ Such a definition requires an existence of some form of an actual and substantial (more than merely possible)⁶³² risk and its foreseeability by the accused. It seems, at least to me, the risks that B may use the property to raise funds, and that B may give the raised funds to the group, and that the group may use it for terrorist purposes are too remote to conclude that it "could well follow" from A's action of letting B use his property.

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 for knowingly providing services to a terrorist who is carrying a weapon in his bag if the driver is aware of a risk that the suspect terrorist may have a gun. But such a possibility seems to be vague and not to be regarded as a real possibility that normally will be regarded in offences where recklessness suffices as mental element. In a similar way, a hotel clerk could be prosecuted for being reckless in providing lodging to the same person under similar circumstances as the cab driver. It has been pointed out that under the recklessness requirement, providing any fungible resources such as money to a terrorist group would raise liability;⁶³³ therefore, no explanation would be accepted for writing a cheque to a terrorist group

⁶³¹ *R v Tipple*, (2005), CA217/05 (New Zealand), at [23].

⁶³² *Darkan v The Queen* (2006) HCA 34.

⁶³³ Chesney, above n 617, at 84.

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 financiers 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 knowingly financing a person or group where there is a vague (and not actual or specific) possibility that the funds will be used for a terrorist act. The main reason that this mental requirement acquires a sweeping character is its failure to define the relationship between a financier’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 (of possibility that) his action will contribute to the prohibited consequence committed or attempted or planned by another. It seems, however, 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.

8.4 Terrorist purposes as a mental element; what does it mean?

In the absence of a link to a specific terrorist act or acts, FATF welcomes the criminalization of the financing of an individual or a terrorist group when financing is carried out for “terrorist purposes”.⁶³⁴ Similarly, the UN Security Council often requires states to freeze funds meant to be used for “terrorist purposes”.⁶³⁵

However, what, then, constitutes “terrorist purposes”? No definition has been provided by FATF or Security Council for this term. The Convention in its preamble and Article 2(5)(3) uses the term ‘terrorist purpose’. But no definition has been provided for the term. Literally, the term ‘terrorist purpose’ seems to include conduct including but of greater scope than just an act of terrorism. A comment has been made that “[t]his terrorist purpose supposedly consists of the perpetration or

⁶³⁴ Financial Action Task Force, above n 13, at [28].

⁶³⁵ See for example UN, S/RES/2253, 17 December 2015, at [69].

preparation of terrorist acts, or the participation in terrorist acts or terrorist training”.⁶³⁶ It can also include activities related to “the maintenance of terrorist structures” of a group,⁶³⁷ 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 limited to the preparation of terrorist offences”,⁶³⁸ 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.

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,⁶³⁹ and it follows that almost every donation can be assumed to directly or indirectly result in terrorism unless the financier 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.

However, when the scope of the term “terrorist purposes” is not precisely defined, and if it should be read to include provision of anything that can facilitate the criminal activities of a group, or free up other resources that can be used for those criminal activities, what exactly should a donor provide as evidence to prove that he did not foresee the possibility that his contribution would be used for terrorist purposes? The vague definition and scope of the term ‘terrorist purposes’, inconsistently with the rule of law, leaves citizens uncertain as to what kinds of activities or what groups they should not support financially on pain of prosecution.

⁶³⁶ Kai Ambos "Our Terrorists, Your Terrorists? The United Nations Security Council Urges States to Combat “Foreign Terrorist Fighters”, But Does Not Define “Terrorism”" [Blog] <<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/>>.

⁶³⁷ Lehto, above n 14, at 297.

⁶³⁸ At 299.

⁶³⁹ *Humanitarian Law Project v. Reno*, 205 F. 3d (9th Cir 2000), at [1136].

8.4.1 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 enhance the ability of a terrorist group to facilitate or carry out a terrorist act or acts (as the Canadian criminal law indicates).⁶⁴⁰ Under this reading, in order to acquire criminal liability, a financier 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 financier knew or specifically intended such an end use of the funds. In practice, the proof of such a connection is believed to be 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.⁶⁴¹ The critics of this formulation claim that this prosecutorial hurdle “permits skilful terrorist sympathizers to evade detection and slip through the prosecutorial net”.⁶⁴² 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.

⁶⁴⁰ Canadian Criminal Code, s 83.18.

⁶⁴¹ See for example *United States v. Arnaout*, 431 F.3d 994, (7th Cir 2005), at [1001]). 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”.

⁶⁴² Pendle, above n 591, at 778.

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 financier 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 constitute 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 though one may assume it is fair,⁶⁴³ 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 or prevent 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 of 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.

⁶⁴³ Roach, above n 554, at 292-293. 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" (p. 271), he does not find 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 or judge", and deserve less constitutional protection.

8.5 Conclusion

This chapter has examined the mental element of the offence of financing individual terrorists and terrorist organizations. It has been explained that FATF and the UN Security Council asks states to expand the scope of the offence, provided by the Terrorist Convention, to include financing of terrorists and terrorist groups. As explained in chapter seven, the offence of terrorist financing defined by the Convention, 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 financier needs to know or intend, in order to be criminally liable. Similar ambiguity arises when the offence is read to include the offence of financing terrorists and 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-intentioned financiers who seek to provide resources to non-violent humanitarian and political activities of a group. Multiple legal challenges would also target any other intent requirements (recklessness or specific intent), including arguments based on vagueness, overbreadth and the requirement of the presumption of innocence.

It has been explained that the FATF and the UN Security Council welcomes the idea of the criminalization of financing individual terrorists and terrorist groups when it is carried for “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. Why such criminalization goes so wrong is the question examined in the next chapter.

Chapter Nine: The Offence of Terrorist Financing: Why does it go so wrong?

9.1 Introduction

In general, in anti-terrorist legislation, the main rationale for targeting preparatory conduct and criminalizing it as a stand-alone offence stems from the need “to defend further up the field”.⁶⁴⁴ In other words, the ability to defend further up the field, which is a footballing phrase, should be advanced as

a consequence of the highly destructive potential of single, concentrated terrorist attacks; the dangers of allowing such a plot to run; and so the resulting need to intervene at an earlier stage.⁶⁴⁵

Defending further up the field in practice means “earlier criminalization, earlier interventions by law enforcers, and earlier and more policing, much closer to everyday behaviour”.⁶⁴⁶

The terrorist financing offence was created with this same rationale. The offence permits criminalization of the collection or provision of funds when they are carried out with the knowledge or intention that the funds will be used for preparation of a terrorist act, or used by terrorists or terrorist groups “for any purposes”.⁶⁴⁷ This extends the reach of criminal law so far ‘up the field’ that it includes a broad range of conduct which falls short of constituting attempt, conspiracy or incitement.

It should be noted that such criminalization of a preventive kind is not limited to terrorist-related offences.⁶⁴⁸ For instances in Australia, it is an offence to connect “equipment to a telecommunication network” with intention “to commit, or facilitate the commission of”, “a serious offence of the Commonwealth”.⁶⁴⁹ Or in UK, it is an offence to meet, or travel to meet, a child for the purpose of person

⁶⁴⁴ David Anderson “Shielding the Compass: How to Fight Terrorism Without Defeating the Law” 2013 3 European Human Rights Law Review 233, see the version uploaded on SSRN (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2292950), at 14.

⁶⁴⁵ At 6.

⁶⁴⁶ Andrew Ashworth and Lucia Zedner *Preventive Justice* (Oxford University Press, Oxford, UK, 2014), at 118.

⁶⁴⁷ Financial Action Task Force, above n 12, at 22.

⁶⁴⁸ Ashworth and Zedner, above n 646, at 99.

⁶⁴⁹ Criminal Code Act 1995 (Australia), art 474.14.

committing a child sex offence.⁶⁵⁰ In both offences the defendant's purpose of committing a substantive offence allows early intervention and criminalization of conduct which is very distant from the substantive offence.

Is it justifiable? There are many different possible ways to argue whether such an approach to criminalization can be justified. It is beyond the scope of this chapter to identify all of them and discuss their merits. My purpose in this chapter (and thesis) is to examine the justifiability of the terrorist financing offence with regard to the principles and values that liberal criminal law is based on. I have chosen the values of liberal criminal law as a yardstick because, as explained, the idea of criminalization of terrorist financing was proposed and developed mainly by Western liberal States. The diffusion of these criminalization measures is overwhelmingly supported by them or the inter-governmental or international organizations backed up by them. It is apt, therefore, to engage in a normative analysis of this offence against the values said to underpin Western criminal law. For purposes of convenience, the issue will be discussed in the context of Anglo-American criminal law.

In the next section, the spectrum of terrorist financing offences, their scope and their elements, are explained. Then the role of liberal criminal law is briefly discussed. The values, principles and policies that should have influence on shaping substantive criminal law are set out in this discussion. In the final section, the four main principles that should be deployed in evaluating the justifiability of creating a candidate offence - the principle of harm, the wrongful requirement, the remoteness requirement, and rule of law standards - are examined in relation to the terrorist financing offence. Whether the terrorist financing offence satisfies the standard criteria of criminalization provided by these principles is discussed, and as a result a determination is made about the justifiability of the offence on these principles.

No argument in support of the offence should outweigh, or be regarded more important than, the arguments favouring these values and principles since they are the compasses of the society that must continue to evolve in order for us to "keep up our bearings".⁶⁵¹ This does not mean at all to suggest that special rules should

⁶⁵⁰ Sexual Offences Act 2003 (UK), s 15.

⁶⁵¹ Anderson, above n 644, at 19.

not be adopted for exceptional situations when existential threats are involved. However, it is controversial to consider terrorism as an existential threat, as well as to think that if terrorism was a threat to our existence, the derogation from these principles and values would be justified. Simester captures the point well:

Western Europeans will recall many acts of terrorism across the past four decades that did not pose such a risk. Until there are cogent reasons for thinking that the terrorist threat has reached that stage, acts of terrorism should be treated as criminal conduct in the ordinary way. Moreover, even if existential threats were real, it would not follow that exceptional criminal-law responses should be adopted. If and when that juncture is reached, the way forward will be to address such dangers by emergency mechanisms of the kind appropriate to other radical events such as natural disasters, the spread of a virulent, non-treatable diseases, or international war. At least in context of making wrongs criminal, it is a moral mistake to think that, when existence is threatened, the gloves may come off and anything goes.⁶⁵²

9.2 Spectrum of terrorist financing offences

Terrorist financing is a term used to include two types of conduct: (i) financing of a terrorist act, and (ii) financing of a person or an organization who or which intends to commit or prepare for a terrorist act, or who or which is designated as terrorist. While from a traditional criminal law perspective, these acts are preparatory in their nature in the sense of facilitating a substantive offence (a terrorist act), the Terrorist Financing Convention and FATF's recommendations conceptualize them as an independent offence. In this part, they will be categorised into two groups of offences: financing of a terrorist act and financing of a terrorist person or an organization.

9.2.1 Financing of a terrorist act

According to the Terrorist Financing Convention, the independent offence of terrorist financing refers to the financing of terrorist acts. The Convention introduces the terrorist financing offence as an act of collection or provision of funds when it is carried out with the knowledge or intention that the funds are to be used for the commission of a terrorist act.⁶⁵³ FATF emphasizes that the

⁶⁵² A. P. Simester "Prophylactic Crimes" in G R Sullivan and Ian Dennis (eds) *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Hart, Oxford, UK, 2012), at 59-60.

⁶⁵³ Terrorist Financing Convention, above n 6, art 2.

criminalization of the financing of terrorist acts “solely on the basis of aiding and abetting, attempt, or conspiracy is not sufficient to comply with” their Recommendations.”⁶⁵⁴ Both the Convention and the FATF’s Recommendations emphasize that “terrorist financing offences should not require that the funds or other assets: (a) were actually used to carry out a terrorist act(s)⁶⁵⁵; or (b) “be linked to a specific terrorist act(s)⁶⁵⁶.” According to the FATF’s “guidance on criminalising terrorist financing”, this means that the financing of a terrorist act includes

instances where the terrorist financier intended to finance a terrorist act, but no terrorist act was in fact carried out or attempted (e.g. because a planned terrorist act was prevented; or because no specific act had been planned; or because the funds or other assets intended for use in a terrorist act were in fact used for some other activity.⁶⁵⁷

Understandably, the nexus between financing/funds and their subsequent terrorist act is not required in order for the offence to stand as an independent offence; otherwise the offence would fall into the category of inchoate offences or offence of complicity. As a result, the offence is defined so broadly in order to include any conduct carried out to facilitate commission or preparation of a terrorist act at some uncertain point;⁶⁵⁸ so, it includes actions which are not appropriately open to criminalization as they did not fall within the scope of attempted offences or complicity. Consider the following examples:

⁶⁵⁴ Financial Action Task Force, above n 13, at 37.

⁶⁵⁵ The Terrorist Financing Convention, art 2(3).

⁶⁵⁶ Financial Action Task Force, above n 13, at 17.

⁶⁵⁷ Financial Action Task Force, above n 12, at [56].

⁶⁵⁸ Such a formulation found its way into domestic legislations. For example, Section 16 of the Terrorism Act 2000 (UK) states “[a] person commits an offence if he (a) possesses money or other property, and (b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism”. Or Section 5 of the Terrorism Act 2006 (UK) says that “[a] person commits an offence if, with the intention of ... committing acts of terrorism, or ... assisting another to commit such acts, he engages in any conduct in preparation for giving effect to his intention. It is irrelevant for the purposes of [this provision] whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally”. Similar provisions can be seen in Section 101.6(1) of the Australian Penal Code and Section 83.19 of the Canadian Penal Code.

Example 1- Buying a map of a city with the intent to prepare or plan for a terrorist act.⁶⁵⁹

Example 2- Possessing information about how to make explosives with the intent to commit a terrorist act.⁶⁶⁰

Example 3- Buying dangerous substance to rob a bank with the intent to use the robbed money for the preparation of a terrorist act.

Example 4- Going to the gym in order to get fit for the preparation or commission of a terrorist act.

9.2.2. Financing of an individual terrorist or a terrorist organization

The Terrorist Financing Convention does not address the financing of terrorists and terrorist groups directly. The Convention only calls on all states to take preventive measures to counter “the financing of terrorists and terrorist organizations”.⁶⁶¹ FATF, nonetheless, calls upon countries to extend the scope of the offence of terrorist financing to include conduct carried out by “any person who wilfully provides or collects funds or other assets by any means, directly or indirectly, with the unlawful intention that they should be used, or in the knowledge that they are to be used ... by a terrorist organisation; or ... by an individual terrorist ... for any purpose”.⁶⁶² FATF has tried to clarify this offence but it seems to fail for following reasons.

The FATF has not provided a generic definition of terrorists or terrorist groups.⁶⁶³ According to FATF’s recommendations, these terms refer to “an organisation or

⁶⁵⁹ This example is similar to the Australian case *R v Lodhi* (2006), 199 FLR 364 discussed in Chapter 7, in which the accused was charged and convicted for 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. See chapter 7.4.2.1.

⁶⁶⁰ Under Section 57(1) of the Terrorism Act 2000 (UK): “[a] person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism”.

⁶⁶¹ Terrorist Financing Convention, Preamble.

⁶⁶² Financial Action Task Force, above n 13, at 37.

⁶⁶³ Under FATF’s recommendations, the term terrorist refers to “any natural person who: (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”. And the term terrorist group refer to “any group of terrorists that: (i) commits, or attempts to commit,

individual that commits, attempts, or is otherwise complicit in a terrorist act”.⁶⁶⁴ As I will discuss in great detail in chapter ten, an individual or organization can also be designated as terrorist by the decision made by national authorities or UN Sanction Committee on the basis of the information or intelligence they receive without any judicial process.

The term “for any purpose” means that

the terrorist financier must be acting with the knowledge that the funds or other assets are to be provided or collected for a terrorist organisation or individual terrorist; and (b) it is only the terrorist financier’s unlawful intention/purpose which is relevant, and that unlawful intention/purpose must be to provide or collect funds or other assets for a terrorist organisation or individual terrorist.⁶⁶⁵

Under the FATF’s Guidance, the following aspects are not relevant to the scope of the terrorist financing offence:

- the purpose for which the terrorist financier intended those funds or other assets to be used by the terrorist organisation/individual terrorist;
- any knowledge that the terrorist financier may have had about how the terrorist organisation/individual terrorist was using or intending to use the funds or other assets;
- the use to which the terrorist organisation/individual terrorist actually put (or intended to put, or tried to put) the funds or other assets; and
- Whether or not the funds or other assets were used to plan, prepare for or carry out a specific terrorist act.⁶⁶⁶

This formulation casts the net of criminal liability even wider than the offence of financing terrorist acts in such a way so as to include conduct not intended to be used for a terrorist act. As explained in chapter eight, it appears that such prohibition

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”. See Financial Action Task Force, above n 13, at 126.

⁶⁶⁴ Financial Action Task Force, above n 12, at [25].

⁶⁶⁵ At [21].

⁶⁶⁶ At [22].

is imposed due to the dangerous status of the recipient (a terrorist individual or group) of funds. Therefore, in addition to the examples listed above, the offence of financing of terrorists and terrorist groups can include the following examples:

Example 5: Selling goods to a person with the knowledge that the person is preparing for the commission of a terrorist act.

Example 6: Providing hotel services to a person designated as terrorist.

Example 7: Employing a designated terrorist to raise funds for charitable purposes.

9.3 Role of Criminal law

Before proceeding with the discussion on whether the terrorist financing offences satisfy the core principles of criminalization, the normative basis and goals of liberal criminal law will be very briefly examined. Individuals are the main components of a liberal society. The aims of a liberal society are to preserve individuals' rights and to maximize their freedom of choice. Under a liberal theory of criminal law, individuals are assumed to be self-interested, calculating beings who are capable of pursuing their own interests.⁶⁶⁷ Therefore, they must be free to do whatever they want to do as long as their action does not conflict with the rights and the liberty of others.⁶⁶⁸ In order to preserve liberty of the individual, liberal theorists all agree that the society needs law.⁶⁶⁹

A state is the creation of individuals (the governed) who under a contract, transfer their authority of self-government to it; they give it authority to make and apply such law.⁶⁷⁰ Assuming that "individuals have in general the capacity and sufficient free will to make meaningful choices",⁶⁷¹ the state must treat every individual as

⁶⁶⁷ Alan W. Norrie *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd ed, Cambridge University Press, Cambridge, UK, 2014), at 35.

⁶⁶⁸ M. P. Zuckert "The Virtuous Polity, the Accountable Polity - Liberty and Responsibility in the Federalist" 1992 22(1) *Publius-the Journal of Federalism* 123, at 124.

⁶⁶⁹ Bottomley and Bronitt point out that there are "differences between liberals over permissible scope of law and the appropriate method of legal reasoning Is law to be used only to provide a neutral framework within which individuals can peacefully pursue their separate ends? Or is law to be used as a tool of social engineering towards certain collective ends including collective freedoms?" See Stephen Bottomley, Simon Bronitt and Michael Kirby *Law in Context* (4th ed, Federation Press, Annandale, NSW, 2012), at 5.

⁶⁷⁰ Thomas Hobbes *Hobbes's Leviathan* (Clarendon Press, Oxford, UK, 1967) Chapter XXX.

⁶⁷¹ Andrew Ashworth and Jeremy Horder *Principles of Criminal Law* (7th ed, Oxford University Press, Oxford, 2013), at 23.

equally responsible for their conduct to the law.⁶⁷² The state is also given authority to create and enforce law which criminalizes, punishes and prevents activities which harm or damage the rights and liberty of other individuals.⁶⁷³ States exercise this authority through its agent, the criminal justice system. However, there should be a strong justification for the enforcement of any punitive and preventive law made by the state because individuals also should be free from the arbitrary control by the state; in other words, individuals have rights not to be unjustly criminalized by the state;⁶⁷⁴ otherwise, the liberty of individuals (citizens), which is the main purpose of a liberal society, cannot be maintained and maximized.

To restrict the power of the state, the liberal theory of mid-19th century introduced the harm principle. John Stuart Mill famously said “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others”.⁶⁷⁵ Under this view, harm to others is the only legitimate reason for state intervention. However, the application of the harm principle is not always unproblematic; the main problem with the harm principle is its ambiguity on “what ‘harm’ really is, conceptually and substantively”⁶⁷⁶ or what types of harm (physical harm, harm to property, and harm to feelings or indirect harms) merits criminalization.⁶⁷⁷

The indeterminacy and breadth of the concept of harm has led liberal legal theorists, such as Feinberg, to argue that the harmfulness of conduct does not alone provide

⁶⁷² The idea of ‘equality’ before the law is one the main component of the rule of law. However, equality is a deeply contested concept. Bottomly and Bronitt point out that “in a crude sense, the definition of and importance attached to equality differs according to the political complexion of the liberal standpoint adopted. On the libertarian end of the spectrum, the attachment is very much to a purely formal or procedural equality-equal treatment of individuals is very much to a purely formal or procedural rather than substantive ends. As formal or strict equality promotes sameness of treatment, it may conceal the substantive political, social and economic inequality of disadvantaged groups or individuals.” The opposite version of equality focusses on the “quality of opportunity”. See Bottomley, Bronitt and Kirby, above n 669, at 19. However, liberal criminal law applies to everyone equally regardless of circumstances in which they act. See Norrie, above n 667.

⁶⁷³ The preventive function of states is theorized in accordance with Hobbes’s theory of social contract. Hobbes argues “[t]he very end for which this renouncing, and transferring of rights is introduced, is nothing else but the security of a man’s person”. See Hobbes, above n 670, Chapter XIII.

⁶⁷⁴ Dennis J. Baker *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* (Ashgate, Farnham, 2011), at 56.

⁶⁷⁵ John Stuart Mill *On Liberty* (Middlesex, Harmondsworth, 1979), at 13.

⁶⁷⁶ Nina Peršak *Criminalising Harmful Conduct the Harm Principle, its Limits and Continental Counterparts* (Springer, New York, NY, 2007), at 14.

⁶⁷⁷ Ashworth and Zedner, above n 646, at 104.

a sufficient ground for criminalization; it is the wrongful (right-violating) cause of harm that makes the conduct in question deserved to be criminalized.⁶⁷⁸ Ashworth and Horder require further tests to be fulfilled: they argue that “before criminalization is justified, not only must the conduct be morally wrong, but there must also be no strong countervailing considerations, such as absence of harm, the creation of unwelcome social consequences, the curtailment of important rights and so forth”.⁶⁷⁹

However, the perception of these requirements (harmfulness, wrongfulness, unwelcome social consequences, public wrong) may vary not only through time, but also through space (between societies).⁶⁸⁰ Ashworth and Horder accept the limits of the liberal theory of criminalization when they argue that “it remains true that key concepts such as harm, wrongdoing, and offensive may tend to melt into the political ideology of the time”.⁶⁸¹ They refer to McCormick who points out that:

Resort to the criminal law is always parasitic on or ancillary to an established legal order of rights and duties in the spheres of private law and public law. Such an order of rights and duties (et cetera) has to be founded on some (however muddled and patchwork) conception of a just ordering of society. The interests protected from invasion by criminal laws are interests legitimated by a given conception of a just social order. ... [T]he criminal law in so far as it is concerned with fending off harmful behaviour is necessarily geared to protection of what are legitimate interests according to a certain dominant political morality.⁶⁸²

Nonetheless, this political reality does not hinder many of liberal legal theorists from arguing that “it is still appropriate to discuss the [liberal] values and principles that ought to be relevant to criminalization decisions, since such considerations rightly play some part at various stages in the generation and refinement of reform proposals”.⁶⁸³ Ashworth and Horder argue that

⁶⁷⁸ Joel Feinberg *The Moral Limits of the Criminal Law* (Oxford University Press, 1984), at 26.

⁶⁷⁹ Ashworth and Horder, above n 671, at 29.

⁶⁸⁰ Lindsay Farmer “Criminal Wrongs in Historical Perspective” in Antony Duff and others (eds) *The Boundaries of Criminal Law* (Oxford University Press, Oxford, UK, 2010).

⁶⁸¹ Ashworth and Horder, above n 671, at 39.

⁶⁸² At.

⁶⁸³ At. See also Douglas N. Husak *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, Oxford, UK, 2008).

although it is true that the frontiers of criminal liability are not given but are historically and politically contingent, it remains important to strive to identify those interests that warrant the use of the criminal law and to refine notions such as harm and wrongdoings which play so prominent a part even in political discussion of these questions.⁶⁸⁴

They have identified a set of principles that, they think, ought to be considered by a liberal democratic state when determining whether and how to make conduct criminal.⁶⁸⁵ They do not hide the fact that these principles, which flow from either “the nature of criminal law and punishment” or “some social derivations”, may conflict in some situations or may be “contestable in their application to given facts”.⁶⁸⁶ They argue, however, that these principles should influence the shaping of substantive criminal law. I will name these principles in the footnote here but avoid explaining them.⁶⁸⁷ However, I have used and will use some of them to examine the justifiability of the offence of terrorist financing in this chapter or other chapters.

Now I turn to consider some of the fundamental principles that must be deployed to justify the creation, and restrain the scope of, a candidate offence. These principles include the principle of harm, the wrongful requirement, the remoteness requirement, and rule of law standards. My purpose is to examine whether the terrorist financing offences satisfy the standard criteria of criminalization provided by these principles in liberal legal theory.

9.3.1 The harm principle

Beginning with the well-known justification, the harm principle is not only about the state’s role of punishing harms. It may be linked to the state’s duty of preventing harm.⁶⁸⁸ The state, under the principle of welfare, has an obligation to “create the

⁶⁸⁴ Ashworth and Horder, above n 671, at 23.

⁶⁸⁵ At 23.

⁶⁸⁶ At 40.

⁶⁸⁷ General principles: the principle of individual autonomy, the principle of welfare, the principle of harm and public wrongs. Specific principles (the minimalist approach): the principle of respect for human rights, right not to be punished, criminalization as a last resort, the principle of not criminalizing where this would be counter productive, the principle of proportionality, principles relating to the rule of law, the non-retroactivity principle, the principle of maximum certainty, the principle of strict construction, the presumption of innocence. Principles relating to the conditions of liability: the principle of *mens rea*, the principle of correspondence, the principle of fair labelling.

⁶⁸⁸ Ashworth and Zedner, above n 646, at 103.

social conditions necessary for the exercise of full autonomy by individual citizens”.⁶⁸⁹ So, the harm principle of criminalization recognises a right for the society and state “to ward off crimes against itself by antecedent precautions”.⁶⁹⁰ Feinberg says “[i]t is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor”.⁶⁹¹ This extends the reach of criminal law beyond its punitive function by giving it a preventive role. Insisting on limiting the coercive use of power by the state, Mill sought to restrain the use of the harm principle in justifying criminalization. He asserts that conduct is not harmful if it is “merely contingent, or, as it may be called, constructive injury ... which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself”.⁶⁹² Instead, the harm in question should be “a definite damage, or a definite risk of damage, either to an individual or to the public”.⁶⁹³ While there is less difficulty in determining the nature and gravity of a definite damage such as murder, the controversy is over what constitutes “a definite risk of damage”.⁶⁹⁴ How should such a risk be measured? What kinds of harms or risk of harms merit criminalization? Can the harm principle justify the criminalization of conduct which does not causes any harm, but contributes or facilitates the commission of harm - conduct such as (remote harm offences, general - public order legislation or preparatory offences)? “To what extent can we hold a perpetrator liable, how far should we look for harm mediated through other actors that can still be legitimately imputed or assigned to the perpetrator?”⁶⁹⁵

Given the indeterminacy and vagueness of the concept of harm, it is warned that a broad reference to the harm principle “could supply a *prima facie* justification for almost all of” conduct nominated for criminalization as candidate conduct may cause harm at some point, and “can be rationalized as preventing harm to others”.⁶⁹⁶ A broad reference to the principle would also “erode the usefulness of the harm

⁶⁸⁹ Ashworth and Horder, above n 671, at 26.

⁶⁹⁰ Mill, above n 675, at 167.

⁶⁹¹ Joel Feinberg *The Moral Limits of the Criminal Law* (Oxford University Press, 1988), at xix.

⁶⁹² Mill, above n 675, at 149.

⁶⁹³ At 142.

⁶⁹⁴ Peršak, above n 676, at 14.

⁶⁹⁵ At.

⁶⁹⁶ Ashworth and Zedner, above n 646, at 104.

principle as a constraint on the state's punitive power".⁶⁹⁷ The limitation of the harm principle has resulted in the adoption of other principled restraints by criminal law theorists as grounds for criminalization.

But, before proceeding with discussion on other restraints, I would like to address my initial inquiry: is the harm principle able to provide justificatory basis for the criminalization of terrorist financing? The answer is both positive and negative. The answer is negative as the current formulation of the offence which seeks to target terrorist financing without connecting it to an immediate harm (a terrorist act) also presents a challenge for the harm principle because its attraction is derived "from its having been applied to more immediate harms" rather than a long-term risk of harm.⁶⁹⁸ However, the answer to the question could be positive because traditionally, the harm principle seems to have less difficulty in justifying a group of preventive offences, the inchoate and participatory offences.

9.3.1.1 Terrorist financing as an inchoate crime

In other words, criminalization of preparatory conduct is not unknown to Anglo-American criminal law. "Most systems of criminal law have some general inchoate offences"⁶⁹⁹ (attempt, conspiracy and incitement), which adequately deal with conduct when the substantive harm is not caused yet. The main rationale for criminalization of inchoate offences is to reduce "harm by authorizing law enforcement officers and the courts to step in before any harm has been done, as long as the danger of the harm being caused is clear".⁷⁰⁰ Even though the scope of inchoate offences is controversial (controversy over "significance of intention", "relevance of impossibility", "significance of resulting harm"),⁷⁰¹ they are defined in a way to include conduct which is connected to and has substantially facilitated a substantive offence, and/or which there is a clear intention towards that

⁶⁹⁷ Simester and Von Hirsch, above n 504, at 53.

⁶⁹⁸ At.

⁶⁹⁹ Ashworth and Zedner, above n 646, at 96.

⁷⁰⁰ Ashworth and Horder, above n 671, at 456.

⁷⁰¹ Duff, above n 553, at 142. With regard to the controversy over the scope of inchoate offences, Ashworth and Zedner also make a similar point. They point out that "the ambit of all three inchoate offences [attempt, incitement and conspiracy] is controversial-for example, is it right to criminalize conduct as an attempt if the person has not yet reached the last act before committing the substantive offence?" see Ashworth and Zedner, above n 646, at 96-97.

substantive offence. Let's have a quick look at some of the inchoate offences' rules and their requirements.

The law of attempts requires that "there can be a conviction even though the substantive offence that was intended is not completed and no apparent harm is caused".⁷⁰² In this formulation, "the intent becomes the principal ingredient of the crime"⁷⁰³ because, it permits the criminalization of conduct before, and even without, the commission of the substantive harm. However, not all preparatory acts constitute attempts. Under English law and the criminal law of Australia, an act must be "more than merely preparatory to the commission of the [subsequent] offence",⁷⁰⁴ or according to United States' Model Penal Code, the act must constitute "a substantial step in the course of the conduct planned to culminate in the commission of" the subsequent offence.⁷⁰⁵ However the issue, especially with regard to incomplete attempt, is deciding when should preparatory conduct be regarded as more than merely preparatory or a substantial step. There are two schools of thoughts on this issue. Under a subjectivist approach,

the essence of an attempt is trying to commit a crime, and ... all the law should require is proof of the intention [of the substantive offence] plus any conduct designed to implement that intention. The reasoning is that any person who has gone so far as to translate a criminal intention into action has crossed the threshold of criminal liability, and deserves punishment.⁷⁰⁶

Objectivists, on the other hand, argue that the law should require "proof of an act close to the commission of the substantive offence".⁷⁰⁷ Their concern is that if the scope of the offence of attempt is not restricted tightly, "any overt act [is] to suffice as the conduct element in attempts".⁷⁰⁸ This can result in increasing "wrongful arrests", conviction on the basis of the dependent's intention; "the police might be

⁷⁰² McSherry, above n 497, at 153.

⁷⁰³ Duff, above n 553, at 5.

⁷⁰⁴ Criminal Attempts Act 1981 (UK), s 1 (1). Or Criminal Code Act 1995 (Australia), s 11.1.2.

⁷⁰⁵ Model Penal Code (US), § 5.01(1)(c).

⁷⁰⁶ Jeremy Horder *Ashworth's Principles of Criminal Law* (8th ed, Oxford University Press, Oxford, UK, 2016), at 479.

⁷⁰⁷ At.

⁷⁰⁸ At.

tempted to exert to obtain a confession; miscarriage of justice might increase”; and “we would be risking a world of thought crimes and thought police”.⁷⁰⁹

Neither of these traditional justifications for attempt offences can be applied to every possible offence of financing terrorist acts. In other words, the scope and definition of offence, according to which the act of financing, or funds raised, do not need to be linked to any terrorist act, seems to make it impossible to apply either a subjectivist approach or an objectivist approaches to justify the offence. Unlike the objectivist approach which requires criminalization of the last act which is unambiguously close to the substantive offence, the offence of terrorist financing includes any act at any a stage (e.g. buying a map, possessing info on explosive or going to the gym), even if it is not linked to a terrorist act. A subjectivist approach cannot be applied as a rationale for criminalization for every possible terrorist financing cases since a clear intent towards an actual, substantive offence is not required.

9.3.1.2 Terrorist financing as secondary participation

Similarly, the application of the harm principle to justify the offence of financing terrorists or terrorist groups is also problematic because the offence does not require criminalization of conduct which facilitates, or contributes to, preparation or commission of harmful conduct carried out by others. Traditionally, the criminalization of such conduct is justified by reference to the law of complicity or inchoate offences. For instance, the law of complicity requires that to be liable as an accomplice, there should be connection between accomplice’s conduct and the principal’s offence; that is, it should be shown “the accomplice’s conduct helped or might have helped the principal in some way”.⁷¹⁰ In addition, the accomplice must know the essential elements of the principal’s offence, or, according to the recent expansion of the UK’s scope of accomplice liability, “a real possibility” that the principal will commit a certain crime or “one of a group of offences”.⁷¹¹ A comparison between the scope of these offences with that of the offence of financing a person who intends to prepare or commit a terrorist act indicates the major shift in criminalization. Consider example 5: selling food (or anything else)

⁷⁰⁹Ashworth and Horder, above n 671, at 462.

⁷¹⁰Horder, above n 706, at 437.

⁷¹¹See Ashworth and Horder, above n 671, at 451.

to a person with the knowledge that the person is planning or preparing terrorist. The seller is criminally liable regardless of whether, and how, the buyer would use the food for a terrorist act, or regardless of whether the seller intended, knew or believed the food would be used for that the commission or preparation of the terrorist act. The offence merely requires knowledge that recipient is a person who intends to commit a terrorist offence. So, the harmful consequences of the provision of the foods do not matter at all.

In a similar manner, the imposition of liability for the financing of a designated terrorist or terrorist group is not connected to any act whether harmful or harmless. Consider example 6: providing hotel services to a designated terrorist. The hotel clerk does not need to know that the designated terrorist intends to commit or prepare for any terrorist act; he does not need to intend any terrorist act to be carried out by the designated terrorist. He is liable because he simply knows that the person is a designated terrorist. This is significantly different from, for example, the law of inchoate offences (the English law of the encouraging and assisting crime) which requires that a defendant's preparatory act must be capable of assisting the commission of the subsequent offence, and that the defendant must intend, know or foresee (oblique intention) that his act facilitates its commission.⁷¹²

Furthermore, while some terrorist financing cases such as example 7 resemble conspiracy, the offence of financing a designated terrorist does not rely on the law of conspiracy to determine the harmful consequences of the financing conduct. Under the UK's conspiracy law, a person is liable for conspiratorial agreement if that

person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible. ... Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence ... unless he and at

⁷¹² See for example, Part 2 of the Serious Crime Act 2007 (UK).

least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.⁷¹³

Under such a law, the principal fund-raiser in my example would not be liable because (a) there is no conspiratorial agreement between them (meeting of minds), and (b) no harmful consequences are intended. However, under the offence of terrorist financing, the principal fund-raiser is liable for employing a designated terrorist merely because he knows he is a designated terrorist, no matter whether the designated terrorist intends the funds to be used for a terrorist purposes, and no matter whether the principal funds-raiser knows, believes or foresees the designated terrorist may use the funds for a terrorist purposes.

9.3.2 The wrongfulness requirement

“A narrower strand of justification than the harm principle” focuses on the wrongfulness of conduct.⁷¹⁴ Feinberg argues that

[i]t is always a good reason in support of a proposed criminal prohibition that it is necessary to prevent serious offence (as opposed to injury or harm) of persons other than the actor and would be an effective means to that end if enacted.⁷¹⁵

Under this approach, “it is not the causing of harm that alone justifies criminalization, but the wrongful causing of harm”.⁷¹⁶ What counts as wrongs? To Feinberg who seeks to extend the concept of harm to include wrongs, harm is “setbacks of interests that are wrongs, and wrongs that are setbacks to interest” (harmful wrongs).⁷¹⁷ Adopting Feinberg’s approach, Ashworth and Horder regard wrong as “culpably assailing a person’s interests, or abusing them by using them as a means to another’s satisfaction”.⁷¹⁸ Simester and von Hirsch regard conduct as wrongful when it treats others “with a gross lack of respect or consideration”.⁷¹⁹

⁷¹³ Criminal Law Act 1977 (UK), s 1(1).

⁷¹⁴ Ashworth and Zedner, above n 646, at 106.

⁷¹⁵ Feinberg, above n 691, at xix.

⁷¹⁶ Ashworth and Horder, above n 671, at 29.

⁷¹⁷ Feinberg, above n 678, at 36.

⁷¹⁸ Ashworth and Horder, above n 671, at 29.

⁷¹⁹ A. P. Simester and Andrew Von Hirsch *Incivilities: Regulating Offensive Behaviour* (Hart, Oxford, UK, 2006), at 142.

Many legal moralists agree that wrongfulness is a prerequisite but not a sufficient requirement for criminalization; therefore, not all moral wrongs (such as cheating at games or lying) are the subject of criminal law.⁷²⁰ A wrong must be regarded as publicly wrong. The “public” element does not only include acts which “harm or wrong the public collectively or the polity as a whole” (crimes such as tax evasion, treason), but also wrongs which, although committed in private and harm individuals without impacting “the wider world” (crimes such as murders and rapes), concern all of us as wrongs against the values we share.⁷²¹ Duff defines public wrongs as a “concern of all citizens in virtue of their shared membership of the polity”.⁷²² On the other hand, there is some conduct that is not pre-legally wrongful (or *malum in se*) but regarded as wrongful because it is prohibited by law (*mala prohibita*) - conduct such as such as traffic offences.

In short, in the criminalization of conduct as wrongful, a following general principle should be followed:

when labelling conduct as wrongful, and when labelling those it convicts as culpable wrongdoers, the state should get it right. In particular, the criminal law contains a general limiting principle that D[efendant] should not be convicted of an offence unless he is responsible for a wrong. Any formal judgment of blame, including the finding of guilt on which the conviction is based must be predicated upon norm-violating conduct. One cannot blame a person unless that person does something that, all things considered, she ought not to do.⁷²³

Applying this requirement to the offence of terrorist financing, the question is where the wrongfulness of the offence is derived from? Let me narrow down the question: is collecting a map, possessing information on explosives, purchasing a weapon, selling foods, offering hotel services, employing a designated terrorist, or sending money to a family member wrongful? How do these actions set back the interests of others? How can we justify the criminalization of terrorist financing by reference to the wrongfulness requirement?

⁷²⁰ See for example, Simister and Von Hirsch, above n 504, at 26.

⁷²¹ Antony Duff *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart, Oxford, UK, 2007), at 141.

⁷²² Duff, above n 15, at 88-89.

⁷²³ Simister, above n 652, at 67.

There is no doubt that committing a terrorist act is a harmful wrong in the sense of setting back to others' interests (make them worse off) and treating them "with a gross lack of respect or consideration".⁷²⁴ Financing of a terrorist act, although not harmful, can be justified as wrongful due to its connection with the harmful act of terrorism. So, its wrongfulness is contingent; that is, it is wrongful because it is correlated with the preparation or commission of a terrorist act.

But this is not what the definition of the terrorist financing offence implies. It should be remembered that the FATF diffuses the idea that terrorist financing includes cases where "no terrorist act was in fact carried out or attempted ... or ... no specific act had been planned; or ... the funds or other assets intended for use in a terrorist act were in fact used for some other activity".⁷²⁵ What this formulation implies is that any financing conduct (collection, possession or provision) carried out with the intent to further a terrorist act should be criminalized. So, it is neither the harmful prospect of financing conduct, nor its connection to a terrorist act which makes the act of financing wrongful; instead, the financier's mere intent that the funds collected or provided will be used for a terrorist act makes the act of financing (collection or provision) criminalizable. The question is whether bad intent can make conduct wrongful? If so, when?

In response to this question, Simester draws a distinction between three categories of conduct: "inherently innocent" "morally ambiguous" and "inherently wrongful". With regard to inherently innocent conduct, he argues that

a criminal prohibition constitutes, *inter alia*, an official pronouncement that the activity is morally wrongful _ qua activity, and not just on particular occasions. Where the proscribed activity is not wrongful, it follows that the state is not telling the truth and criminalisation is *prima facie* unjustified. Hence the state should not prohibit, and label as criminal ... inherently innocent conduct. ... The thought here is that [such an activity] is simply not wrong, and its normative status ... cannot be infected by the further intentions with which it is done.⁷²⁶

⁷²⁴ See Simester and Von Hirsch, above n 719, at 142.

⁷²⁵ Financial Action Task Force, above n 12, at [56].

⁷²⁶ Simester, above n 652, at 74.

He also points out that “the prospect of future wrongdoing does not seem to supply any significant reason as to why we should not do those activities, any reason that we might remark upon. The risk of facilitating such wrongdoing is too ancillary, especially where the conduct is otherwise quinnidine and harmless”.⁷²⁷ These rule out the criminalization of otherwise harmless conduct such as buying a map, going to the gym, selling a car, offering hotel services and employing a designated terrorist.

With regard to the morally ambiguous conduct the character of which “cannot be determined by reference to its external, *actus reus* feature alone” (e.g. picking up a wallet lying in the street), Simester argues that the *mens rea* requirement of an offence “may suffice to restrict its application to activities that are indeed wrongful” (e.g. picking up the wallet in order to keep it *versus* picking up the wallet in order to hand it over to a nearest police station).⁷²⁸ While this satisfies the wrongfulness requirement in the cases where the mental element of the offence is clearly and closely directed to the substantive offence (e.g. keeping the wallet), such a connection in the terrorist financing offence is missing. So, the criminalization of the possession of information on explosives (example 2) or any other articles which have a legal as well as illegal function is not justifiable unless their application is restrictively limited to a specific activity intended by the possessor. Needless to say that such a requirement rules out the offence of financing designated individuals or groups, which does not link to any wrongful conduct.

In respect of “inherently wrongful”, Simester argues that there are some activities whose nature indicates their wrongfulness. His example is the purchase of a police radar detector. He argues that “one cannot regard the use of radar detectors as incidental or ancillary, and unconnected to its purposes”.⁷²⁹ So, their purchase or possession is wrongful and must be subject of criminal law due to its core function, regardless of whether there is any harmful act is planned or attempted.

Can this approach be used to justify the financing cases when the financiers are involved in illegal acts? Let’s examine the example 2. A person purchases some

⁷²⁷ At 74-75.

⁷²⁸ At.

⁷²⁹ At 75.

explosives to use them in a bank robbery. The person wants to use the proceeds of the crime for the commission or preparation of a terrorist act. According to Simester's argument, the purchase of the explosives is wrongful as it will be used for damaging another's property (a bank). But is it accurate to argue that it is wrongful because of its direct connection to the bank robbery? Or should we conclude that it is wrongful because of the ulterior intent of the person (using the money for commission or preparation of a terrorist act)? What if the person will change his mind after the bank robbery and will not proceed with his plan of committing, or preparing for, a terrorist act? Is it fair to regard his act of purchasing the explosives as terrorist financing? It seems, at least to me, that such labelling is not consistent with the principle of fair labelling which requires offences must be "subdivided and labelled so as to represent fairly the nature and magnitude of the law breaking".⁷³⁰

9.3.3 The nexus requirement

As mentioned, the offence of terrorist financing does not follow the traditional pattern of criminalization as it permits criminalization of financing cases where connection between financing conduct and a terrorist act is blur. This poses, what Simester calls, "remoteness problems". Simester distinguishes between two types of remoteness; remoteness with regard to the "nexus" between the preparatory conduct and the substantive offence for which the preparatory conduct is carried out, and remoteness in relation to distance between these two.⁷³¹

9.3.3.1 Remoteness of the nexus

In relation to the remoteness of the nexus, Simester argues that

the nexus requirement ... addresses the connection between risks of Y and doing of X, such that doing X with the intent to do Y becomes wrong. Its point is that the connection is established when there is a nexus between the doing of X and the intent to do (or, perhaps, facilitate) Y. If I am walking the streets today, having resolved to murder my brother tomorrow, that connection is lacking - unless my actions today are part of my project for tomorrow.⁷³²

⁷³⁰ Ashworth and Horder, above n 671, at 77.

⁷³¹ Simester, above n 652, at 67.

⁷³² At 68.

Unlike the offence of financing terrorists or terrorist groups, the offence of financing terrorist acts seems to satisfy this requirement since, for example, the purchase of a map or possessing of information on how to make explosives is part of a terrorist attack which may (or may not) be executed at some point. However, in practice, the offence raises evidential and human rights concerns;⁷³³ the main question here is: when there is no terrorist act involved, how can a court determine that the purchase of map or having information on explosives is part of a [future] project? A defendant may have a terrorist intention, but how can a court determine with sufficient certainty that the purchase of a map or possession of the information is related to a terrorist act, or will be used for the commission or preparation of a terrorist act which may not be planned yet? In the absence of any real connection between financing conduct and an actual terrorist act, the offence seems to require the imposition of liability based on the presumption that these acts may be related to a terrorist act. This approach is in obvious contradiction with a fundamental principle of procedural fairness in the criminal law or the presumption of innocence which requires proof of guilt beyond reasonable doubt, not shadow of doubt.⁷³⁴

What if “the defendant’s conduct gives good ground for suspecting that the risk of some eventual wrongful harm has been increased by virtue of this person’s actions”⁷³⁵? Is the prosecution of such conduct justified if the law gives the defendant an opportunity (defence) to prove and reassure a court, the state and fellow citizens that his suspicious behaviours are nothing to do with commotions or facilitation of any terrorist act (an evidential burden)?⁷³⁶ The question then arises: when there is no terrorist act planned or attempted, with regard to what terrorist act should the suspect provide evidence to avoid liability? Even if, as Duff argues,

⁷³³ See Chapter 7.4.

⁷³⁴ Ashworth and Horder, above n 671, at 71.

⁷³⁵ Peter Ramsay “Democratic limits of preventive criminal law” in Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (eds) *Prevention and the limits of the criminal law* (Oxford University Press, Oxford, 2013), at 216.

⁷³⁶ This approach has been taken by English law where, in Section 57(1) of the Terrorism Act 2000 (UK), “a person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. Section 57 (2), however, states that “[i]t is a defence for a person charged with an offence ... to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.”

[w]e can make normative sense of this procedural structure by thinking about what it is reasonable to expect citizens to answer for in a criminal court, [it would be] on the pain of conviction and punishment if they cannot offer an exculpatory answer. They can be expected to answer for what we call ‘presumptive wrongs’ – conduct that the court can probably conclude or presume to have constituted a culpable public wrong in the absence of an exculpatory explanation of it.⁷³⁷

In addition, Peter Ramsay warns that the enforcement of such a law results in “mass routine surveillance” which seeks “to identify the dangerous intentions that may be lurking there”.⁷³⁸ The effect of such a law is also to make “the distribution of criminal liability more dependent on executive discretion (formally so in respect of preventive orders), and to extend the scope of executive surveillance and coercion into the most private areas of individual subject’s existence”.⁷³⁹

9.3.3.2 Remoteness and the distance problem

The second sense of remoteness concerns with the problem of distance between preparatory conduct and the subsequent act.⁷⁴⁰ Ashworth and Zender argue that “even if a sufficient nexus between X and Y is established in the particular case, X may still be too distant from Y to justify criminal liability”.⁷⁴¹ The offence of financing terrorist acts fails to pass this test as it targets conduct very far from any terrorist act. Similarly, the offence of financing of terrorists or terrorist groups does not satisfy this requirement as criminal liability can be imposed merely because the status of recipient(s) of funds is regarded by the state or UN Sanction Committee as dangerous.

In the support of such an approach, one may raise the argument that the gravity of the offence of terrorism requires and justifies the early intervention and criminalization of any preparatory conduct which may lead to a terrorist act. Why should a connection between preparatory acts and a terrorist act matter? Why should we adhere to the nexus requirement and demand criminalization of conduct which

⁷³⁷ Duff, above n 722, at 96.

⁷³⁸ Ramsay, above n 735, at 218.

⁷³⁹ At 219.

⁷⁴⁰ Simester, above n 652, at 69.

⁷⁴¹ Ashworth and Zedner, above n 646, at 111.

“comes close to the actual commission of the offence” and not “merely conduct undertaken with intent to commit an offence?”⁷⁴² Duff argues that

An initial answer is that the law should leave intending criminals a *locus poenitentiae*: the chance to decide for themselves to abandon their criminal enterprises. This matters, because the law should treat and address its citizen as responsible agents. The central value to which this answer appeals is that of individual freedom to determine one’s own action. We must look more carefully at the character of that value. From one, roughly consequentialist, perspective, individual freedom is a good which the law should seek to maximize. That is, the law should aim to secure to every citizen the maximum possible freedom to determine her own actions and future, by her own choices.⁷⁴³

Do preparatory offences like terrorist financing fulfil this commitment? Simester argues the approach taken to deal with preparatory offences rests on an idea that

focuses on the lack of trust and respect exhibited by a state that pre-emptively regulates conduct. ... At the core of any decent legal system is a commitment to respect the dignity of those it governs, to treat them as reasoning human beings. Preparatory crimes undermine that commitment.⁷⁴⁴

So do terrorist financing offences.

9.3.4 Rule of law standards

An offence cannot be justified unless it satisfies the fundamental principles and values of the rule of law. A minimum respect for the principle of autonomy requires citizens to “be informed of the law before it can be fair to convict them of an offence”.⁷⁴⁵ The principle of maximum certainty requires that “criminal laws should be drafted with as much certainty as possible, so as to clarify the boundaries of the criminal sanction, both for individuals and courts”.⁷⁴⁶ The law must also “avoid taking people by surprise, ambushing them, putting them into conflict with its requirements in such a way as to defeat their expectations and to frustrate their

⁷⁴² Duff, above n 553, at 387.

⁷⁴³ At.

⁷⁴⁴ Simester, above n 652, at 70.

⁷⁴⁵ Ashworth and Horder, above n 671, at 56.

⁷⁴⁶ Ashworth and Zedner, above n 646, at 113.

plans.”⁷⁴⁷ How consistent the offences of terrorist financing are with these principles will be discussed in great detail in the rest of this PhD thesis. I will briefly discuss some controversial elements of the offence here.

Under the Terrorist Financing Convention, the offence of terrorist financing prohibits unlawful and wilful collection or provision of funds with the intent that the funds are to be used, in order to carry out commission or preparation of a terrorist act.⁷⁴⁸ However, this formulation of the offence does not satisfy rule-of-law values for the following reasons.

The first issue is related to the definition of terrorism. Internationally, there is no consensus on the definition of terrorism. The attempt of the drafters of many conventions on terrorism to define terrorism failed. Resort to definition by the Security Council⁷⁴⁹ seems to indicate an absence of agreement in the draft UN Convention on Terrorism.

No international convention has defined ‘terrorist group’. States’ definitions of terrorism are different from one another. In some countries (such as the United Kingdom), terrorism has been defined so broadly that includes conduct which does not inflict violence.⁷⁵⁰ A state may have several definitions of terrorism.⁷⁵¹

⁷⁴⁷ John Gardner “Introduction” in H. L. A. Hart and John Gardner (eds) *Punishment and Responsibility: Essays In the Philosophy of Law* (2nd ed, Oxford University Press, Oxford, UK, 2008), at xxxvi.

⁷⁴⁸ The Terrorist Financing Convention, above n 6, art 2(1).

⁷⁴⁹ For example see the UN Security Council Resolution 1566 (UN, S/Res/1566 (2004) “recalls that 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, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”

⁷⁵⁰ Terrorism Act 2000 (UK), Section 1, an act is regarded as terrorist if it “is designed seriously to interfere with or seriously to disrupt an electronic system”.

⁷⁵¹ See for example in the United States (18 U.S. Code § 233, Chapter 113(B)), terrorism is defined as “violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State ... appear to be intended t (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and...(C) occur primarily within the territorial jurisdiction of the United States...”. Unlike this definition, the Federal Bureau of Investigation (FBI) considers damage to private property a terrorist act if they carried out with “political or social” purposes (See FBI, “Terrorism 2002/2005”, <<https://www.fbi.gov/stats-services/publications/terrorism-2002-2005>> viewed at 22 Feb, 2017). The Department of Homeland Security’s definition has much emphasis on the damage or threat to “critical infrastructure or key

Terrorist Financing Convention defines 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”.⁷⁵² Nonetheless, as discussed in chapter five, this definition does not precisely clarify what types of conduct, by whom, in what circumstances and when, against whom (targets or victims) and with what intention or motivation ought to be considered terrorism? So, if a definition of terrorism suffers from ambiguity, it is not surprising that any terrorist-related offences would be ambiguous. In other words, if financing with the intent to bring about a terrorist act is the subject of criminal law, there should be a clear understanding of what constitutes terrorism the financing of which is urgently sought to be tackled. This causes problems especially because terrorism is regarded as a transnational offence which transcends international borders and transgresses the laws of several states, and which needs a close and harmonised cooperation to be prevented. The absence of an agreement on a generic definition of terrorists, or a lack of consensus on distinction between terrorists and freedom fighters can lead to massive variation in the application of terrorist offences, in the violation of the rule of law.

Secondly, the conduct element of the offence is both vague and broad. As discussed in Chapter 6.3, it is vague because it is arguable whether the act of collection is prerequisite to the act of provision, or there are two different, but successive offences? That is, if a person collects funds in order to provide them, is it an inchoate crime or complete one? Is it also controversial what ‘unlawful’ collection or provision of funds means? Under what circumstances, or when, is financing of a terrorist act or an individual terrorist or an organization lawful? The conduct element is also very broad. The Convention defines term “funds” in the way to include almost everything:

resources” (See the Department of Homeland Security, “Homeland Security Presidential Directive 7: Critical Infrastructure Identification, Prioritization, and Protection”, <<https://www.dhs.gov/homeland-security-presidential-directive-7> >). The US Department of Defence’s definition of terrorism has more emphasis on the use of threat “to instil fear and coerce the government or society” (see “Department of Defense Dictionary of Military and Associated Terms, 8 November 2010; As Amended Through 15 February 2016” <http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf>).

⁷⁵² The Terrorist Financing Convention, above n 6, art 2(1)(b).

monetary as well as non-monetary articles.⁷⁵³ It has been explored in Chapter 6.5 that, in the US, funds include tangible goods, “training”, “personnel”, “transportation”, “service” and “expert advice or assistance”.⁷⁵⁴ So, it is controversial how giving advice to a terrorist group about “how to petition the United Nations to seek redress for human rights violations” is considered a criminal act?⁷⁵⁵

Thirdly, a general principle of the rule of law requires that citizens have “fair opportunity to exercise the capacity for doing what the law requires and abstaining from what it forbids”.⁷⁵⁶ Central to this principle is the principle of *mens rea*, which states that “criminal liability should impose on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences”.⁷⁵⁷ That the offence can be committed without connection to, or the existence of a terrorist act disregards this rule of law value. In other words, in the absence of such connection the question arises as to what a financier should know or intend to be criminally liable? According to the FATF’s recommendations, “terrorist purposes” is the mental element;⁷⁵⁸ however, it is also unclear what constitutes “terrorist purposes”? To sum up my arguments about the definition of the offence, if “criminal law should operate so as to guide people away from certain courses of conduct, and should provide for the conviction only of persons who intend or knowingly risk the prohibited consequences”,⁷⁵⁹ it is not wrong to conclude that the current formulation of the terrorist financing offences, as applied and advocated by liberal states, fails to play such a role.

Lastly, the over-inclusiveness of an offence concerns the rule of law. Ashworth and Zedner argue that “it is contrary to principle to provide for the criminalization and

⁷⁵³ According to Article 1 (1) of Terrorist Financing Convention, “funds means 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”.

⁷⁵⁴ 18 U.S.C. §§ 2339 A and B.

⁷⁵⁵ See for example *Humanitarian Law Project v. Gonzales*, 380 F.Supp.2d 1134, (C.D. Cal. 2005), at [1152].

⁷⁵⁶ Ashworth and Zedner, above n 646, at 113-114.

⁷⁵⁷ Ashworth and Horder, above n 671, at 155

⁷⁵⁸ Financial Action Task Force, above n 12, at [15].

⁷⁵⁹ Ashworth and Zedner, above n 646, at 114.

punishment of conduct that is significantly broader than the wrong it is aimed to prevent.”⁷⁶⁰ Referring to Husak’s argument of over-criminalization,⁷⁶¹ they argue that it risks “a presumption against over-inclusive criminal law, explaining that an over-inclusive law is one whose justificatory rationale applies to some but not all of the conduct it proscribes”.⁷⁶² The offence of terrorist financing is a good example of over-inclusiveness. The offence permits the criminalization of conduct even before a terrorist act is planned. Such an early intervention, leads to laying liability on people before they determine whether and how they may commit a terrorist act. This is contrary to the principle of individual autonomy which underpins the liberal view that “individuals should be treated as capable of changing their mind and conforming to the criminal law, because this is what it is to respect him as a responsible agent”.⁷⁶³

Regarding the financing of a terrorist or a terrorist group, the offence stretches the boundaries of criminal law beyond the preventive role of criminal law by prohibiting conduct carried out with no bad intention (e.g. financing designated individuals or groups). The FATF justifies such criminalization by arguing that funds can be used by a terrorist organization for different purposes such as “propaganda and recruitment, training, salaries and member compensation, and social services”. ... “Funds provided for and spent on these non-attack activities nevertheless contribute to terrorist attacks, by sustaining the terrorist organisation’s *capability* to mount such attacks”.⁷⁶⁴ While there may be some truth in this argument, the use of criminal law in such a vague and broad way can turn the law into a sweeping tool which targets a broad range of conduct assumed to contribute to the sustainability of terrorist groups.⁷⁶⁵ So, it is not surprising that, if the law on terrorist financing is interpreted loosely, I am criminally liable for intentionally writing this chapter while I know that terrorist groups may read it and use its

⁷⁶⁰ At 113.

⁷⁶¹ See Husak, above n 683.

⁷⁶² Ashworth and Zedner, above n 646, at 113.

⁷⁶³ At 110.

⁷⁶⁴ Financial Action Task Force, above n 12, at [19].

⁷⁶⁵ “A well-known example, though not a typical one, is of Rizwaan Sabir, the University of Nottingham student who in 2008 downloaded the Al-Qaida training manual from the US Justice Department website in order to research his choice of thesis, and found himself detained for several days in a police station, along with a University employee, on suspicion of the commission, preparation or instigation of acts of terrorism. He eventually won his action for false imprisonment”. See Anderson, above n 644, at 10.

arguments in their propaganda against liberal states which have established, support and diffuse a law on terrorist financing which actually contradicts their fundamental principles of criminalization and which violates human rights.

9.4 Conclusion

Prevention of sending funds to those who commit terrorist acts is a good idea. However, this requires a clear definition of terrorist acts, terrorists and terrorist organizations. Being certain on the scope and nature of terrorism, then we need to respond to another question: is the criminal law a proper tool to be deployed in countering terrorist financing? It should be noted that criminal law is “a censuring and preventive mechanism” but not the only one.⁷⁶⁶ It is the “the strongest formal censure that society can inflict”;⁷⁶⁷ so it should be used as a last resort.⁷⁶⁸ “Morality, social convention”, “peer pressure”, “civil liability” and “administrative regulation” are other sources of regulating suspicious and unwelcomed behaviour.⁷⁶⁹ Whether terrorist financing is one of the behaviours that can be dealt with more effectively by one of these mechanisms was beyond the scope of this research. The focus, instead, was, and will be, on the detrimental consequences of the stretch of the scope of criminal law to accommodate the terrorist financing offence which is poorly conceptualized and vague.

Even if the thesis’ argument concerning the impermissibility of the vagueness of the penal measures on terrorist financing does not stand up or is not convincing, the criminalization of terrorist financing in the way required by the Terrorist Financing Convention or UN Security Council’s resolutions, or in the way recommended by FATF is not justifiable in terms of existing notion of criminalization. In other words, terrorist financing cannot be criminalized without being connected to an actual terrorist act and still adhere to the principles of criminalisation. Financing conduct in many cases is so innocent and ancillary that its criminalization cannot be justified on these principles. Its criminalization as an independent offence

⁷⁶⁶ Ashworth and Horder, above n 671, at 33.

⁷⁶⁷ At 1.

⁷⁶⁸ At 33.

⁷⁶⁹ At.

violates liberal criminal law principles and values and raises regulatory problems and human rights concerns, as discussed

The sad part of the story is that liberal Western states and inter-governmental organizations backed by them insist the offence must be adopted globally and implemented rapidly, and pressure other states to do so. As it will be discussed in chapter thirteen, states, including those with low or no respect for democratic values, have started embedding the offences in their domestic law. The point is that, if the terrorist financing offence violates the fundamental principles which criminal law relies on, or disturbs protected individuals rights in countries where those rights and democratic values are highly respected and promoted, its draconian impacts on the life of those who live and are ruled by authoritarian or dictatorial states will be catastrophic. Whether or not it is the time to rethink the offences of terrorist financing should be left to legislators and international policy makers to decide. This chapter, however, has raised serious doubts on the compatibility of the offences with some of non-negotiable, fundamental principles of criminalization. I have not spent much time evaluating the arguments in favour of the offence as I believe any argument in favour is invalid as long as the offence does not satisfy the requirements of these principles. A further question is whether and if so how such over criminalization impacts other counter-terrorist financing measures. In the following chapters, I will examine the impact of the scope of the offence on seizure and confiscation measures.

Chapter Ten: The history of the development of forfeiture legislation

10.1 Introduction

The second set of penal measures, introduced by the Convention, are the seizure and forfeiture of terrorist funds.⁷⁷⁰ The application of these measures, which largely depends on the vague definition (especially of the mental element) of the offence of financing of terrorist acts in the Convention and the offence of financing terrorist individual terrorists or terrorist groups structured by FATF and the UN Security Council, deserves rigorous scrutiny. It has been established above there is no need to link funds collected or provided to any terrorist act (the consequences of criminalisation of terrorist financing as an independent offence). So, the question becomes whether and if so how the mental state of a person who has been collecting or providing funds for a terrorist act, which is not attempted or planned, can be used to impose a confiscation sanction on the property of that person. Similarly, it should be examined whether such a mental state provides a sufficient basis for imposing freezing or confiscation sanctions on those who provide funds to individual (suspect) terrorists or terrorist groups.

This chapter begins with a brief exploration of the historical concepts on which the modern (Anglo-American) forfeiture law are based on. The study of the modern (Anglo-American) forfeiture law is important as it has had a significant influence on the existing (being globalized) laws and agreements on the seizure and confiscation of terrorist funds. It shows how the American approach to the confiscation of proceeds of drugs, which is an unattractive reconstruction of ancient concepts (that had long since been abolished or fallen into desuetude), was expanded to confiscate terrorist funds. It also illustrates how this approach has crept

⁷⁷⁰ See Terrorist Financing Convention, above n 6, art 8. Nowadays and in this thesis, the terms confiscation and forfeiture are used interchangeably. But traditionally and literally, “the subject matter of forfeiture is generally specific property immediately connected with the commission of an offence. Confiscation is a more modern term often used, in contradiction to forfeiture, to denote deprivation of an offender of assets being the proceeds, or profits of crime”. However, the difference between these terms is blurred as in many legal national and international legal laws, the term forfeiture includes confiscation of proceeds of crime. Brent Fisse “Forfeiture, Confiscation and Sentencing” in Brent Fisse, David Fraser, and Graeme Coss (eds) *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (Law Book Company, Sydney, 1992), at 109.

into the international and regional conventions and agreements, resulting in the creation of a draconian forfeiture regime, that is linked to a weak fundamental premise – the justification for criminalisation of terrorist financing.

10.2 The ancient concepts of Forfeiture

There is a lengthy history behind the States' power to seize and forfeit, which is beyond the scope of this research. But, in order to understand the complexity and function of our modern forfeiture law, it is important to introduce, although very briefly, the historical concepts on which our modern forfeiture law are based. More specifically, special attention needs to be devoted to the history of English law which has had a significant influence on the existing (being-globalized) laws on confiscation.

Asset seizure and forfeiture as legal hybrids of criminal and civil penalties have existed for thousands of years.⁷⁷¹ They were rooted in the ancient concepts of 'corruption of blood' and 'deodand'. Until 1840, in England, a person who was convicted of treason or a felony and who was sentenced to death was subject to "the automatic extinction of his civil rights, including the right to hold, inherit or dispose of property"⁷⁷² (forfeiture of estate). The confiscated objects did not need to be connected to an offence, but simply were confiscated because the crime was regarded as "a breach of the offender's fealty to his lord".⁷⁷³

The concept of deodand, which means a "thing forfeited, presumably to God for the good of community, but in reality to the English crown",⁷⁷⁴ also permitted confiscation when an inanimate object was the cause of the death of any reasonable creature. The Biblical example of this is a 'goring ox' sentenced to death by stoning for killing a man.⁷⁷⁵ A similar notion was the basis of confiscation in the ancient Greece where it was believed that "inanimate objects which caused death had

⁷⁷¹ David Fraser "Lawyers, Guns and Money; Economics and Ideology on the Money Trail" in Brent Fisse, David Fraser and Graeme Coss (eds) *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (Law Book Company, Sydney, 1992), at 53.

⁷⁷² A. Freiberg "Criminal Confiscation, Profit and Liberty" 1992 25(1) *Australian and New Zealand Journal of Criminology* 44, at 46.

⁷⁷³ At.

⁷⁷⁴ Leonard W. Levy *A License to Steal: The Forfeiture of Property* (The University of North Carolina Press, Chapel Hill, NC, 1996), at 7.

⁷⁷⁵ Exodus 21:28. "If a bull gores a man or woman to death, the bull is to be stoned to death, and its meat must not be eaten".

personalities possessed by *Erinyes*, the furies”, and had to be banished.⁷⁷⁶ Confiscation in this form proceeded on the fiction that if the object is guilty, it should be held forfeit as a dangerous thing which had to be removed from circulation. It seems that the foundations of the current confiscation law can be found in this notion allowing governments to confiscate guns, cars with concealed compartments that are used for drug smuggling, or electronic devices used for child pornography even in the absence of a conviction.

Even by thirteenth century, when the law of deodands was transformed for more practical purposes into a revenue producing function, the same practice was followed; so “an animal that killed a person, the wheel of a water mill that crushed him, and the cart that ran over him” were confiscated to the Crown as deodands (or their equivalent value in money was paid to the Crown) as the Crown was responsible for keeping peace that has been disturbed by the death.⁷⁷⁷ Interestingly, a similar analogy was used by the US government when it sued the rifle used to assassinate President Kennedy, forfeiting the gun for public as compensation.⁷⁷⁸

The law of deodands survived the Reformation by being justified as a deterrent against misfortunes. It was argued that accidental deaths “are in part owing to negligence of the owner, and therefore he is properly punished by such forfeiture”.⁷⁷⁹ Deodands presumably would result in better care on the part of the owner.

However, in the nineteenth century, the increase in the frequency of deaths, which resulted from industrialization, urbanism and the development of the railroad, and which required the provision of a remedy to the victims’ survivors (instead of confiscation to God or the Crown) necessitated the consideration of an alternative to deodands.⁷⁸⁰ The Crown also lost interest in deodands “as it was increasingly

⁷⁷⁶ Levy, above n 774, at 9.

⁷⁷⁷ At 13.

⁷⁷⁸ *United States v. One 6.5 Mm. Mannlicher-Carcano Military R.*, 250 F. Supp. 410 (N.D. Tex. 1966), at [414].

⁷⁷⁹ William Blackstone *Commentaries on the laws of England*, Chapter the Eighth : Of the King's Revenue, at 301.

⁷⁸⁰ Levy, above n 774, at 11-12.

ineffective as a source of revenue and the Crown found that it could more effectively raise revenue by taxation than forfeiture”.⁷⁸¹

Therefore, from 1870 to 1980, a series of statutory forfeitures were enacted, which although they “pave the way for the reversion of wrongful death to the realm of civil tort law”,⁷⁸² they restricted the scope of the law of deodands in such a way as to acknowledge the right of victim’s survivors to compensation, and withdrew the Crown or King from “direct concern as an injured party”⁷⁸³ Even in the cases of felonious homicide (intentional murder), the confiscation of a convicted felon’s property (as a corruption of blood) to the Crown was replaced with other penalties such as deprivation of life and liberty.⁷⁸⁴

However, the fact is that although these statutory forfeitures were aimed at abolishing of the deodands and the corruption of blood, they had a clear solicitude for the protection of the Crown (State) revenue, of the health and safety of community and of the quality of its products.⁷⁸⁵ Therefore, they were developed on the basis of objective criminal liability, which “allowed little scope for distinguishing culpability on the basis of subjective states of mind”.⁷⁸⁶ In other words, as Freiberg says, these

statutory forfeitures proliferated together with regulatory offences to create and support the modern administrative state. As a general rule, the collective interest in conviction took precedence over the concept of personal guilt. It is this social defence of forfeiture law which partly explain[s] ... the Draconian overreach of the modern forfeiture law.⁷⁸⁷

This also proved to be a landmark, “opening up an entirely new realm to the criminal law, namely that which has come to be known as Public Welfare

⁷⁸¹ Freiberg, above n 772, at 47.

⁷⁸² Jacob J. Finkelstein “The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty” 1973 46(2) Temple Law Quarterly 169, at 198.

⁷⁸³ In 1846, the Parliament in England enacted the Act for the Compensation the Families of Persons Killed by Accidents. At 198.

⁷⁸⁴ With the enactment of Forfeiture Act 1870 (33 & 34 Vict. c. 23) in England, forfeiture for treason and felony was abolished. In the US, in 1790, the Act of April 20, 1970, Chapter 9, Section 24, abolished forfeiture of estate and corruption of blood, including treason and felony cases.

⁷⁸⁵ *Regina v. Woodrow*, 88. 15 M. & W. 403 (1846), at [409-413]

⁷⁸⁶ Freiberg, above n 772, at 47.

⁷⁸⁷ At.

Offences”⁷⁸⁸, which do not require any mental element.⁷⁸⁹ So it was not surprising that after the abolition of the law of deodands and corruption of blood, the early statutory forfeitures such as admiralty (maritime) laws⁷⁹⁰ included cases where, for example, ships should be fortified without inquiry into the guilt of the owner for slave-trafficking, piracy and rum-running.⁷⁹¹ Similarly, customs and revenue statutes⁷⁹² allowed the forfeiture of, for example, land used in the operation of illegal tax-delinquent distilleries.⁷⁹³

10.3 Forfeiture laws in the war on drugs: the US approach

Despite this draconian character, the power of statutory forfeitures began to be regarded as “inadequate” in the fight against what were characterized as growing problems of the second half of the twentieth century, drugs and organized crime.⁷⁹⁴ In the 1970s, in the US where the well-springs of both the problems arose and remedies were crystalized and became a model for countries to follow, a loud call for an attack on (as Naylor argues the exaggerated and mythical)⁷⁹⁵ wealth of drug-organized crime groups was issued. They were considered “as a particular danger” as they “threatened governmental process, depleted the public purse and subverted and nullified the political process through graft and corruption”.⁷⁹⁶ The fear was also instilled in the public that organized crime wealth could be used to take over legitimate business activities.⁷⁹⁷ The view grew in popularity that the existing confiscatory laws, which authorized only *in rem* actions against contraband or

⁷⁸⁸ Finkelstein, above n 782, at 198.

⁷⁸⁹ Finkelstein, at, refers to decision of the court in the case *Regina v. Woodrow*, 15 M. & W. 403 (Exch 1846) as a landmark. The court ruled that “forfeiture may be incurred even in circumstances where there was no intention of fraud and the in the absence of the word “knowingly from the statute forfeiture”.

⁷⁹⁰ See for example Navigation Acts of the mid-17th century in England remained in place in England, requiring that any ships importing or exporting goods from England ports fly under the England flag. If the Acts were violated, the ships or the cargo could be seized and forfeited to the crown regardless of the guilt or innocence of the owner.

⁷⁹¹ See for example, *United States v. Stowell*, 133 U.S.1, (1890). *United States v. Brig Malek Adhel*, 43 U.S. 209, (1844).

⁷⁹² For example, Act of July 13, 1866, Chapter. 184, Section. 14, (14 U.S stat.) did not limit the scope of seizure and forfeiture of the properties used for fraud to the guilty mind of the owner. So the property used for the commission of a crime could be forfeited in a civil action only if the lessee had the intention to commit the crime.

⁷⁹³ See *Cofeey v. United States*, 116 U.S. 436, (1886).

⁷⁹⁴ Freiberg, above n 772, at 47.

⁷⁹⁵ Naylor argues that “every rational assessment indicates that the sums of criminal money supposedly involved are grossly exaggerated”. See Naylor, above n 270, at 18, 19 and 134.

⁷⁹⁶ Freiberg, above n 772, at 48.

⁷⁹⁷ Naylor, above n 270, at 34-5.

articles put to illegal use (instrumentalities of a crime),⁷⁹⁸ lacked deterrent efficiency, not being able to put criminal organizations out of business. President Nixon said, “as long as the property of organized crime remains, new leaders will step forward to take the place of those we jail”.⁷⁹⁹ The demand for new weapons and tools which would allow the government to strike at the Mafia’s source of revenue rose.

As a result, new legislation under Title IX of the Organized Crime Control Act 1970 known as RICO (Racketeer Influenced and Corrupt Organizations Act of 1970) was enacted to proscribe the use of dirty money (acquired and maintained through racketeering) for the legal acquisition or operation of a legitimate enterprise by organized groups. This legislation as well as the subsequent legislation,⁸⁰⁰ intended to be civil in nature, adopted the principles of antitrust laws and applied it to the problem of organized crime. In a radically innovative manner, it authorized civil actions against certain contraband or property, used in the commission of a narcotic crime or acquired from it, by imposing a lower standard of proof (balance of probabilities) and greater powers of investigations in criminal cases. But forfeitures could not take place until after the conviction of an offender.

However, within a few years, these civil forfeiture laws were found to be unproductive because of their less extensive coverage and because they were “limited to persons convicted of participating in continuing criminal enterprises”.⁸⁰¹ The US Congress extended the reach of the forfeiture statutes to include the forfeiture of all proceeds traceable to the purchase of a controlled substance as well as any negotiable instrument or money intended to facilitate violations of the narcotics laws.⁸⁰² It also “greatly expanded the potency and scope of forfeiture by authorizing *in rem* actions, which provide few of the constitutional guarantees that

⁷⁹⁸ For example, Contraband Seizure Act 1939 (US) and its amendment in 1950 restricted confiscation to instruments and properties used in drug trafficking.

⁷⁹⁹ See United States Congress *Measures Relating to Organized Crime: Hearings, Ninety-first Congress, First Session* (U.S. Government Printing Office, Washington, DC, 1969), at 448-50.

⁸⁰⁰ See for example Comprehensive Drug Abuse and Prevention Act 1970 (US) or Organized Crime Control Act 1970 (US) which criminalized racketeering participation in commercial ventures and allowed the civil forfeiture of all interests held in violation of the law.

⁸⁰¹ Scott Alexander Nelson “The Supreme Court Takes a Weapon From the Drug War Arsenal: New Defenses to Civil Drug” 1994 26(1) *St. Mary's Law Journal* 157, at 159-160.

⁸⁰² In 1978, this amendment added subsection (a)(6) to 21 U.S.C. § 881 (1988) to the Comprehensive Drug Abuse Prevention and Control Act 1970 (US).

are attached to a criminal indictment”:⁸⁰³ this amendment, which included what is known as the relation-back doctrine, provided that all right, title and interest in property which is “used or intended to be used , in any manner or part, to commit or facilitate” the commission of a crime giving rise to forfeiture would vest in the government immediately when the crime is committed .⁸⁰⁴ While the main purpose of this expansion was to close a potential loophole that would allow escape from forfeiture through the sham transfer of such a property to a third party,⁸⁰⁵ it was criticised mainly for its harsh results of shifting the burden of proof to the accused,⁸⁰⁶ and of allowing the forfeiture of property with scant regard to the innocence or guilt of the owner of the forfeited property (forfeiting property on the basis of the fiction of guilty property, the common law concept of deodand).⁸⁰⁷

⁸⁰³ Nelson, above n 801, at 160.

⁸⁰⁴ Comprehensive Drug Abuse Prevention and Control Act 1970, (*codified as amended* at 21 U.S.C. § 881(h)).

⁸⁰⁵ Levy shows that while the drug forfeiture laws was aimed at starving the drug organized groups of the profits of their crime, as soon as they came into effect, they were mostly used against “the little people. See Levy, above n 774, at 127. He also considered the forfeiture laws as “failure”, pointing out that although they were aim at preventing the criminal infiltration of organized groups into legitimate business, “very few indictments involved the charge that the accused used the proceeds of a pattern of racketeering activity to acquire an interest in an enterprise”.

⁸⁰⁶ Under civil forfeiture, in order to confiscate a property, the government only needs to demonstrate that there is a probable cause to believe that a substantial connection exists between the property and the illegal activity (or guilty property). (for example, in *United States v. One 1975 Ford F100 Pickup Truck*, 558 F.2d 755, 756 (5th Cir. 1977) the government claimed forfeiture of a truck by only showing probable cause that the truck was employed to facilitate concealment, possession, or transportation of cocaine). Probable cause may entirely be based on circumstantial evidence, hearsay or an anonymous informant’s tip (without being tested in court), and it can be met simply by lodging a complaint by the government. If the accused fails to prove the innocence of his property, or fails to prove he did not know his property was involved in illegal action, he will lose it. In other words, as Levy (above n 774, at 124) discusses, in civil forfeiture, forfeiture proceedings are against property not a person, so “the property which has no rights is accused of crime and convicted on the basis of a showing of probable cause”. This turns upside down the presumption of innocence _ property is guilty until the owner proves otherwise. Levi further argues and illustrates that such lenient burden of proof on the government empowers the government with “draconian forfeiture weapons” to seize and confiscate citizens’ property without observing their constitutional rights and without insuring that “guilt and innocent is fairly determined”.

⁸⁰⁷ While the amendment recognized the “innocent owner defence” by allowing a party (owner) to plead that the crime took place “without the [his] knowledge or consent”, in practice, controversy arises on what constitutes an owner defence? Does the defence include a case where the owner knew about the illegal use of his property, but did not consent to it? Does a claimant need to demonstrate that the illegal use of his property took place without his wilful blindness? See *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 995 F.2d 1558 (11th Cir 1993). Several courts ruled that the claimant “must demonstrate both that he lacked actual knowledge and consent, and that he did everything reasonably possible” to prevent misuse of the property (see for example *US v. One single family residence* (1988), 683 F.Supp. 783). Levy (above n 774, at 164-165) argues that this reading was not satisfactory as it unfairly resulted in the rejection of the innocent owner defence of , for example, a women who forfeited her car because she permitted her son who had a criminal record for drug dealing to use the car. The son used the car for a drug

Despite the criticisms, the draconian expansion of the scope of forfeiture laws continued. An amendment was added, which allowed seizure and forfeiture of the “substitute” assets of an offender (value confiscation), in case the offender could get rid of the property subject to forfeiture.⁸⁰⁸ This amendment was criticized for raising the Eighth amendment problem of imposing excessive, cruel and unusual punishment,⁸⁰⁹ and for violating the constitutional provision against the doctrine of ‘forfeiture of estate’.⁸¹⁰ The establishment of money laundering offences, which is argued that it “was shaped not by a rational request for an effective way to deal with a well-understood problem but by a mix of myth, hyperbole, and delirium”,⁸¹¹ greatly expanded the policy and scope of forfeiture by authorising in rem actions against any property involved in financial transactions that represent the proceeds of some form of unlawful activity, or involved in concealing and disguising the

transaction without his mom knowing or being consent to such an illegal use. But the car was forfeited.

⁸⁰⁸ Anti-Drug Abuse Act 1986 (US), s 1153(a).

⁸⁰⁹ The forfeiture of substitute assets does not strike some as being fair as it could include the forfeiture of innocents. Levi warns that such an amendment may make an honest shopkeeper forfeit his entire business “if he got mixed up in a single fraudulent scheme”. Levy, above n 774, at 116. In the case of money laundering, such a forfeiture law can have unfair and dramatic impact on, for example, “a securities lawyer who prepares a prospectus which his clients, investment promoters, use to raise \$1.5 million from investors in 2004. Assume that the lawyer also allows his attorney trust account to be used to receive the funds and that he then transfers the funds to entities controlled by his clients. The government, claiming that the lawyer knew that the prospectus contained material omissions and misstatements, brings money-laundering charges, and a count seeking criminal forfeiture of \$1.5 million, based on the lawyer’s transfers of funds he knew were obtained by securities fraud. Assume that most of the lawyer’s own assets are represented by his home, worth \$2.0 million, which he purchased in 1995 with funds he earned through years of honest toil well before he ever met the clients alleged to have conducted the 2004 fraud. Nevertheless, because the lawyer transferred the \$1.5 million in alleged tainted money to third parties—his clients’ entities—the government can list the lawyer’s home in the indictment as a “substitute asset” subject to forfeiture up to \$1.5 million and can, in the event of the lawyer’s conviction, seek the forfeiture of that home if the tainted \$1.5 million is unavailable.” Richard F. Albert and Amy Tully “A Bad Fit—Criminal Forfeiture of Substitute Assets, the *Lis Pendens*” 2005 234(27) *New York Law Journal* 1.

⁸¹⁰ Traditionally, there is a constitutional requirement of a connection or nexus between the crime and the property forfeited. Some are of the opinion that “the forfeiture of an equivalent value of substitute assets resembles “forfeiture of estate,” particularly in the common case of the criminal whose property is traceable to illegal activity and whose illegal gains over time exceed the value of his current assets”. See for example opinion of the court in *United States v. Ginsburg* (1986), 773 F.2d 798, 806 (7th Cir. 1986) (Ripple, J., dissenting) cited by D. J. Fried “Rationalizing Criminal Forfeiture” 1988 79(2) *Journal of Criminal Law & Criminology* 328, at 344-345.

⁸¹¹ See R. T. Naylor *Counterfeit Crime: Criminal Profits, Terror Dollars, and Nonsense* (McGill-Queens University Press, Montreal, 2014), at 98. Naylor argues that anti-money laundering regime in the US was shaped on the basis of some “erroneous or exaggerated beliefs” about amount of money generated by organized groups, the durable nature and hierarchical structure of these groups, the purposes of these group to infiltrate into legitimate businesses and corrupt them, the financial motivation of these groups (as only motivation), and bankers’ desire to be “the devil’s apprentices” (“an opinion reinforced by widely repeated stories about the misdeeds of Swiss bankers in particular”). See R. T. Naylor “Criminal Profits, Terror Dollars and Nonsense” November 2007 23(201) *Crime and Justice International* 27, at 28-29.

illegal origin of property.⁸¹² The most distinct feature of these anti-money laundering laws is their expansiveness; they include “over one hundred possible offenses including not only drug trafficking, but also such things as, fraud, espionage, and environmental crimes”⁸¹³, crimes that do not have provisions which permit forfeiture of proceeds of those crimes.⁸¹⁴

10.4 Forfeiture of terrorist funds; a reversion to primitive conceptions

There had already been steps taken to reform of US civil forfeiture laws due to their constitutional challenges and unfair consequences,⁸¹⁵ but the attacks of 2001 provided the US an ideal opportunity to push forward the globalization of the exaggerated assumption that there is a nexus between organized crime and terrorism.⁸¹⁶ It was able to consequently expand its forfeiture strategy to include the so-called the financial war on terror,⁸¹⁷ without regarding the differences between terrorist money which normally has legal origin and dirty money (proceeds)

⁸¹² Money Laundering Control Act 1986 (US).

⁸¹³ Scott Saltzer “Money Laundering: The Scope of the Problem and Attempts to Combat It” 1995 63 Tennessee Law Review 143, at 161.

⁸¹⁴ Money Laundering Control Act 1986 codified in Title 18 U.S.C.A. s 1956(c)(7).

⁸¹⁵ The Civil Asset Forfeiture Reform Act was enacted in 2000 in order to make a number of changes to the US forfeiture laws. For example, the prosecution is required to establish, “by a preponderance of the evidence”, that the property is subject to forfeiture” (see 18 U.S.C. § 983 (b)(2)(A) (2000)). Prior to this amendment, the government could freeze a property on only probable cause (see note 806). The amendment also allows the courts to “reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth if “the forfeiture is grossly disproportional to the offense” (See 18 U.S.C. § 983 (g)(4)(2000)). Prior to this amendment, there was no balance between forfeiture and gravity of an offence (see note 809). However, as Johnson argues, these amendments failed to fully solve the problems that arose from the prior the forfeiture laws. “[T]he Act fails to completely equalize the burdens of proof required by the government and innocent owners”. Also, “the amendment failed to adopt the proper inquiry under the Excessive Fines Clause and instead only uses a proportionality inquiry”. See Barclay Thomas Johnson “Restoring Civility: The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System” 2002 35(3) Indian Law Review 1045, at 1084.

⁸¹⁶ While Terrorist Financing Convention, which was initiated and drafted by G8, was made to instill the idea that terrorism and organized crime are similar in terms of making and moving money, so similar tools to anti-money laundering regime can be used to counter it, before 9/11 attacks, only few countries signed the Convention. The UN Security Council (obviously by a US push) adopted Resolution 1373 (S/RES/1373 (2001)) which calls upon all countries to ratify the Convention and requires seizure of any funds directly or indirectly related to terrorism and terrorist groups.

⁸¹⁷ Naylor argues that the idea of war on terror “heartily endorsed both by media pundits and by the growing army of post-9/11 ‘national security experts’,” did not emerge suddenly from the fevered mind of some Republican Party spinmeister. It had been gaining converts for decades before it crystallized in the legislative and military aftermath of 9/11. The anti-mafia hysteria that had gripped the United States during the late nineteenth and much of the twentieth centuries provided the images, the vocabulary, and even some of the important legal weaponry deployed in the anti-Islamic Terror campaign of the late twentieth and early twenty-first”. See R. T. Naylor *Satanic Purses: Money, Myth, and Misinformation in the War on Terror* (McGill-Queen's University Press, Montreal, 2006), at 46.

connected to a crime committed. As a result, the USA Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001)⁸¹⁸ was adopted (or in the view of Naylor, “sold to the public as the necessary response”).⁸¹⁹ The Act, which criminalizes provision of material support and resources for preparation or commission of terrorist acts or to terrorists or terrorist groups,⁸²⁰ was the result of the combination of two earlier strategies: the forfeiture strategy, which had been employed in the war on drugs, and the strategy which has been developed out of the experience of economic warfare during and since World War I,⁸²¹ and which gives the government (the President) authority to seize any property or transaction by declaring those who control the property or engage in the transaction an “enemy” of the State.⁸²²

The combination of these two strategies in the fight against terrorist financing resulted in the expansion of the scope of the forfeiture regime in an unprecedented manner. The Act allows the seizure and forfeiture of “all assets” of people who, on a balance of probabilities, are shown to be connected, in any way, to terrorism; that is, the government can forfeit “all assets”, foreign or domestic, of any individual or organization engaged in planning or preparing a terrorist act, all assets “affording any person a source of influence over any such entity or organization”, all assets “acquired and maintained with the intent and for the purpose of supporting, planning, conducting, or concealing” a terrorist act, all assets “derived from,

⁸¹⁸ Codified at 18 USC § 1 (2001).

⁸¹⁹ Naylor, above n 817, at 11.

⁸²⁰ 18 USC § 2339.

⁸²¹ Naylor (above n 817, at 10.) argues that this strategy began to be used to counter terrorist financing in the 1990s when “the Clinton administration started to apply the logic of asset freezes to designated groups rather than to countries”.

⁸²² The Trading with the enemy Act 1917, codified at 12 U.S.C. SEC. 95a–95b, gave the President the power to control over and impose restriction on trade between the U.S and foreign countries and/or nationals declared “enemy”. In other words, this law allowed the seizure of the assets and property of blacklisted individuals or entities, domestic and foreign, controlled by or involved in trade or financial relations with the ‘enemy’. The power of the president was extended by the enactment of the Emergency Banking Relief Act of 1933. By the enactment of the 1977 International Emergency Economic Powers Act, such power remains in force in times of war. Two decades later, under the Antiterrorism and Effective Death Penalty ACT of 1996 (*codified as amended at 28 USC § 1605A*), two lists of entities, designated foreign terrorist organizations and state sponsors of terrorism, were created. This law imposed restriction on financial transactions with these entities. For a review of history see Laura K. Donohue *The Cost of Counterterrorism: Power, Politics, and Liberty* (Cambridge University Press, Cambridge, UK, 2008) at 147-148; see R. T. Naylor *Patriots and Profiteers: On Economic Warfare, Embargo Busting, and State-Sponsored Crime* (M & S, Toronto, 1999).

involved in, or used or intended to be used to commit any act of terrorism”.⁸²³ The US forfeiture law also permits the forfeiture of any property collected or provided for terrorism without a need to prove the connection between the property and an actual terrorist act.⁸²⁴

The main noticeable difference between these terrorist forfeiture provisions and the earlier forfeiture laws is that unlike the provisions on illegal drugs and money laundering in which the forfeiture is limited to the forfeiture of assets derived from crime (proceeds of crimes) or assets used or intended to be used for commission or facilitation of crime, the terrorist forfeiture provisions do not require “any substantial connection between the property and terrorist activity nor any sense that particular property be linked to any crime at all”.⁸²⁵ So, if the government shows, by a preponderance of the evidence, a person or a group of persons are terrorists, all of their assets become forfeitable. Similarly, if it shows that assets are collected for a terrorist purpose, whatever that means, they are liable to seizure and ultimately forfeiture.

In other words, what makes an asset forfeitable is not its use for the commission of a crime or its illegal origin, but its attachment to the terrorist-labelled identity or terrorist intent of the owner or holder. According to this approach, it is the identity or intention of an accused which taints all of his assets, and consequently makes them liable to seizure and forfeiture. This is the draconian reconstruction of the abolished ancient concepts of “deodand” (guilty objects) and “corruption of blood” according to which the forfeited objects did not need to be connected to an offence, but simply were confiscated because the crime was regarded “as a breach of the offender’s fealty to his lord”.⁸²⁶ Similarly to in anti-terrorist laws such as the Patriot Act, terrorism in any form (even a thought) seems to be considered under US law as a breach of the offender’s allegiance to the state which expresses zero tolerance for the presence of certain people and thoughts suspected of or labelled terrorism. But unlike the forfeiture of the corruption of blood which required a conviction, and unlike the forfeiture of deodand which required the occurrence of some type of

⁸²³ Patriot Act, s 806, codified at 18 USC § 981 (a)(1)(g).

⁸²⁴ 18 USC § 981 (a)(1)(h).

⁸²⁵ Mary Michelle Gallant *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar, Cheltenham, UK, 2005), at 106.

⁸²⁶ Freiberg, above n 772, at 46.

wrongdoing, this terrorist forfeiture law allows the forfeiture of “all assets” of a person or a group of persons who, on a balance of probabilities, are demonstrated to be terrorists or to have a terrorist intent. These identity-based confiscation and intent-based confiscation rules have established one of the most draconian forfeiture regime in the history of liberal democracies.

Even worse, the Patriot Act also provides another alternative (draconian) means to confiscate terrorist property. It greatly increases presidential authority to freeze and confiscate the assets and property of blacklisted individuals or organizations by declaring them foreign terrorists (similar to the concept of ‘enemy’), without granting judicial review of the forfeiture.⁸²⁷ While the owner of property may file a lawsuit, if he seeks the return of his property, the burden is on him to demonstrate, by a preponderance of the evidence, that the confiscated property is not a property of suspected terrorists.⁸²⁸

10.5 Internationalization of the intent-based approach

The US identity-based and intention-based confiscation approaches not only has become a model for much of what is commonly described as the Western world,⁸²⁹ but also has crept into the international and regional conventions and agreements. The Terrorist Financing Convention, in its article 8, requires “the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2”.

⁸²⁷ Patriot Act, above n 818, s 106.

⁸²⁸ At s 316 (a)(2).

⁸²⁹ See for example Terrorism Act 2000 (UK) section 23 which allows forfeiture of any assets, collected, received possessed to be used for the “purpose of terrorism”. Anti-terrorism, Crime and Security Act 2001(UK), section 1, permits civil forfeiture of cash and property intended for use for the purposes of terrorism, or property that represents the property of a proscribed organization, or cash or property that has been found by a court as “terrorist cash”, without a need for criminal prosecution. Criminal Code of Canada, section 83.14, allows a court to order, on a balance of probabilities, forfeiture of “property owned or controlled by or on behalf of a terrorist group”, and property that has been used or will be used for the facilitation or commission of a terrorist activity, with no need for connection between the property and an actual terrorist act. Australian Charter of the United Nations Act 1945, Section 25, gives the Minister for Foreign Affairs authority to proscribe a person or an entity as terrorist, and to order seizure of the asset owned or controlled by the proscribed a person or a group. Section 20 of this Act creates offences for dealing in such a “freezable asset”, offences such as holding the asset, using the asset, allowing the asset to be used and facilitating the use of the asset.

The link to the flawed criminalisation of terrorist financing as an independent offence is thus firmly established. The offences set forth in article 2 include terrorist financing offences (collection and provision of funds) as well as terrorist offences. Emphasizing the criminalization of terrorist financing as an independent offence (which is, in its nature, a preparatory offence),⁸³⁰ the Convention in article 2 (3) does not require any connection between the funds collected or provided and any terrorist act; as pointed out above, the terrorist financing offences also rely heavily on the intent of the accused.⁸³¹ Reading these provisions together implies that the Convention obliges confiscation of any assets and funds that can be attributed to an imaginary terrorist act, as well as confiscation of assets used or intended to be used for the collection or provision of funds for terrorist purposes (intent-based confiscation).

In dealing with the issue of terrorism financing, as discussed in chapter three, the UN Security Council also adopted an identity-based approach to round off the counter-terrorist financing regime that begins with criminalization. But, this approach was made and has been developed to “operate based on diplomacy and not due process”.⁸³² The Resolution 1267 set up a committee, called the “Al-Qaida Sanctions Committee” and gave it a mandate to create and update (without a proper judicial process) a list of individuals, groups, undertakings and entities associated with al-Qaida and Taliban (“Al-Qaida Sanctions List”).⁸³³ Having regard to the information provided by the UN Member States and regional organizations,⁸³⁴ 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 included in the List or delisted.⁸³⁵ In 2009, the Security Council created an office of Ombudsperson “who reviews requests from individuals, groups, undertakings or entities seeking to be removed from the

⁸³⁰ See Hamed Tofangfaz “Rethinking Terrorist Financing; Where Does all this Lead?” 2015 18(1) *Journal of Money Laundering Control* 112.

⁸³¹ Lehto, above n 14, at xxxiv.

⁸³² Cian Murphy *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart, Oxford, UK, 2012), at 120.

⁸³³ UN, S/RES/1267, 15 October 1999, at [6]. See the amendments to this resolution in UN, S/RES/1425, 20 December 2002. UN, S/RES/1455, 17 January 2003. UN, S/RES/1526, 30 January 2004. UN, S/RES/1617, 29 July 2005. UN, S/RES/1735, 22 December 2006. UN, S/RES/1822, 30 June 2008. UN, S/RES/1989, 17 June 2011.

⁸³⁴ UN, S/RES/1390, 16 January 2002, at [5 (a)].

⁸³⁵ UN, above n 200, at [4].

Al-Qaida Sanctions List of the Security Council's Al-Qaida Sanctions Committee".⁸³⁶ However, the office of ombudsperson does not provide any judicial review. This matter will be explored in detail in chapter 12.3.

The Resolution 1267 along with the subsequent resolutions requires all countries to freeze all financial assets of Bin Laden, Al-Qaida and Taliban.⁸³⁷ Following the attacks of 11 September 2001, this approach became universal with the Security Council Resolution 1373, which addresses financing of terrorists and terrorist groups in a general way without adopting a list.⁸³⁸ While there is no agreement on the definition of terrorism, the UN Security Council asked all countries to adopt necessary measures, *inter alia*, to

[f]reeze without delay funds and other financial assets or economic resources of persons [not limited to assets of Al-Qaida and Taliban] who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.⁸³⁹

The Resolution has left it to Member States to draw up and establish a terrorist list other than the designated list created by Al-Qaida Sanctions Committee. It has set up a committee, named the "Counter-Terrorism Committee" to monitor states' compliance with this Resolution.⁸⁴⁰ There was subsequent endorsement and enforcement by the European Union, which will be discussed later.

Similarly, the FATF recommends the adoption and implementation of measures to freeze funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts.⁸⁴¹ It also recommends

⁸³⁶ UN, S/RES/1904, 17 December 2009.

⁸³⁷ UN, S/RES/1267, 15 October 1999, at [4(b)]. UN, S/RES/1333, 19 December 2000. UN, S/RES/1390, (2002). UN, S/RES/1455, (2003).

⁸³⁸ UN, S/RES/1373, 28 September 2001.

⁸³⁹ At [1].

⁸⁴⁰ At [6].

⁸⁴¹ Financial Action Task Force "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, the FATF Recommendations" (February 2012)

confiscation of “property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations”, “without requiring a criminal conviction”, and “even in the absence of a link to a specific terrorist act or acts”.⁸⁴² It also recommends “[c]ountries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law”.⁸⁴³

10.6 Conclusion

The current (globalized) freezing and confiscatory measures have been greatly influenced by ancient English concepts of forfeiture. These concepts, which allow the forfeiture of property with scant regard to the innocence or guilt of the owner of the forfeited property (forfeiting property on the basis of the fiction of guilty property, the common law concept of deodand), have crept into the US confiscatory measures in the war against drugs and then into confiscatory measures in the war against terror. The US approach to confiscation and freezing of terrorist funds has found its way into the Terrorist Financing Convention, FATF recommendations and UN Security Council’s resolutions.

The application of this approach accompanied by the vague definition of offence of terrorist financing has created draconian forfeiture measures. Previous chapters have shown how to impose liability, the terrorist financing offence largely relies on the mental element of the financier who proceeds with collecting or providing funds which may not necessary to be used for any terrorist act. In the absence of the necessity of a link between funds and an actual terrorist act, the basis of imposing forfeiture sanctions against property involved is questionable. It seems that the combination of the current forfeiture approach and the vague definition of the offence permits the seizure and forfeiture of property not because it will be used for preparation or commission of, or linked to, any criminal activities, but because it is

http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf, at 13.

⁸⁴² At.

⁸⁴³ At.

assumed to be used for terrorist purposes (whatever it means) or used by suspect terrorists or terrorist groups. Even worse, the UN Security Council, adopting the US approach, has created a mechanism to freeze, without due process and for an indefinite time, all the property of those who are designated, in a gross violation of due process, as terrorists, terrorist organizations and their financiers.

The following chapters engage in a closer examination of these seizure and forfeitures measures, identifying the regulatory problems that arises from such vague and arbitrary measures in the context of EU and ASEAN. The EU has been chosen because it is a value-based community which has emphasis on the maintenance and promotion of human rights and rule of law. The approach of ASEAN countries towards criminalization and confiscation of terrorist financing is also subject to examination because it functions as a kind of counter model to the EU: it consists of countries which may not share the same democratic values as the EU and its Member States, but ASEAN states are encouraged (sometimes pressurised) by EU or other Western democratic states to take into account human rights and democratic values when dealing with issues such as terrorism.

Chapter Eleven: The EU's approach towards the confiscation of terrorist funds

11.1 Introduction

Following the terrorist attacks on September 11, 2001 and subsequent terrorist attacks in Europe, regional security developments have become particularly important for European policy and security. The EU also insists on the adoption and implementation of the current counter-terrorist financing regime, which was provided by the Terrorist Financing Convention and the UN Security Council resolutions and which has been promoted by international organizations such as FATF. It should be also noted that many EU Member States have supported and are still supporting the creation and diffusion of the counter-terrorist financing regime. But the question is how the EU, as a value-based community, and its Member States which are subject to those value yardsticks, address the legal issues arising from imposing (i) criminal liability and (ii) consequently seizure and confiscation measures against the property of accused terrorist financiers on the basis of their mental state without linking their action, or mental state to any actual terrorist act.

The EU's approach is worthy of careful examination as the EU claims to have a strong commitment to fight against terrorism while maintaining fundamental principles, such as respect for the rule of law, good governance, fundamental freedoms and promoting human rights and democratic values.⁸⁴⁴ Any difficulties that the EU and its Member States have with the regime thus may throw light on the flaws of the regime argued for above.

11.2 The EU regional approach

As a regional organization, the EU has incorporated the current terrorist financing measures into its counter terrorist financing strategy, but in a piecemeal way. While the initial EU definition of terrorist financing is in line with the definition provided by the Terrorist Financing Convention,⁸⁴⁵ there are constant amendments pushed

⁸⁴⁴ Consolidated Version of the Treaty on European Union, C 326/17, (26 October 2012), art 2.

⁸⁴⁵ Article 1(5) of "EU Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and

forward to bring EU laws in line with the FATF revised recommendations and UN Security Council resolutions. For instance, the latest proposal for a Directive on combating terrorism has pushed through provisions which require the EU Member States “to criminalize the provision of funds that are used to commit terrorist offences and offences related to terrorist groups or terrorist activities” including a new terrorist financing offence (financing of travelling abroad for terrorist purposes)⁸⁴⁶ introduced by the FATF’s revised Interpretive Note to Recommendation 5 on the criminal offence of terrorist⁸⁴⁷ and UN Security Council Resolution 2178 (2014).⁸⁴⁸ This proposal has been adopted as an EU directive in March 2017.⁸⁴⁹

Regarding the relationship between terrorist financing offences and its subsequent terrorist offences, the EU laws on terrorism have also provided similar provisions to those adopted by the Terrorist Financing Convention and the FATF. It has been repeatedly emphasized that “it shall not be necessary that a terrorist offence is actually committed”.⁸⁵⁰ The emphasis has also been made that in dealing with terrorist financing offences, “it is sufficient that there is knowledge about the use of the funds for purposes furthering the terrorist activities in general without there being a need to be linked to for instance a specific already envisaged travel abroad”.⁸⁵¹ Nevertheless, none of these EU legislative acts and proposals defines what constitutes ‘terrorist purposes’. This not only results in different interpretations, but also fails to satisfy the principle of legality.

It is worth noting that the EU’s definition of terrorism is very broad including many criminal offences, and it has hard-to-infer mental elements. Terrorism according to

Commission Directive 2006/70/EC” define ‘terrorist financing’ as “the provision or collection of funds, by any means, directly or indirectly, 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 any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

⁸⁴⁶ At, art 11.

⁸⁴⁷ Financial Action Task Force, above n 12, at 37.

⁸⁴⁸ UN, S/RES/2178, 24 September 2014.

⁸⁴⁹ EU Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

⁸⁵⁰ EU Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, Article 3 (3).

⁸⁵¹ Article 15 of Proposal for a EU Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, (OM/2015/0625 final - 2015/0281). See also EU Directive 2017/541, above n 849.

the Article 1 to 4 of the Framework Decision 2002/475/JHA covers a list of violent acts⁸⁵² which

may seriously damage a country or an international organisation where committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

However, the EU has provided a narrower definition of terrorist groups. Unlike the Terrorist Financing Convention which does not provide any definition of terrorist groups, and unlike the very broad definition of terrorist groups recommended by the FATF⁸⁵³, the EU has defined a ‘terrorist group’ as

a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. ‘Structured group’ shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.⁸⁵⁴

Regardless of whether the concept of terrorism or a terrorist group in itself is vague and undefinable, the EU Member States, also, do not share a common understanding of what (or what not) precisely constitutes terrorism as a crime. For example, while the German Criminal Code only criminalizes financing of serious

⁸⁵² According to EU Framework Decision 2002/475/JHA on combating terrorism, Article 1 (1), terrorist offences can include “attacks upon a person’s life which may cause death”, “attacks upon the physical integrity of a person”, “kidnapping or hostage taking”, causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility”, “seizure of aircraft, ships or other means of public or goods transport”, “manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons”, “release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life”, “interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life”, “threatening to commit” any of the acts mentioned above.

⁸⁵³ According to the FATF, the term terrorist group refers to “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”. See FATF, above n 13, at 122.

⁸⁵⁴ EU Framework Decision 2002/475/JHA on combating terrorism, art 2 (1).

violent acts “endangering the state” (meaning commission of a criminal offense against life within the meaning of Section 211 or 212 of German Criminal Code or against personal freedom within the meaning of Section 239a or 239b of the Criminal Code),⁸⁵⁵ the United Kingdom’s definition also covers violent acts “designed seriously to interfere with or seriously to disrupt an electronic system”.⁸⁵⁶

There are also noticeable differences in the definitions of a terrorist group provided by EU Member States. According to the Spanish Criminal Code, for example, a terrorist group is construed to be a stable group formed by one or more persons, for an indefinite time, in collusion and co-ordination to distribute diverse tasks or duties in order to commit felonies, as well as to carry out reiterated commission of misdemeanours”.⁸⁵⁷ Compare this with Greece’s definition of terrorist groups according to which funding “a terrorist group is not a crime unless that group consists of three or more people acting jointly in order to commit” a terrorist act.⁸⁵⁸

When it comes to the confiscation of terrorist funds, following the US approach and the FATF Recommendations, the EU uses its anti-money laundering confiscation provisions to counter terrorist financing, without regard to differences between the proceeds of organized crime and terrorist funds. It requires its Member States to confiscate “either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for” criminal offences, including terrorist offences covered by the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.⁸⁵⁹ Reading this provision in conjunction with the provisions on the criminalization of terrorist offences, which do not require a connection between terrorist offences and an actual terrorist act, implies an intent-based confiscatory regime in which people’s assets may be confiscated merely on the basis of what they (are presumed to) intend to do, rather than what they actually commit or plan

⁸⁵⁵ Section 89a (2) number 4 of the Criminal Code of the Federal Republic of Germany 1971.

⁸⁵⁶ Terrorist Act 2000 (UK), s 1(1).

⁸⁵⁷ Article 571 and Sub-Section 2 of Section 1 of Article 570 bis of Spanish Criminal Code (1995).

⁸⁵⁸ Financial Action Task Force *Third mutual evaluation on anti-money laundering and combating the financing of terrorism, Greece* (29 JUNE 2007), at [135].

⁸⁵⁹ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Article 4. 1. See also Article 3 (1)(b) of Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.

to do. But there is a noticeable difference between the EU laws and the US confiscation model. While in the US, “all assets” of a person engaged in terrorism can be confiscated regardless of whether they have been used or intended to be used for terrorism, the EU laws appear to require the confiscation of the assets (assumed to be) linked to terrorism or terrorist purposes; that is, it appears that there should be some kind of connection, although presumptive, between the confiscated assets and terrorism or terrorist purposes.

11.3 Confiscation of terrorist funds at the EU national level

Although the application of the EU laws and regulations on terrorism offences at the national level differs in many respects among EU Member States, especially with regard to the definition of the elements of the terrorism offences, some EU Member States appear to have adopted approaches similar to the US Confiscation model of countering terrorist funds (the intent-based model).

For example, in the UK where a number of terrorism offences are set out,⁸⁶⁰ the collection or provision, possession and use of money or any property can be regarded as an offence if a person involved in any of these actions intends that the money or property should be used for the “purposes of terrorism”, or has reasonable cause to suspect that it may be used for such purposes.⁸⁶¹ Where a conviction for any of these offences is secured, the court may order the forfeiture of any money or other property which, at the time of the offence, the convict “had in their possession or under their control, and which had been used for the purposes of terrorism, or, they intended should be used, or had reasonable cause to suspect might be used, for those purposes.”⁸⁶² Similarly, entering into or becoming concerned in an arrangement which facilitates another’s retention or control of terrorist property is an offence; but, unlike above-mentioned offences, the burden is on the accused to prove that he “did not know and had no reasonable cause to suspect that the arrangement related to terrorist property;”⁸⁶³ if the accused fails to do so and is convicted of such an offence, the court may order the forfeiture of the money or

⁸⁶⁰ Terrorism Act 2000 (UK), ss 11, 12, 13, 55, 56, 57, 58, 58A.

⁸⁶¹ At ss 15, 16.

⁸⁶² At s 23 (1)(2)(3).

⁸⁶³ At s 18.

other property to which the arrangement in question related.⁸⁶⁴ Departing from the conviction-based approach, the forfeiture order may be extended to

any money or other property which, at the time of the offence, the person [the accused] had in their possession or under their control, and which (a) had been used for, the purposes of terrorism, or (b) was, at that time, intended by them to be used for those purposes.⁸⁶⁵

Basically, what the prosecution needs to prove is that the accused had terrorist purposes when he became involved in those financing activities. If they can, not only is the property involved in those activities subject to forfeiture, but in addition, other property of the financier, which can be assumed to be used for terrorist purposes, can be unfairly and irrelevantly in danger of forfeiture if the prosecution alleges that those property could be used, or intended to be used for terrorism purposes. An example might be the forfeiture of other property (say a house) of a person who used his shop for supporting terrorism, simply because the property also might be used, or there is reasonable cause to suspect it might be used, for terrorist purposes. In other words, by proving that the financier had a terrorist propose when he was using his shop for fund-raising the prosecution could ask for the forfeiture of other property of the financier as it could be used for terrorist purposes.⁸⁶⁶

English law also allows courts to order the forfeiture of a property not intended or suspected for use in terrorism when that property was “wholly or partly, and directly or indirectly,... received by any person as a payment or other reward” in connection with any offence mentioned above.⁸⁶⁷ Thus, for example, the payment made to an accountant for preparing accounts on behalf of a proscribed organisation is

⁸⁶⁴ At s 23 (5).

⁸⁶⁵ At s 23 (4).

⁸⁶⁶ In spite of such a law, in UK case *R. v. Farooqi and Others*, [2013] EWCA Crim 1649, the first attempt to forfeit the residential property of the Farooqi (an Islamic bookstall owner) failed. He received four life sentences for soliciting to murder (inciting two undercover police officers who regularly visited his family house to fight in Afghanistan), for dissemination of terrorist publications and for engaging in conduct in preparation for acts of terrorism. Although the judge (Sir Richard Henriques QC.) pointed out that the law allows the court to forfeit the house, he rejected to order the forfeiture of the convict’s home on the grounds that “it would make Farooqi’s “wholly innocent” family homeless”. Martin Evans “Terrorist is Allowed to Keep his Home as Bid to Seize Property Fails” (23 May 2014) <<http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10852503/Terrorist-is-allowed-to-keep-his-home-as-bid-to-seize-property-fails.html>>.

⁸⁶⁷ Terrorism Act 2000 (UK), s 23 (7).

forfeitable whether or not the money was intended or suspected for use in terrorism.⁸⁶⁸

Forfeiture can be also issued in English law on conviction for specified offences, such as weapon training, possessing things and collecting information for the purposes of terrorism, training for terrorism, or any ancillary offence to these offences, or offences where a “terrorist connection” exists.⁸⁶⁹ Such a forfeiture order may be made against “any money or other property that was, at the time of the offence, in the possession or under control of the convict where it had been used for the purposes of terrorism, or it was intended for such use.”⁸⁷⁰ In the same manner, property under the control or in the possession of a person convicted of supporting (this is not limited to the provision of money) a proscribed group can be forfeited if, on a balance of probability, it is shown that it has been used in connection with the activities of the group, or “the court believes that it may be used in that connection”.⁸⁷¹ Therefore, for example, a rented flat in which the convict collecting information (which according to the language of this provision, can include watching a video) on making bombs for terrorist purposes can be put in jeopardy of confiscation through its use as a venue for these activities in spite of the landlord’s lack of knowledge thereof or consent that they occur.⁸⁷²

Modelled on the drug trafficking cash seizure scheme, the English law also authorizes the seizure and forfeiture of “terrorist cash” (such as coins, postal orders, bankers’ drafts etc.) in a form of *in rem* civil forfeiture (without a criminal conviction).⁸⁷³ So, cash can be seized if law enforcement has “reasonable grounds for suspecting” that it is terrorist cash.⁸⁷⁴ However, this approach, in practice, can be problematic because unlike drug-derived cash which has a criminal background, terrorist funds have a criminal destination; so suspicious grounds for the seizure of such cash seem to rely more on fiction than on reasonableness. That is, these

⁸⁶⁸ UK Parliament “Explanatory Notes to Terrorism Act 2000” (2000) <http://www.banksr.co.uk/images/Statutes/T-W/Terrorism_Act_2000_Explanatory_Note.pdf>, at [33].

⁸⁶⁹ Terrorism Act 2000 (UK), s 23A.

⁸⁷⁰ At s 23A (1).

⁸⁷¹ At s 111.

⁸⁷² Clive Walker *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford University Press, New York, NY, 2009), at 87.

⁸⁷³ Anti-terrorism, Crime and Security Act 2001 (UK), part 1 (2) of Schedule 1.

⁸⁷⁴ At part 2 (1) of Schedule 1.

suspicious grounds for suspecting can be anything which may possibly raise suspicion that the cash can be used for terrorist purposes. Suspicious grounds can be “the country of destination, material on the person’s computer’s hard drive, ... combat clothing in the luggage of the courier”,⁸⁷⁵ the failure to convince the law enforcement officials of the purpose and reasons for carrying the cash, having links with terrorists or terrorist groups, previous conviction of the owner. A court can order forfeiture of any cash, no matter how small the amount, when the court is satisfied, on a balance of probability, that it “is intended to be used for the purposes of terrorism”,⁸⁷⁶ without a requirement to identify a terrorist act which gives rise to the cash forfeiture. However, from a classic criminal law perspective, it is totally unacceptable (or draconian) to forfeit cash only on the basis of the evidence which points to the status of a person (whom he knows or is connected to, or where he travels to), instead of a wrongdoing he might do or he already has done.

Similarly, in Italy, terrorist financing is no longer limited to the act of “financing associations”.⁸⁷⁷ It can cover any financing activity carried out for “purposes of terrorism” or “democratic order subversion”.⁸⁷⁸ While the terms “purpose of terrorism” and “democratic order subversion” are not defined, it is not required that the funds involved in such financing are used or allocated for an actual terrorist act or an act aimed at subverting democratic order.⁸⁷⁹ Therefore, a person who possesses, receives or provides assets or property to another person or an organization can be prosecuted and convicted for what may be assumed (understood) to be terrorist purposes or subversion. In terms of confiscation, it seems that Italy has expanded its preventive system of seizure and confiscation of mafia-type assets to counter the terrorist funds, without considering the fact that while mafia assets may be derived from illegal sources, terrorist funds have an

⁸⁷⁵ R. E. Bell “The Seizure, Detention and Forfeiture of Cash in the UK” 2004 11(2) *Journal of Financial Crime* 134, at 144.

⁸⁷⁶ Anti-terrorism, Crime and Security Act 2001 (UK), part 1 (1) of Schedule 1.

⁸⁷⁷ The concept of “financing associations” is not defined by Italian law; so, it is unclear whether it includes acts of collection, receipt or provision.

⁸⁷⁸ By adopting the LD N.109/2007 of June 22, 2007, Italy has broadened the scope of terrorist financing offences to include financing of terrorist activities. Financial Action Task Force *Anti-money laundering and counter-terrorist financing measures; Italy* (February 2016), at 136.

⁸⁷⁹ While the Italian Penal Code is silent on this matter, Italian authorities point out to the FATF assessors that the offense of terrorist financing “refers to the alleged risk in order to prevent the result of financing, and anticipates punishability at a prodromal time. Moreover, the Italian Court of Cassation has stated that the [terrorist financing] offense punished ... is committed, without it being necessary that material execution of the terrorist act be actually set up”. At 136.

illegal destination. A confiscation order can “target the assets of persons who (i) are linked to organised and non-organised crime; (ii) ‘habitually’ conduct criminal activities ...; or (iii) are suspected of funding terror”.⁸⁸⁰ Such confiscation is not limited to the property or funds proven to be the “price”, “product”, “profit” or instrumentalities of a criminal act; as the FATF’s report indicates, it can include “assets or other property” for which the offender or the third party cannot justify a legal origin,⁸⁸¹ and which, in the case of terrorist or terrorist financing, are assumed to be intended to be used by another person or an organization for terrorist purposes or subversion of democratic order. Therefore, the burden would be on the accused or the third party to prove otherwise.

In a similar fashion, the Austrian Penal Code allows confiscation of any property that is at the disposal of a terrorist organization as well as confiscation of all property within the possession of a person who is convicted of being member of a terrorist group.⁸⁸² A person is considered a member of a terrorist group when the person participates in the group’s activities solely by collecting or providing assets for the group with the knowledge that he promotes the association or its offences.⁸⁸³ The definition of a terrorist group has been expanded to include not only a group that engages or aims at terrorist act, but also a group established for the purpose of terrorist financing.⁸⁸⁴ Although this law has been rarely applied as the prosecution needs to prove the elements of the terrorist organization,⁸⁸⁵ all property of a person who receives or collects or provides funds for another group would be in jeopardy if the convict fails to prove that his property and assets do not have illegal sources (“membership benefits”) or an illegal destination.

On the other hand, some EU Member States allow confiscation of terrorist funds, but unlike the US model, in a very restrictive manner and in such a way as to restrain the abuse of the criminal law. For instance, in Germany, financing (collecting,

⁸⁸⁰ At 59.

⁸⁸¹ At 133.

⁸⁸² Financial Action Task Force *Mutual evaluation report; anti-money laundering and combating the financing of terrorism; Austria* (26 June 2009), at [209].

⁸⁸³ At [186].

⁸⁸⁴ Austrian Penal Code, s 278 (3).

⁸⁸⁵ According to the Section 278b (3) of the Austrian Penal Code, a group is considered a terrorist group when the group is designed as an “union planned for a longer time of more than two persons aiming at” the commitment of terrorist offences or financing of terrorism.

receiving or providing of assets) of serious violent acts entangling the state⁸⁸⁶ does not constitute an offence if there is no explicit connection between the act of financing and a specific (or serious violent) terrorist act.⁸⁸⁷ For an act to be regarded as an offence, the assets involved also need to be substantial in the sense that they need to make “a greater than merely insubstantial contribution to the preparation of a serious violent act endangering the state”.⁸⁸⁸ Where these requirements are met and a conviction is obtained, a confiscation order can be made only against the assets generated by or used or intended for use in the commission or preparation of the terrorist financing offence or the terrorist act.⁸⁸⁹ The forfeiture cannot be directed at such assets if they, at the time of the commission of the offence, were owned or controlled by the third party who did not provide his assets for the support of the offence “with knowledge of the circumstances of the act”.⁸⁹⁰ On the other hand, the mere collection of funds for a terrorist organization⁸⁹¹ is regarded as support of a terrorist organization.⁸⁹² Unlike the offence of financing of violent acts, it is not necessary for the financial means to be used for the commission or preparation of a criminal act. The collection or provision of funds must be simply made “for an objective purpose for the terrorist organization and must be useful for it”.⁸⁹³ But as only intentional conduct attracts criminal liability according to German law, the prosecution should prove that the accused had the intention that the funds be used for support of a group whose aims or activities were directed towards the

⁸⁸⁶ A serious violent act endangering the state is defined as a criminal offense “against life ... or against personal freedom” which is intended and able to impair “the existence or security of a state or of an international organisation, or to abolish, rob of legal effect or undermine constitutional principles of the Federal Republic of Germany”. See Criminal Code of the Federal Republic of Germany 1971, s 89a (1).

⁸⁸⁷ At s 89a (2)(4). See also Financial Action Task Force “3RD follow-up report mutual evaluation of Germany” June 2014, at 14.

⁸⁸⁸ Financial Action Task Force *Mutual Evaluation Report; Anti-Money Laundering and Combating the Financing of Terrorism; Germany* (Paris, 19 February 2010), at [209].

⁸⁸⁹ Criminal Code of the Federal Republic of Germany 1971, ss 73-74.

⁸⁹⁰ At s 73(3).

⁸⁹¹ A criminal group in the German law is defined as “an organizational 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”. According to Section 129a (1), a criminal group is considered a terrorist group when such a group’s aims and activities are directed at the commission of specific offences such as murder, genocide, crimes against humanity, war crimes or crimes against personal liberty. Terrorist organizations are, according to Section 129a (2), those whose purpose it is or whose activities are aimed, for example, at causing serious physical or psychological harm to another person, computer sabotage, destruction of structures and so on.

⁸⁹² At s 129a (5).

⁸⁹³ Financial Action Task Force, above n 888, at [223].

commission of violent acts.⁸⁹⁴ Consequently, forfeiture may be made against the assets proved to be intended for use of the purposes of the group, whether they are legal or illegal. This can include support for humanitarian purposes. A similar approach has been taken by some other jurisdictions such as Denmark.⁸⁹⁵

Nonetheless, in Finland, contribution to a terrorist group may give rise to forfeiture only if the contributor is aware that his contribution could promote the “criminal activity” of the group.⁸⁹⁶ Similarly, in Switzerland, financing of a group does not constitute an offence and as a result, the money involved is not subject to forfeiture if the financing is not made to support the group “in its criminal activities”,⁸⁹⁷ or if the financing is carried out “with a view to establishing or re-establishing a democratic regime or a state governed by the rule of law or with a view to exercising or safeguarding human rights”.⁸⁹⁸ While this may put the prosecution in the difficult position of proving the criminal intention of the financer, it does at least guarantee the human rights of the accused and closes any possible abuse of fundamental rights.

11.4 Ambiguity about the mental element and the question of liability

Although there are noticeable differences among EU Member States in the criminalization and confiscation of terrorist funds, there is a growing trend towards utilising an intention-based criminalization and confiscation approach - an approach to targeting what is assumed to be terrorist funds based on the intention of the financer without linking them to an actual terrorist act (whether completed or only attempted). As mentioned above, at the EU level, this approach has been adopted to impose a criminal penalty in two ways. In the restricted way, practiced by states such as Germany and Finland, confiscation is limited to the funds and property

⁸⁹⁴ At [223].

⁸⁹⁵ Danish Criminal Code (as of 2004), s 114a. The FATF’s report points out that “Explanatory notes to Section 114a, which provide details not contained in legislation and are considered by the courts to carry a high degree of legal weight, make clear that it is a punishable act to provide funds or financial services to both the legal and illegal activities of a terrorist group. Intent is required in relation to the fact terrorist acts are part of the activities or aims of the group. Participation in or support to an organization that has both humanitarian and terrorist aims are covered”. See Financial Action Task Force “Third mutual evaluation on anti-money landing and combating the financing of terrorism; Kingdom of Denmark” 22 June 2006, at [222].

⁸⁹⁶ Criminal Code of Finland (39/1889, amendments up to 927/2012 included), Chapter 34a, s 4.

⁸⁹⁷ Criminal Code of the Swiss Confederation 1937, art 260ter.

⁸⁹⁸ At 260quinquies (3).

intended to be used for terrorist purposes. The broader manner, adopted by the UK, allows the expansion of confiscation to the convict's other property which is not involved in financing but which is suspected might be used for terrorist purposes.

Both these approaches depend on a mental element to impose confiscation. However, reliance on the guilty mind of offenders raises questions in terms of the justifiability of this approach, and the scope and formulation of the mental element. With respect to the justifiability of the approach, it should be recalled that from a classic criminal law perspective, it is controversial to impose guilt on a person (and consequently confiscation sanctions on his property) merely on the basis of what the person intends without a link to any criminal conduct. It is merely because, as the principle of *mens rea* implies, people "should be held criminally liable only for events or consequences which they intended or knowingly risked",⁸⁹⁹ or punished for the commission or facilitation of actual criminal conduct not criminal thoughts or state of being (as principle of legality requires).

As far as the structure of the offence is concerned, there is an uncertainty over the formulation of the mental element of the terrorist financing offence (the structural vagueness). In fact, according to the Terrorist Financing Convention, in order to establish an independent offence of terrorist financing, there is no requirement for any connection between the preparatory act of financing and the subsequent terrorist offence for which the financing occurs. Such a requirement would limit the crime of financing to the equivalent of an act of complicity in the terrorism itself or alternatively make it an attempt by the financier themselves to commit terrorism. However, we must recall again that according to the Convention, all that is required is the financier's intention, that funds should be used for terrorist activity (purposes), or his knowledge, that the funds will be used for such purposes, and this is enough to make his act of financing criminal and his property forfeitable.

The unanswered question is that if there is no need that the financier intend or know of any specific terrorist act, what exactly should a financier of terrorist activity know or intend to be criminally liable and be subject to confiscation sanctions. Unfortunately, both the Terrorist Financing Convention and EU legislation and

⁸⁹⁹ Ashworth, above n 499, at 75.

directives have failed to set out a clear definition of what constitutes the fault element of the offence. In spite of this ambiguity, the adaptation and implementation of this approach are emphasized as it is assumed that terrorist financing is as serious an offence as terrorism, which needs to be tackled (criminalized) independently⁹⁰⁰ but with heavy reliance on the offence's mental element. This ambiguity has left the fault element of the offence of terrorist financing open to different interpretation. The possible mental elements read by jurisdictions into the definition of the terrorist financing offence will be discussed in next part.

11.4.1 Terrorist intent and the challenge of human rights

Before examining those mental elements interpreted into definition of the terrorist financing offence, it is necessary to note that as the Convention requires, adoption of any state of mind as a fault element of the offence and as a basis for the imposition of criminal liability, needs to be consistent with the relevant fundamental rights laid down in domestic and international human rights.⁹⁰¹ Generally speaking, the validity of any confiscation measure depends on its compatibility with the laws safeguarding an individual's right to the peaceful enjoyment of property under the human rights law.⁹⁰² The European Convention on Human Rights⁹⁰³ and the Charter of Fundamental Rights of the European Union,⁹⁰⁴ for example, rigorously protect the right to own, use, dispose of and bequeath lawfully acquired possessions. The main purpose of these laws, according to the European Court of Human Rights, is "to prevent the arbitrary seizures, confiscations, ... or other capricious interferences with peaceful possession that many governments are - or frequently have been - all too prone to resort to".⁹⁰⁵

⁹⁰⁰ 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".

⁹⁰¹ The Terrorist Financing Convention, above n 6, art 17. "Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law".

⁹⁰² Peter Alldrige *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart, Oxford, 2003), at 113.

⁹⁰³ See article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952), Paris, 20.III.1952.

⁹⁰⁴ (2000/C 364/01), art 17.

⁹⁰⁵ *Marckx v. Belgium* (1979), App No. 6833/74 (ECtHR), at [20].

However, the right to property is not absolute. Both the Convention and Charter give states the right to interfere with one's property under two circumstances: where it is *precisely* provided by law, and where it is necessary for the general interest.⁹⁰⁶ These two requirements are well explained by the European Court of Human Rights.

With regard to the former which flows from the criminal law principle of legality (no punishment without law), the European Court of Human Rights has laid down two requirements: accessibility and foreseeability. The court ruled that:

the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁹⁰⁷

In relation to the necessary interference for the general interest, the question is whether and when in exercising their right to control the use of private property, states are acting in accordance with the general interest of its society. In order to manage disputes involving the property right of individuals and public interest, the European Court of Human Rights has commonly applied the proportionality principle.⁹⁰⁸ According to this principle, there should be a reasonable relationship of proportionality between the means employed in, *inter alia*, the deprivation of property and the legitimate objectives pursued to be realised by the deprivation.⁹⁰⁹ In other words, legislation must strike "a fair balance between the demands of the

⁹⁰⁶ At the time of emergency "threatening the life of the nation", states are also allowed to take measures derogating from their obligation to value the right to property, "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". See the European Convention on Human Rights, Article 15.

⁹⁰⁷ *The Sunday Times v. the United Kingdom* (1979), App No. 6538/74 (ECtHR), at [49].

⁹⁰⁸ Article 52 (1) of the Charter of fundamental Rights of the European Union (above n 904) allows limitations on the exercise of the rights and freedoms recognised by this Charter on the conditions that they are "provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

⁹⁰⁹ *Pressos Compania Naviera SA and Others v. Belgium* (judgment of 20 November 1995), Application no. 17849/91, at [38].

general interest of the community, which in the case of terrorist financing, is the prevention of the use of funds and property for terrorist activity, and the requirements of the protection of the individual defendant's fundamental rights".⁹¹⁰

In determining whether such a balance is held, the principle implies three tests:

Whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right [reasonableness test]; (ii) the measures designed to meet the legislative objective are rationally connected to it [appropriateness test]; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective [proportionality test].⁹¹¹

In applying these tests to counter terrorist financing measures, one must ask the following questions: (i) is financing of terrorism really "a matter of grave concern to the international community", with regard to which regulatory measures limiting the fundamental rights need to be adopted to prevent movements of funds intended for terrorist purposes⁹¹² (reasonableness test)? (ii) is the designation (criminalization) of terrorist financing as an independent offence, although preparatory in its nature, suitable or appropriate to achieve the given goal (appropriateness test)?; (iii) and does the imposition of liability and confiscation sanctions on the basis of guilty mind of the accused result in an excessive burden on the individual (proportionality test)?

Regardless of whether the counter-terrorist financing regime can survive the first two tests (reasonableness and appropriateness test), the proportionality of its measures depends very heavily on the mental element to the definition of terrorist financing offence. As mentioned above, this mental element would be the main basis for imposing criminal liability and sanctions in the absence of a requirement to link financing to an actual terrorist act. In order for any mental element to pass the test of proportionality, its consistency with the protected human rights needs to be tested. In fact, any formulation of the offence should not be upheld as being

⁹¹⁰ *John and others v. Germany*, (ECtHR, Judgment 30 June 2005), Applications nos. 46720/99, 72203/01 and 72552/01, at [93].

⁹¹¹ *De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* (1990) 1 AC 69, at [80].

⁹¹² The Terrorist Financing Convention, above n 6, Preamble.

consistent with protected right to the peaceful enjoyment of possession if it, although necessary and suitable, does not precisely indicate the scope of confiscation which might be imposed on those involved in financing.

A *mens rea* requirement cannot be justified as being proportionate if it fails, due to its vagueness, to make a distinction between the innocent and guilty. In other words, legislation which pursues an aim in the general interest of preventing only those funds and property from being used for terrorist activity, will be in the violation of the protected right to property if it results in depriving individuals of funds and property which are not proved to be used, or are not intended to be used for such activity. It is because it could not proportionally and reasonably enhance the aim thereof (failure of proportionality test).

In the absence of a requirement to link the preparatory act of financing to the actual terrorist act, three possible forms of *mens rea* could be determined for the offence of terrorist financing: awareness of circumstances, general knowledge a terrorist act, and knowledge of the identity of the recipient(s) of funds. As will be illustrated below, it seems that none of these fault elements can meet the requirements of the proportionality principle for two reasons: either they are vague about what should be confiscated due to the fact that there is no actual terrorist act with regard to which a confiscation sanction is imposed; or they impose liability and penalty without any kind of guilty mind on the part of the accused (financing of a person or an organization).

11.4.2 Confiscation on the basis of awareness of circumstances

In the absence of a requirement to link a preparatory terrorism offence to an actual terrorist act, as noted in chapter 7.4.2.1, an Australian court in the case of *R v Lodhi* ruled that awareness of a circumstance can be a sufficient ground for imposing liability; that is, the fault element of such offences can be demonstrated in respect of the act of preparation or facilitation without a need to prove that the accused intended to facilitate or contribute either a specific act or general terrorist act.⁹¹³ The court regarded the accused's conduct (collection of maps, seeking information about a price list of chemicals and possessing materials containing general

⁹¹³ *R v Lodhi* 2006, 199 FLR 364.

information about making explosives) as a series of linked actions which convinced it that the accused knew all three acts would lead to “one continuing uninterrupted course of conduct centring upon an enterprise to blow up a building or infrastructure”.⁹¹⁴

As discussed, the *Lodhi* court’s reading of the fault element (awareness of circumstance) attracted criticism for stretching out the boundaries of criminal liability beyond the principles of criminal law.⁹¹⁵ It would also provoke criticism if it had been used as a basis for confiscation. In other words, if a person is convicted of a preparatory terrorism offence where there is not any actual terrorist act and where the gravity, nature and the scale of that terrorist act is not clear even to the accused, what exactly should be confiscated?

While in a case like *Lodhi*, the convict’s involvement in any terrorist act need not to be proven, any of his property could be in danger of confiscation if the prosecution can link it to any (unproven) terrorist act assumed by the prosecution to be the target of the convict. Even if the law contains a defence (as the English law does)⁹¹⁶ which allows the accused to prove, by providing evidence, that the seized or confiscated property was not intended or could be used for terrorism, the problem is identifying the terrorist act in regard to which the accused should provide such evidence to prevent the confiscation. That is, the imposed liability under this mental element is too vague to allow for any sort of meaningful rebuttal. A confiscation order can be issued where the accused may deny (as *Lodhi* did but received 30 years imprisonment for) his involvement in preparation for a terrorist act, and where the prosecution is exempted to prove that terrorist act, and where such an act is not planned or even clear to the accused.

This *mens rea* seems to be ambiguous in its scope in the sense that it does not meet the accessibility and foreseeability requirements of the right to property provisions, and it does not provide sufficient safeguards against the unjust confiscations or capricious interferences with peaceful possession. However, its use has been

⁹¹⁴ At 44.

⁹¹⁵ McSherry, above n 497.

⁹¹⁶ Terrorism Act 2000, article 18 (2). It is a defence for a person charged with an offence under subsection (1) to prove that he did not know and had no reasonable cause to suspect that the arrangement related to terrorist property.

justified on the basis that it is an efficient tool to the end of ensuring security and prevention of (fictional) subsequent harm.⁹¹⁷ But at what price?

11.4.3 Confiscation based on general knowledge of a terrorist act

Where the actual knowledge or intention of a financier need not be linked to a specific terrorist act,⁹¹⁸ also as noted chapter 7.4.2.2, in *R v Khawaja*⁹¹⁹ ‘general knowledge of a terrorist act’ has been regarded by a Canadian court as a sufficient fault element to trigger criminal liability for the facilitation of or contribution to terrorist activity. This means 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.”⁹²⁰

As mentioned in chapter 7.5.2, this fault element as a basis for imposing criminal liability is justified as an efficient tool to include cases where a terrorist cell may not know the specific nature of the terrorist act the actual perpetrator is going to carry out until the last moment.⁹²¹ It is also justified as it appears to satisfy minimum standards of knowledge since it requires some type of material or actual connection between the act of preparation or facilitation and the subsequent crime. But there are two sources of uncertainty as to the breadth of such a fault requirement.

First, it imputes guilt to those who are remotely and indirectly connected 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. Under the construction of this requirement, the property of whoever engages closely or remotely, directly or indirectly, in the preparatory act can be confiscated in the same manner. 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.⁹²² As discussed in chapter seven, 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 find

⁹¹⁷ Lynch and Williams, above n 551, at 19.

⁹¹⁸ Canadian Criminal Code, art 83.02.

⁹¹⁹ 2006 CanLII 63685 (ON SC), at [39].

⁹²⁰ At [32].

⁹²¹ At [31].

⁹²² Davis, above n 570, at 305.

that whatever his purpose was, he knowingly made his restaurant available to be used for planning a terrorist act.⁹²³ Consequently, similar to the property of those directly involved in planning for the terrorist act (if any property involved at all), the restaurant is also forfeitable.

Second, 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, let us imagine that A and B decide to commit a terrorist act about which C knows, but disagrees. If C engages in fund-raising with A and B for non-criminal purposes, but a portion of the funds collected ends up being used by A and B for the preparation or facilitation of the terrorist act without C's knowledge, C seems to be criminally liable as all elements of the offence exist: C knowingly engaged in collecting funds that were used or were intended by A and B to be used for the preparation of the terrorist act; C had a general knowledge that a terrorist act may occur by A and B. This can consequently result in unfair and unsound confiscation of C's property involved in the fund-raising, or in English law, his other property and assets assumed that they could be used for terrorist activity if C fails to prove - in the sense of providing some evidence to disturb the inference of his knowledge - that his property or assets were not intended to be used or could be used for the preparation or commission of the terrorism act.

11.4.4 Identity-based confiscation

As argued in chapters eight and ten, cutting off the financial resources of terrorists and terrorist organizations is a further and lately much-used method of addressing terrorist financing, adopted by the UN Security Council resolutions⁹²⁴ and recommended by the FATF.⁹²⁵ According to this method, referred to in this thesis as 'identity-based confiscation', the knowledge that the recipient of the funds

⁹²³ At.

⁹²⁴ See for example paragraph 1(d) of Resolution 1373 (S/RES/1373 (2001)) which require all states Members to "[p]rohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons."

⁹²⁵ Financial Action Task Force, above n 841, at 82.

collected or provided is a terrorist or terrorist organization triggers criminal liability, and makes the funds and property involved forfeitable.

Unprecedentedly and inconsistently with principles of criminal law,⁹²⁶ this formulation does not require any additional requirement that there should be knowledge (or a specific intent) on the side of the financier that, for example, the funds are substantial enough in value or effect to enhance the ability of the group to commit a terrorist group. However, there are multiple legal and human rights challenges targeting such a fault element. Firstly, in contrast with principle of *mens rea*, it imposes criminal liability and confiscatory sanctions on the basis of whom accused financiers know or associate with, not on the basis of another's criminal act to which they know or intend their act may contribute.

Practically speaking, 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-blameworthy mental states. For instance, a taxi driver could be liable for giving a ride to a member of a terrorist group, if the driver knows that he is the member of the group. Similarly, a hotel owner could be held liable for providing lodging to a member of a terrorist group. As a result of the imposition of liability under this knowledge requirement, the car and the hotel is forfeitable without the existence of any malicious intent or knowledge that the provision of the services could contribute to the preparation or contribution of a terrorist act, and where the provision of these services may not sufficiently substantial to the preparation or contribution of any criminal act.⁹²⁷

Finally, this intent requirement not only has a chilling effect, violating the right to freedom of expression, on those who seek to provide material resources to “the non-violent humanitarian and political activities” of designated groups,⁹²⁸ but may also result in the imposition of confiscation without existence of guilty mind on the side of the financier. Such a sanction violates the right to property as it does not meet the proportionality test. That test requires that the measure limit the fundamental right

⁹²⁶ See chapter 8.2.

⁹²⁷ *United States v. Al-Arian*, 329 F. Supp. 2d 1294, (M.D. Fla. 2004) at [300].

⁹²⁸ *Humanitarian Law Project v. United States*, 352 F.3d 382 (9th Cir 2003) at [385].

to property in accordance with the general interest only if it proportionally and reasonably enhances the aim of the measure, which is, in this case, the prevention of funds and property only from being used for the commission or preparation of terrorist in which the adopted measures limiting the fundamental right to property in accordance with the general interest should proportionally and reasonably enhance the aim of the measure, which is, in this matter, the prevention of funds and property only from being used for the commission or preparation of terrorist activity, not humanitarian purposes.

11.5 Conclusion

In this chapter, I have examined the approach of EU and some of its Member States to penal measures introduced by the Terrorist Financing Convention and recommended by FATF to counter terrorist financing. As noted, the EU was chosen for two reasons. First, the Convention and FATF's recommendation are greatly supported by the Western states, some of which are EU Members. And secondly and more importantly, it enabled examination of how the EU, a value-based community with a strong commitment in preservation and promotion of democratic values and human rights, addresses the regulatory problems which arises from the implementation of the counter-terrorist financing measures are explained in previous chapters.

The adoption and implementation of the existing counter-terrorism measures by both EU and its Member States seems to throw up similar and familiar problems. First and foremost, it is not clear what exactly constitutes (or does not constitute) terrorism, a terrorist act or a terrorist group. The Member States of the EU have different understanding and definitions of terrorism, and their definitions are vague and broad. As far as the principle of legality is concerned, this raises a concern that in determining terrorist financing offenses, there are multiple possible definitions of terrorism that can be used as grounds to impose liability or forfeiture sanctions.

In terms of the conceptualization of terrorist financing as an offense, EU Member States have incorporated into their law the vague definition provided and promoted by the Terrorist Financing Convention, and FATF's recommendations. That is, financing of terrorism, which includes financing of terrorist acts, terrorists, and terrorist organizations, is an independent offense without a requirement to link the

act of financing to an actual criminal act for which the financing acts may be carried out. This means that the offense relies heavily on the mental element of the terrorist financing offense. A financier's intention or knowledge alone can make the financier criminally liable and taint the funds or property collected, provided or possessed by the financier. But the question is what that intention or knowledge refers to. In the absence of any connection between an act of financing and a subsequent criminal act, a financier must have "terrorist purposes" to be liable and subject to forfeiture sanctions. In other words, the financier should intend or know that the funds, collected, provided or possessed by him or her, will be used for terrorist purposes. However, neither EU and nor its Member States have defined this term. In the absence of an effort to clarify what exactly constitutes the mental element of the offence, I have examined three possible forms of *mens rea* (awareness of circumstances, general knowledge of a terrorist act, or knowledge of the identity of the recipient(s) of funds) determined by courts outside the EU jurisdictions. My purpose in examining these mental elements was to find out whether there is any interpretation of the mental element of the offence that can resolve the structural ambiguity inherent in the definition of the offence. As the analyses in this chapter have shown, these mental elements are vague in the sense that they do not provide guidance as to where the criminality of funds or property which are regarded as terrorist funds and which are subject to confiscation are derived from. They are also unjustifiable as they have detrimental consequences in a way that would result in the imposition of liability on the innocent or well-intentioned accused (financers such as donors or humanitarian activists), and consequently result in the potential violation of rights to property by depriving the accused of his or her funds and property on the basis of the fiction of guilty property even when it is not proved to be used, or intended to be used, for commission or preparation of any criminal activity.

In the following chapter, I will examine the EU's and its Member States' response to the mechanism created and developed by the UN Security Council to freeze all the property of those suspected of being terrorists, terrorist groups and their supports for an indefinite time and in a gross violation of due process rights.

Chapter Twelve: The EU's approach to freezing of assets of designated individuals or organizations

12.1 Introduction

Confiscation is usually preceded by a preliminary measure, the freezing of the asset or funds. Yet, in regard to terrorism, the freezing of assets of a person or a group on the basis of a suspicion (not conviction or charges) that they engage in terrorist activities or associate with terrorists has become the common practice of many jurisdictions due to the binding nature of the UN Security Council's resolutions, and an end in itself. It is not clear whether the Security Council found it necessary to create a freezing regime that imposes freezing sanctions for an indefinite time on such a seemingly flimsy basis because the confiscation measures established under the counter-terrorism laws have proved insufficient or impractical. Regardless of whether this the case or not,⁹²⁹ it seems that the Security Council has shifted the focus of the fight against terrorist financing from a preventive approach, which seeks to counter terrorism within the sphere of criminal law by criminalizing all preparatory acts which may result in facilitation and contribution to terrorism, to a primitive, identity-based approach which seeks to incapacitate persons or groups, suspected of involvement in terrorism, by freezing all of their assets without imposing guilt on them. However, the adoption and development of this approach, copied from the US approach and supported by the US and many Western states,⁹³⁰ seems to be the logical destination of the thinking that underpins the terrorist financing offence - the prevention of financing terrorism on the basis of mere association with suspect terrorists or terrorist groups even when there is no connection between an act of financing/financers and any terrorist act or terrorists' or terrorist groups' criminal activities.

⁹²⁹ The English Judge, Lord Rodger, commented that the measures adopted by these Security Council resolutions can be found in the Terrorist Financing Convention. But the reason that the Security Council adopted such resolutions is that by September 2001, only few states had ratified the Convention. Indeed, the resolutions "imposed on all states the selected obligations which would otherwise have bound them only if they had eventually decided to ratify the Convention". See *R (Al-Jedda) V Secretary of State for Defence* (2008), AC 332, at [161].

⁹³⁰ See Chapter 10.5.

The diffusion of this method of dealing with the criminal issue of terrorist funds has been pushed through at national and regional level at the cost of the complete suspension of the fundamental principles of criminal law. This chapter examines the response of the EU to this approach. For the same reason as that mentioned in previous chapter which discussed the EU's and its Member States' approach to the criminalization of terrorist financing, the EU has been chosen because it is a value-based community which places a great emphasis on the human rights and democratic values.

This chapter very briefly explores the EU's response to the Security Council resolutions on freezing terrorist funds. Then, it points out the challenges that the adoption and implementation of this approach have created in the EU in terms of its compatibility with the human rights values reflected in the European Convention on Human Rights or the Charter of the Fundamental Rights of the European Union. It further argues why the EU approach is not legally justifiable by examining it against some of the fundamental values and principles, protected by the EU, namely the presumption of innocence, the principle of legality, the right to due process and the right to property.

12.2 The EU response to the Security Council UN Resolutions

The EU has adopted a mix of legal instruments to oblige its Member States to implement the Security Council (identity-based) freezing measures.⁹³¹ The EU responded to Security Council Resolutions 1267 (1999) and 1333 (2000), which require States to freeze the assets of Bin Laden and Al-Qaida and other designated and listed individual and entities associated with them, by incorporating the Security Council list into its own framework through the Regulation 881/2002.⁹³² The incorporation of a person or entity into the implemented UN list does not need to be accompanied by the imposition of any charges or conviction. In fact, while

⁹³¹ Freezing funds, according to article 1 (2) the Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, means "the prevention of any move, transfer, alteration, use of or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management".

⁹³² The Regulation 881/2002 was amended several times by the Council Regulation (EU) No 1286/2009 of 22 December 2009, and by the Council Regulation (EU) No 754/2011 of 1 August 2011, and by Commission Implementation Regulation (EU) 2016/13 of 6 January 2016.

the EU Commission seems to have had power to make independent decisions on listing and delisting,⁹³³ the EU Commission has faithfully adopted and updated its list in accordance with the UN list. Article 2 of Regulation 881/2002 requires the freezing of “all funds and economic resources belonging to, or owned or held by”, the listed persons and entities. “No funds” and “no economic resources” should be made available, directly or indirectly to these people and entities. These provisions are directly applicable in European national legal systems without the need of transposing them into domestic legislation.

In terms of responding to Resolution 1373 (2001), which requires states to adopt independent measures against those whom states consider to be terrorists, the EU has taken a similar approach to its implementation of the Al-Qaida Sanction list. The EU has adopted Common Position 2001/931 leading to the establishment of a list (an autonomous EU list), which incorporates groups and persons suspected of being “involved in terrorist acts”. ‘Involvement in terrorist acts’ has a broad meaning. It includes association with terrorists. According to Article 2 (1) of the Common Position, ‘persons and entities involved in terrorist acts’ means

persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist act[;] groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.

The list of person and entities ‘involved in terrorist acts should be drawn up and reviewed

on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a [national] competent authority”, [denoting a

⁹³³ The latest amendment to the listing procedure of the UN designation list requires the EU commission to take a decision to list a person or entity designated by the UN Sanction Committee on the basis of a statement of reasons provided by the UN sanction Committee. The commission, then, communicates the decision to the listed person or entity and provide them a chance to “express his, her or its views on the matter.” If any observations are submitted, the Commission may review its decision. Those observations shall be forwarded to the UN Sanction committee. See article 7 (a) of the Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al-Qaida network and the Taliban.

judicial authority or an equivalent competent authority]⁹³⁴, ... irrespective of whether [the list] concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act[,] based on serious and credible evidence or clues, or condemnation for such deeds.⁹³⁵

While it seems that such a procedure involves some form of “judicial check”, “there is no certainty of this”.⁹³⁶ What is certain is that there is a need for a decision to be taken by a national authority. In practice, a person or entity can be listed merely on the basis of information or clues obtained from “the sphere of intelligence or investigation”.⁹³⁷ In addition, the basis on which an investigation is instigated or suspicion is raised seems to vary from one state to another due to differences in the national perceptions of terrorist threats, and differences with regard to the definition of a ‘terrorist act’ or ‘terrorist group’.⁹³⁸ Consequently the Common Position requires “the freezing of the funds and other financial assets or economic resources of the persons, groups and entities listed”.⁹³⁹ Under the Regulation 2580/2001, the EU Council, “acting by unanimity”, has also designated a list of individuals and groups suspected of committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism; legal persons or entities owned or controlled by such designated persons, groups or entities; or persons or entities

⁹³⁴ A Competent Authority” here does not mean an appeal or review body. It is an investigative body authorised by a state to investigate on suspected individuals or groups. “An investigation may well be authorised by a court or an investigative judge, but depending on how a state’s system is constructed, it can also be envisaged that investigations are ordered by a prosecutor. It is even possible that the investigation is an intelligence operation ordered by a senior security official which is not designed to result in the collection of evidence or prosecution.” See Iain Cameron “European Union anti—terrorist blacklisting” 2003 3(2) Human Rights Law Review 225, at 235.

⁹³⁵ Article 1 (4) of the Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP). A “clearing house and “Working Party on implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism”, composed of the representatives of the ministries of justice and internal affairs of the EU Member States, has been established and charged with evaluate the information provided by states (national competent authority) to decide whether a suspected person or organization is involved in terrorism. After the examination, the Council adopts the list through a unanimous Council decision.

⁹³⁶ Imelda Tappeiner “The Fight Against Terrorism. The Lists and the Gaps” 2005 1(1) Utrecht Law Review 97, at 106.

⁹³⁷ At.

⁹³⁸ The EU, in the Framework Decision on Combating Terrorism, (above n 935, art 1-2), has defined ‘terrorist act’ and ‘terrorist group’. But, the EU Member States have not transposed the definition into their national law. As illustrated above, this has resulted in a disparity in their definition of terrorism, and probably the standard against which terrorist suspects’ action are judged.

⁹³⁹ At art 2.

acting on behalf of or at the direction of such person and entities.⁹⁴⁰ Article 2 of the Regulation allows the freezing of all funds, other financial assets and economic resources owned or held by listed person or entities.

12.3 Human rights challenges and introduction of amendments - is it enough?

Although reaching an agreement to establish a regional asset-freezing system may be regarded as a notable achievement in the fight against terrorism, in practice, the implementation of the measures, with regard to both the implemented UN list and the autonomous EU lists, poses serious questions of human rights compatibility. In spite of the operation of articles 6 and 13 of the European Convention on Human Rights and article 47 of the Charter of the Fundamental Rights of the European Union, which established the principles of due process within the EU, the asset-freezing regimes (autonomous EU list and implemented UN list) did not provide for a right for listed persons or groups to be heard, a right to access to effective judicial review or a right to enjoy the possession or use of their property. As soon as a person or group was placed into one of the designated lists, states could freeze all of the assets of the listed person for an indefinite time, without imposing any charges or conviction that he was involved in terrorist activity or association with terrorists, or his assets were used, or intended to be used, for criminal activity. The EU's General Court, in early cases, did not find these asset freezing sanctions "an arbitrary, inappropriate or disproportionate interference with the fundamental rights of the persons concerned".⁹⁴¹ They repeatedly held that "freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof".⁹⁴² In addition, they refused to review the legality of the sanctions, imposed against persons and entities listed in the implemented UN list, because they found themselves incompetent to review or challenge the UN

⁹⁴⁰ The Regulation 2580/2001, above n 931, art 2(3). The EU Council established a list of persons and entities with regard to article 2(3) of the Regulation 2580/2001. See Council Decision of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (2001/927/EC).

⁹⁴¹ *Kadi v Council and Commission* (2005), Case T-315/01, at [251].

⁹⁴² At. See also *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* (2005), (Case T-306/01), at [320]. *Sison v Council* (2007), Case T-47/03, at [101]. *Fahas v Council* (2010), Case T-49/07, at [64].

Security Council resolutions.⁹⁴³ However, the severity of the sanctions - the freezing of all the assets of listed persons for an indefinite period- led the courts to acknowledge (and scholars to argue) that these sanctions are quasi-criminal in nature, and need to be regarded as “either judicial or subject to judicial review”.⁹⁴⁴

Eventually, the European Court of Justice, in its decision on *Kadi*’ the leading case,⁹⁴⁵ noted that the EU “is based on the rule of law”.⁹⁴⁶ It held that “respect for human rights is a condition of the lawfulness... [of EU laws], ... and that measures incompatible with respect for human rights are not acceptable in the Community”.⁹⁴⁷ It continued that

the obligations imposed by an international agreement [UN resolutions] cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.⁹⁴⁸

Although it ruled that EU courts are competent to review the lawfulness of asset freezing measures, no court has upheld a challenge or examined the nature of assets freezing regime against the accepted principles of criminal law ruling criminalization and confiscation proceedings. In this regard, the European Court of Justice, in *Kadi*’s case, recognised that in fulfilling their international obligations, legislatures, at the domestic or EU level, enjoy “a wide margin of appreciation, with

⁹⁴³ See *Kadi v Council*, above n 941, at [215]. With regard to the question of whether EU courts are competent to review the listing and freezing measures adopted against persons and groups listed in the EU autonomous list, the Court of First Instance had found itself competent to assess the lawfulness of the measures as they were adopted in compliance with the UN Security Council Resolution 1373 which calls for the adoption of necessary measures to combat terrorist financing without specifying persons or entities who should be subject to the measures. See for example *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union* (2006) Case T-228/02, at [100].

⁹⁴⁴ *Kadi v Commission* (2010), Case T-85/09, at [150]. (referring to the opinion of the United Nations High Commissioner for Human Rights). For scholars’ views see also Christina Eckes *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, Oxford, UK, 2009); Cameron, above n 934. Or, Andrew Hudson “Not a Great Asset: The UN Security Council’s Counter-Terrorism Regime: Violating Human Rights” 2007 25(2) Berkeley Journal of International Law 203.

⁹⁴⁵ See Murphy, above n 832, at 132.

⁹⁴⁶ *Yassin Abdullah Kadi and Al Barakaat International Foundation. v. Council of the European Union* (2008), joined cases C-402/05 P and C-415/05 P, at [281].

⁹⁴⁷ At [284].

⁹⁴⁸ At [285].

regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest for the purpose of achieving the object of the law in question”.⁹⁴⁹

Nonetheless, the European Court of Justice, in *Kadi*, found the procedure deployed to list and freeze the assets of the targeted persons concerned in this case to be in violation of due process rights because it lacked a mechanism whereby the targeted persons could be informed of the reasons or the basis of which they had been listed and their assets had been frozen.⁹⁵⁰ The court also upheld that the deployed procedure was in the breach of right to effective judicial protection as “it was adopted without furnishing any guarantee enabling the listed persons concerned to put his case to competent authorities”.⁹⁵¹

The court, therefore, set an administrative guideline, which has been incorporated into the EU laws.⁹⁵² This guideline consists of two parts: listed persons must be informed of the reasons adduced against them; and listed persons must be able to make known their view on those reasons.⁹⁵³ The court (as well as the new amendment to the EU laws) emphasized that there is no need to communicate those reasons to listed persons, or to hear the listed persons’ views on the reasons, before they are entered in the list, and before the freezing sanctions are imposed against them.⁹⁵⁴

Unlike the UN listing and freezing procedures which do not provide for a mechanism for a judicial or impartial review of the sanctions,⁹⁵⁵ to retain the right

⁹⁴⁹ At [360].

⁹⁵⁰ At [360].

⁹⁵¹ At [369].

⁹⁵² See Council Regulation No. 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al-Qaida network and the Taliban.

⁹⁵³ *Yassin Abdullah Kadi and Al Barakaat International Foundation. v. Council of the European Union* (2008), joined cases C-402/05 P and C-415/05 P, at [348]. With regard to listing and freezing procedure used to establish and update the EU autonomous list, the Court of First Instance in the case *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union* (2006) Case T-228/02, at [172], ruled that “a statement of reasons” on the basis of which a person or entity is listed must be communicated to the listed persons or entities.

⁹⁵⁴ See Council Regulation No. 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al-Qaida network and the Taliban, art 7a (2).

⁹⁵⁵ In 2009, the Security Council the Council authorized the establishment of an Office of the Ombudsperson to assist the Security Council in delisting requests. The Ombudsperson can intervene

to judicial review, EU courts have found themselves competent to “review of the conformity of the system of sanctions ... with the system of judicial protection of fundamental rights laid down by the EC Treaty”.⁹⁵⁶ The General Court, in another case, however, held that this does not mean that courts can “substitute their assessment of the facts and circumstances justifying the adoption of such measures for that of the Council”.⁹⁵⁷ In fact, it has made it plain that a review for conformity, which seems to be an administrative review, should be limited to “checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power.”⁹⁵⁸

12.4 Is it legally justifiable?

While the attempts of the EU courts to change the procedural rules for listing and imposing freezing sanctions should not be understated, it is naive to believe that such changes would remove all barriers to the establishment of a well-funded, human rights-consistent regime. In this part, it will be argued that the regime,

on behalf of the listed persons, but her/his decision does not override the Security Council’s decisions on listing or de-listing. The Ombudsperson does not provide judicial review of listing decisions. It simply gathers “information of relevance to the delisting request” and distributes them to the Sanction Committee. Then the Committee makes decision, by consensus, on the delisting request on the basis of the information provided by Ombudsperson. The former Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, expresses doubts as to the adequacy of the Ombudsperson office. He identifies “10 key objections”: (i) the mandate of the Ombudsperson did not confer a power to overturn decisions of the Committee; (ii) the Committee therefore continued to act as judge in its own cause; (iii) delisting required a consensus within the Committee; (iv) the Ombudsperson lacked a power of recommendation; (v) disclosure of information to the Ombudsperson or the Committee was subject to the unfettered discretion of States; (vi) the Ombudsperson’s authority to disclose sensitive information to the petitioner was similarly at the discretion of States; (vii) there was no requirement that the petitioner be informed of the identity of the designating State; (viii) neither the comprehensive report, nor the Ombudsperson’s conclusions, could be disclosed to the petitioner; (ix) the Committee was under no obligation to provide reasons for its decision; and (x) the office of the Ombudsperson lacked the authority to grant appropriate relief where human rights were violated. See UN, A/67/396, 26 September 2012.

⁹⁵⁶ *Kadi v Commission* (2010), Case T-85/09, at [117].

⁹⁵⁷ *Modjhedines du peuple d’Iran v. Council of the European Union*, above n 953, at [159]. In terms of reviewing measures adopted against persons listed by the UN Security Council, The European Court of Justice, in *Kadi v Commission* (2013), Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, at [118-9], ruled that “in the event that the [listed] person concerned challenges the lawfulness of the decision to list or maintain the listing of his name ..., the review by the Courts of the European Union must extend to whether rules as to procedure and rules as to competence, including whether or not the legal basis is adequate, are observed”. This means that courts need to determine whether the decision to list a person “is taken on a sufficiently solid factual basis”, and whether the reason for adoption of that decision in itself is “substantiated”.

⁹⁵⁸ At [117].

targeting suspect terrorists, terrorist groups, their supporters and their property without any legal proof as to whether and how they and their property are linked to a criminal activity (the same basis used under the terrorist financing offence for imposing criminal liability and confiscation sanctions), is a gross violation of due process and human rights values.

12.4.1 Ambiguity in the nature of the regime and challenge of presumption of innocence

Firstly, the regime offends a key principle of criminal law, the presumption of innocence. Under this regime, targeted persons or entities are suspected (not charged with or convicted of) of being involved in terrorism on the basis of information and evidence obtained from the instigation of investigations or intelligence. These persons or entities must be listed (labelled and announced) as terrorist, and all their assets should be frozen. Although the evidence adduced to enable the listing of persons is not tested in any independent, impartial judicial court, any listed persons or entities seeking delisting should submit evidence to the body (the Security Council, national authorities or the EU council) which listed them to prove that they are not terrorists or terrorist supporters.

The European Convention on Human Rights and the EU's Charter of Fundamental Rights human rights state that "everyone charged with a criminal offence should be presumed innocent until proved guilty according to law".⁹⁵⁹ Since the establishment of the regime, there has been a continuing debate as to whether the sanctioning measures imply an accusation of a criminal kind under human rights laws. The measures have been designed in a way so as not to be indicative of criminal sanctions; that is, they are not classified as a criminal offence or criminal charge in any jurisdiction; they are designed as precautionary, temporary measures which pursue preventive purposes; they do not impose any punishment in the criminal sense of the word.⁹⁶⁰

⁹⁵⁹ Article 6 (2) of the European Convention on Human Rights (1950). Article 28 of the Charter of Fundamental Rights of the European Union, above n 904.

⁹⁶⁰ To determine whether a measure has a criminal nature, the European Court of Human Right looks into the domestic classification of the measure, the nature of the offence, and severity of punishment that may be imposed. See *Engel and others v. the Netherlands* (1976), Appl. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72. It seems the freezing sanction cannot meet any of these criteria. See

However, in practice, they have the effect of a criminal sanction: they impose the stigma of being a worst type criminal (a terrorist) on targeted persons; they deprive the targeted persons of access to all of his assets and property for indefinite time (in some cases longer than the punishment provided for the commission terrorist offences);⁹⁶¹ they have a profound impact on the social and financial life of not only the target persons but those who have relationship with them.⁹⁶²

One may ask that if this stigmatization and loss of livelihood is not a criminal matter and does not have a punitive nature, then what kind of character does it have? Is it possible to argue that a certain group of citizens are excluded from the protection of human rights? Can the human rights laws be read to mean that everyone suspected of being a terrorist or a terrorist supporter should remain, and be announced to be, a criminal suspect until authorities decides otherwise? Irrespective of how these questions are dealt with, the fact is that the sanctioning regime “strips the individual of protections that are key to the safeguarding of the rule of law”.⁹⁶³

12.4.2 Principle of legality

As discussed in Chapter 1.4.1, under the principle of legality, a person’s rights can be restricted only under clear statutory language. The asset-freezing regime violates this principle. The main challenge that the regime (or any counter-terrorism regime which aims at setting up universal measures against terrorism) faces is, in the absence of a universal consensus on the nature, definition and scope of the offence of terrorism (as discussed in chapter five), what evidence may raise a suspicion that a person or an entity is a terrorist or a terrorist supporter? On the basis of what

Melissa Hazelhorst van den Broek, Monique, and Wouter de Zanger “Asset Freezing: Smart Sanction or Criminal Charge?” 2010 27(72) Utrecht Journal of International and European Law 18.

⁹⁶¹ Kadi was listed and his assets were frozen for 10 years. See *Kadi v Commission* (2013), Joined Cases C-584/10 P, C-593/10 P and C-595/10 P.

⁹⁶² In *Chafiq Ayadi v Council* (2006), Case T-253/02, at [97], the sanctioning measures had “the effect of denying an individual all income or public assistance and, ultimately, any means of subsistence for him and his family”. He was refused by the Irish authorities a taxi-driver's licence as it would have been regarded as provision of financial services to him. In the case *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* (2005), Case T-306/01 R, Yusef, Swedish citizen, was listed by the UN Sanction Committee, and all of his assets were frozen by Swedish government. The family rendered destitute. His social assistance was frozen. No one was allowed to help them, and he was removed by Kista employment office from the list of job seekers. The Swedish authorities raised doubt that the payments made to the applicants by the Swedish authorities might be unlawful. It took a while for the authorities to find a way to give them some social benefits to survive.

⁹⁶³ Murphy, above n 832, at 144.

definition should a person's actions be judged? And what should the listed persons do, or how should he behave, to dispel the suspicion that he is a terrorist or a terrorist supporter?

While these questions have been left unanswered, the UN Security Council has ruled that a person or entity can be targeted as terrorist suspect if they are suspected of

participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; supplying, selling or transferring arms and related materiel to; recruiting for; or otherwise supporting acts or activities of Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.⁹⁶⁴

No definition of 'terrorist act' and 'terrorist group' is provided. Similar to the offence of terrorist financing, there is no need to link a person's action to an actual terrorist act. It is not also clear what level of association with a terrorist group may give rise to the suspicion that the targeted person is criminal-minded. Association with such a terrorist group for humanitarian purposes may not prevent a person or entity from being blacklisted.⁹⁶⁵ So, in this situation, it is not clear on what basis a state may regard a person or entity as terrorist and proposes their listing in the UN designated list, and it is, also, unclear on what basis the UN's Sanctions Committee may list, or refuse to list, that person. For example, in the *Yusef* case, three Swedish citizens were placed in the UN Sanction list on the basis of the information that the US provided. All of their assets were frozen.⁹⁶⁶ There was a great argument between the US and Sweden as to whether the listed persons did meet the requirements of being regarded as terrorist supporters. While the US authorities and the Sanction Committee considered there was sufficient evidence to suspect them of being a terrorist, Sweden's intelligence agency was not convinced. Two of the targeted persons were delisted after a long diplomatic struggle between the US and Sweden.

⁹⁶⁴ UN, S/RES/1882, 30 June 2008. See also UN, S/RES/1617, 29 July 2005.

⁹⁶⁵ The new EU directive, in its introduction, excludes from the scope of the terrorism-related offences covered by this directive "provision of humanitarian activities" to terrorist groups only if such provision is made by "impartial humanitarian organisations recognised by international law". See EU Directive 2017/541, above n 849.

⁹⁶⁶ *Yusuf and Al Barakaat International Foundation v Council of the EU and Commission of the EC* (2006), Case T-306/01.

A similar approach has been taken in establishing and updating the autonomous EU list. A person may be listed not only for being suspected of committing, or attempting terrorist acts, but also for having a connection with or being in association with a terrorist or a terrorist group. While the EU has provided definitions of ‘terrorist act’ and ‘terrorist group’, the definitions have not been transposed by the Member States into the domestic law probably due to the differences in the national perceptions of terrorist threat. So, it is reasonable to believe that a person or entity is placed (by the request of a State Member and a unanimous decision of the Council) on the autonomous EU list in accordance with national authorities’ perception of a terrorist threat, not with regard to the definition of terrorism provided.⁹⁶⁷ Insistence on keeping the Kurdish militant group, the PKK, in the autonomous EU list is a good example. The group renounced its military struggle against Turkey in 2013 and has been lawfully operating for a few years. Its armed wing in Syria is receiving recognition and help from the US and other Western help in its fight against the Islamic State (ISIS). But it is still on the EU list.

The obvious conclusion, as Murphy says, is that

even if the sanctions system is viewed as an extraordinary preventive counter-measure, it still breaches key rule of law principles. First, the absence of any clear rules on why any particular individuals or entities are targeted by either the UN or EU sanction list is a breach of the principle of legality. The presence of multiple [and vague] definitions of terrorism, and the apparent application of none of them is a clear breach of this cornerstone of the constitutive aspect of the rule of law. Problems with the constitutive aspect of the rule of law have consequential effects for the rule of law’s safeguarding aspect. If the relevant rules are vague and are not applied then the individual cannot know what rules they are subject to.⁹⁶⁸

12.4.3 Due process

The rule of due process requires that “in the determination of his civil rights and obligations or of any criminal charge against him”, everyone is entitled to be treated fairly, efficiently and effectively by, *inter alia*, being heard and having access to an

⁹⁶⁷ Murphy, above n 832, at 140.

⁹⁶⁸ At 140.

independent and impartial tribunal. The rights to due process also place limitations on laws and legal proceedings to safeguard these rights. In the case of almost all anti-transnational crime measures, the rule of due process requires the freezing procedure to be limited by two requirements: the freezing of assets should be connected to a criminal investigation; and the investigation should be related to the commission, preparation, or proceeds of, of crime (as mentioned, this requirement is not applicable to the offence of terrorist financing defined by the Convention and developed by FATF).⁹⁶⁹ This procedure is justifiable as “prior to bringing of criminal proceedings against an individual, the state may wish to freeze their assets to prevent their dispersal or use for criminal activities”.⁹⁷⁰ However, the terrorist asset-freezing regime is remarkably inconsistent with this procedure. In other words, by being classified as a temporary, precautionary and administrative system of sanctions, notwithstanding its criminal effects, the assets-freezing regime grossly violates all standard of due process rights, even civil due process standards.

Firstly, the person can be listed and subject to freezing sanctions on the basis of information (not necessarily a criminal investigation) which raises a suspicion that the person is involved in terrorism or in association with terrorists (suspicion by association). There is no need for a link between the person’s activity and any terrorist act. There is no mechanism to turn the freezing sanctions into confiscation, or no timeframe to lift the sanctions.

According to the new amendments to the EU laws, the listed person should be informed of the reasons based on which he is listed and his assets are frozen. He is entitled to communicate his views on the reasons to the body (national authorities, the EU Council, the UN Sanction Committee) which blacklisted him. Assuming that there was an agreed set of rules and standards on the definitions and determination of ‘terrorist involvement’ and ‘terrorist association’, can this be regarded as the ‘right to be heard’? While it is inaccurate to say that after hearing the persons’ view on the reasons, these bodies (national authorities, the EU Council, the UN Sanction Committee) would not be able to reach a fair and impartial decision, it is unfair and in violation of due process not to allow the targeted person

⁹⁶⁹ At 139.

⁹⁷⁰ At.

to be heard by an impartial and independent judicial body where the rules of evidence and procedure are applied.⁹⁷¹

One may argue that by recognizing that national or EU courts are competent to review the legality of the listing and restrictive measures, the listed persons and entities are given the right to fair hearing and right to access to an effective remedy. But, it should be remembered that such a review is an administrative review limited to checking whether the listing and the imposition of freezing measures have complied with the procedural safeguards set out, and whether such a decision “is taken on a sufficiently solid factual basis”.⁹⁷² This means that the court simply and merely reviews whether the reasons for listing and freezing are convincing enough to continue suspecting that the targeted person is a terrorist or terrorist associate, and suspecting they may use their assets for terrorist purposes. This by no means implies that a court would determine whether the listed person has committed, or attempted to commit, terrorist activity. This also does not mean that a court will determine whether (how much of) the assets of the targeted persons were involved in, or intended to be used for, terrorist activity.

Finally, what is the point of seeking judicial review if such a review is ineffective? That is, if a national or EU court annuls the restrictive measures adopted by the UN Sanction Committee, the targeted person will remain on the UN terrorist list because such annulment is not binding on the Security Council (the Sanction Committee). While the court may order the unfreezing of the assets, a state may, depending on the constitutional powers of its executive, issue an executive order overruling the court’s decision.⁹⁷³ If it does not do so, it will breach its international obligations. In addition, Judicial review does not seem to offer effective and permanent protection as there is always a possibility of being re-listed on the basis of a new investigation or allegation made against the person who has obtained through judicial review the annulment of listing and sanctions. For example, in the

⁹⁷¹ Jeans-Francois Thony and Cheong-Ann Png “FATF Recommendations and UN Resolutions on the Financing of Terrorism; A Review of the Status of Implementation and Legal Challenges Faced by Countries” 2007 14(2) *Journal of Financial Crime* 150, at 160.

⁹⁷² *Kadi v. Commission* (2013), Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, at 119.

⁹⁷³ Sidney Yankson “Starving Terrorist of Their Financial Oxygen - At All Costs?” 2010 13(3) *Journal of Money Laundering Control* 150, at 158.

Case of *People's Mojahedin Organization of Iran*,⁹⁷⁴ despite three successive annulments, the targeted entity was re-listed three times on the basis of new allegations provided by different states (France and the UK). It took over 10 years for the entity at issue to be removed from the autonomous EU list.

12.4.4 Right to property

The legality of the asset-freezing regime can also be challenged in relation to the right to property. As far as human rights laws are concerned, the validity of any measure interfering with one's property depends on its compatibility with the law protecting human right to property. As mentioned before, the individual right to property can be limited in accordance to the general interest of a society under restricted circumstances. In order to be lawful, a measure adopted must strike a balance between the pursuit of a general interest and the limitations that the measure imposes on the rights of an individual. Where the lawfulness of a measure is examined, under the principle of proportionality, the answer to the each of the following questions should be in the affirmative: Is the purpose of the measure sufficiently important to justify its imposition? Is the measure adopted in pursuit of the ground of "public interest" rationally connected to it? Are the measures used to impair individuals' rights no more than is necessary to accomplish the objective?

In the context of the suppression of terrorist funds, there is no doubt that allocation or use of funds or property for the preparation or commission of terrorist acts is blameworthy and should be subject to limitation of course *if* there is a requirement that imposes the proof of such connection. However, no such requirement has been laid down by Terrorist Financing Convention or the asset-freezing regime. In addition, the asset-freezing regime, which is pre-emptive in nature focusing on minimising or eliminating the risk that terrorist suspects or supporters may use their assets for terrorist activity, hardly survives the second and third tests.

The question which needs to be tested is that, if the dangerous nature of a person poses such a risk, whether the freezing all of his assets "rationally" and appropriately eradicates the risk of his assets being used for terrorist acts? In

⁹⁷⁴ *People's Mojahedin Organization of Iran v. Council of the European Union* (2006), Case T-228/02.

defining what counts as “rationally”, EU courts, with regard to another system of restrictive measures of an economic nature, held that

measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation ... when there is a choice between several appropriate measures recourse must be had to the least onerous, (whether the measure is the least intrusive in the circumstances and that struck a fair and appropriate balance between all affected interests), and the disadvantages caused must not be disproportionate to the aims pursued.⁹⁷⁵

The main controversy here is whether the freezing of all assets of a person, suspected of (not convicted of, or charged with) being involved in terrorism or connected with terrorists, for an indefinite time is the only and the “least onerous” and restrictive measure that could be deployed to eliminate the risk? It is hard to believe that this measure is the only and the least intrusive means of protecting the public interest. Finding alternative tools to deal with the problem at issue is not the subject matter of this research. It is enough to say that the freezing regime as it exists at the current time, seems to be a reversion to the condemned primitive freezing and confiscation measures deployed by fascist totalitarian regimes against a group of people suspected by the regime of posing risk to the economic and political stability of the regime.⁹⁷⁶

Lastly, there is no guarantee that the regime could pass the third test (proportionality) at all times. As mentioned before, the main purpose of the establishment of the right to property is to prevent the arbitrary and capricious interference with peaceful possession “that many governments –frequently have been – all too prone to resort to”.⁹⁷⁷ The right to property can be limited in the general interest of the society. But the serious concern whether there is any

⁹⁷⁵ *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* (1990) EUECJ R-88/146. See also, *Huang v Secretary of State for the Home Department* (2007) UKHL 11, 2 AC, 167, 187, at [19].

⁹⁷⁶ For example, the Nazi regime in Germany regarded the Jews as the followers of an abhorrent religious, economic and political doctrine, who seek to dominate the non-Jewish world. The regime considered the Jews’ dominance harmful based on the assumption that their dominance on financial system caused the German defeat in the World War One. The regime applied various tools including, inter alia, freezing and confiscation sanctions on all Jews to eliminate their risk. See Martin Dean *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust, 1933-1945* (Cambridge University Press, Cambridge, UK, 2010).

⁹⁷⁷ *Marckx v. Belgium*, App No. 6833/74 (ECtHR, 13 June 1979), at [20].

guarantee that the asset-freezing measures will not be used unlawfully and cruelly against a specific (non-guilty) group of people? In the absence of an agreed and clear definition of ‘terrorism’, terrorist involvement’ and ‘terrorist association’, giving so much power to the executive (the UN Sanction Committee, states, intelligence agencies) to determine who are terrorists or terrorist supporters, without any proper supervision, is very dangerous. There is potential for the measures to turn into weapons against those the executive wishes to suppress by labelling them as terrorists and choking off their lives by freezing all of their assets.

12.5 Conclusion

The approach of the EU to adopting and implementing the assets-freezing regime created by the UN Security Council relies on the logic that underpins the terrorist financing offence - imposition of sanctions on people and their property without linking them to any actual terrorist act and/or on the basis of their mere association with suspect terrorists or terrorist groups. It has been shown that although these measures are regarded as precautionary and administrative measures, they impose the same stigma and sanction as a criminal law may do: listing and labelling people as terrorists or terrorist groups and freezing all of their assets for an infinite time and without a proper judicial due process.

Not surprisingly, the EU has faced human rights challenges in adopting these measures due to their incompatibility with its protected values and rights such as right to be heard, right to access to effective judicial review, or right to enjoy possession or use of property reflected in the European Convention on Human Rights or the Charter of the Fundamental Rights of the European Union. Even the introduction of amendments to the EU policies on the asset-freezing measures, followed by EU courts’ decisions, has not alleviated the draconian impacts of these measures. The EU’s amended version of the regime cannot be legally justified as its rules are in a gross violation of EU values and principles such as principles the presumption of innocence, principle of legality and the rule of due process and right to property.

The following chapter analyses an example of a different kind: the response of ASEAN to the terrorist financing. It should be noted the EU has expressed great interest in developing and strengthening its relationship with ASEAN, and has

stressed that any cooperation or political dialogue with the ASEAN should contain an essential element clause, promoting human rights, and rule of law, democratic principles and good governance.⁹⁷⁸ But the irony is that the EU in many of the respects mentioned in this and previous chapters has failed to adhere to its own values and principles which it seeks to promote.

⁹⁷⁸ European Commission, *A new partnership with Southeast Asia*, COM (2003) 399/4, Brussels.

Chapter Thirteen: ASEAN's legal response to terrorism financing

13.1 Introduction

The Association of Southeast Asian Nations (ASEAN) makes a good comparative case study because it is a different kind of regional regime where individual rights and values are not claimed to be as important as in the EU. Its members regard each other with political suspicion; they are (unlike the EU) mostly developing states, but still have a problem with terrorism. It should be noted at the outset, however, that ASEAN or Member States have not created a unique or very different counter-terrorist financing regime as they are subject to strong pressure from the West to diffuse a harmonized counter-terrorist measures on the model in the Terrorist Financing Convention as enhanced by the FATF.

This chapter discusses how ASEAN and its Member States have conceptualized terrorist financing as an independent offence and how they implement confiscatory measures where there is no link between acts of financing or funds and a terrorist act - the idea that underpins the counter-terrorist financing regime. Their response to the structural and definitional ambiguities inherent in this concept and to the human rights issues and legal problems arising from the implementation of the regime is interesting because of the heavy pressure from Western States and the EU to take into account human rights, and rule of law, democratic principles and good governance in this process of implementation.⁹⁷⁹ The chapter very briefly explores the response of ASEAN, as a regional community, and then given its limited impact examines the approach of four of its Member States (Singapore, Malaysia, Indonesia and the Philippines) to terrorist financing.

13.2 ASEAN's response to terrorism

Terrorism has received special attention from ASEAN since 1970s when terrorism was regarded and classified as a transnational crime. In 1997, the ASEAN Declaration on Transnational Crime called for the establishment of "clear and effective regional modalities" to combat transnational crimes such as piracy, money laundering, drug trafficking and terrorism, "especially on the aspect of information

⁹⁷⁹ European Commission, *A new partnership with Southeast Asia*, COM (2003) 399/4, Brussels.

exchange and policy coordination”. In 1999, ASEAN Plan of Action to Combat Transnational Crime was adopted to establish an institutional framework for ASEAN cooperation and coordination on transnational crime. With regard to terrorism, the 2002 Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime set out steps to be taken and measures to be implemented in order to enhance regional cooperation and coordination in the fields of information exchange, legal matters, law enforcement matters, training, institutional capacity-building and extra-regional cooperation.⁹⁸⁰ The measures set out by the Work Programme have become the main framework for almost all of ASEAN’s responses to terrorism.

In 2001, ASEAN adopted the ASEAN Declaration on Joint Action to Counter Terrorism in reaction to the 9/11 terrorist attacks. The Declaration cites terrorism as “a direct challenge to the attainment of peace, progress and prosperity of ASEAN”, which must be addressed through regional and international cooperation. The Member States agreed, under the Declaration, to undertake the following practical measures: strengthening their national laws and legislation on terrorism, calling for signing and ratification of all anti-terrorist conventions, enhancing

⁹⁸⁰ With regard to “information exchange”, a database of national laws and regulations on terrorism and international treaties and agreements was to be established by the ASEAN Secretariat; the Secretariat was called upon to “explore ways for ASEAN to cooperate with ASEANAPOL [ASEAN Association of Heads of Police] and relevant international organizations concerned with terrorism matters to further facilitate sharing of information and analysis of critical intelligence information such as “modus operandi” and offences involving terrorist activities”; ASEAN Member States were required to exchange information on security practices, on technologies to detect and deter terrorist attacks, and on terrorists and terrorist organizations, their movements and funding. With regard to legal matter, the Member States were called on to work towards the criminalization of terrorism, and to “provide information among each other and to the ASEAN Secretariat on the progress of their efforts to enact domestic legal instruments”; it was to be established whether there was a possibility of developing “multilateral or bilateral legal arrangements to facilitate apprehension, investigation, prosecution, extradition exchange of witness, sharing of evidence, inquiry and seizure in order to enhance mutual legal and administrative assistance among ASEAN Member” States; ASEAN Secretariat was required to work and study on “a regional operational convention or agreement on terrorism”, and “on a bilateral or multilateral mutual legal assistance agreement or arrangement to enhance cooperation in combating terrorist acts and deliberating on various aspects of the issue in a comprehensive manner including its definition and root causes. With regard to law enforcement matters, the ASEAN Secretariat was made responsible for providing coordination and cooperation “in law enforcement and intelligence sharing on terrorism on terrorism” affecting Member States; Member States were encouraged to make proposal “on training programme/conferences ; ASEAN Secretariat was required to assist Member States in strengthening their national mechanism to combat terrorism. with regard to extra-regional cooperation, “ASEAN Secretariat was made responsible for conducting “a study on how ASEAN programmes/projects could complement/support UN resolutions”; ASEAN Secretariat was made responsible for looking into “the possibility of inviting [and involving] the Plus Three Countries – China, Japan and the Republic of Korea – and other dialogue partners” in the war against terrorism.

“information/intelligence exchange”, strengthening “cooperation at bilateral, regional and international levels in combating terrorism”, and deepening cooperation among their law enforcement agencies.

In July 2002, the ASEAN Regional Forum also endorsed a statement on a set of financial measures to counter terrorist financing.⁹⁸¹ The Statement committed Member States to enhance cooperation on the international exchange of information. They also agreed to implement relevant UN Security Council resolutions, particularly the Security Council Resolution 1373, which as we have seen involves making lists of terrorists and freezing all their assets and their associates’ assets.

In response to the Bali attacks, the 8th ASEAN Summit in Phnom Penh issued the 2002 ASEAN Declaration on Terrorism. In it, the Member States reiterated their determination and commitment to adopt measures outlined in the Declaration on Joint Action to Counter Terrorism. At the 2004 Bali Regional Ministerial Meeting on Counter-Terrorism, Member States were asked to take more practical measures to counter terrorism. These measures included “the development of appropriate skills among prosecutors and judges to ensure sufficient legal expertise exists to deal with terrorists”, having “a sufficiently broad range of offences in national law to prosecute and punish those responsible for committing or supporting terrorist acts, while respecting democratic values, human rights and due process of law”, having sufficient legal tools “to confiscate the proceeds of crime, obtained through illicit activities being used to fund terrorist activities”, and ratification of UN anti-terrorism conventions and resolutions.⁹⁸²

In January 2007, ASEAN adopted the ASEAN Convention on Counter-terrorism. The Convention does not provide a generic definition of terrorism or terrorist group. It does make provision for a number of criminal offences, prohibited under the anti-terrorist convention, such as hijacking, hostage taking and bombing, which Member States agreed to be treated as terrorist acts.⁹⁸³ The Convention requires the ASEAN

⁹⁸¹ ASEAN, ARF Statement on Measures against Terrorist Financing 30 July 2002, http://asean.org/?static_post=arf-statement-on-measures-against-terrorist-financing-30-july-2002-3.

⁹⁸² ASEAN, Bali Regional Ministerial Meeting on Counter-Terrorism Bali, Indonesia, 5 February 2004 Co Chairs’ Statement.

⁹⁸³ See Article II of ASEAN Convention on Counter Terrorism (13 January 2007).

Member States to ensure that these offences, especially when they are “intended to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature”. The Convention also requires Member States to cooperate to prevent the commission, facilitation, financing, of terrorist acts, and to prevent the movements of terrorist and terrorist groups. Fair treatment and conformity with international human right law are also promised.

Besides these regional efforts, a significant number of bilateral and multilateral agreements and declarations have been agreed or made between ASEAN and other regional institutions or states,⁹⁸⁴ among ASEAN Member States,⁹⁸⁵ and between ASEAN Members States and other countries, such as EU and or states such as USA, Japan, and Australia. Following the same pattern as the ASEAN counter-terrorism cooperation, these agreements re-affirm the importance of a framework for cooperation to prevent, disturb and combat international terrorism and terrorist financing through exchange of information, relationships amongst the their law enforcement agencies, training and consultations, and strengthening border control.

To sum up, ASEAN appears to have made a strong formal commitment to establish a comprehensive counter-terrorism regime. However, there is not much actual work done at the ASEAN level to deal with issue of terrorist financing, except for some provisions in the ASEAN Convention on Counter-Terrorism, which emphasizes cooperation in the suppression of terrorist financing.⁹⁸⁶ Real action is confined to legislative activity by Member States, which varies significantly.

13.3 Individual ASEAN Member States approaches to approaches to counter-terrorism financing

Individual ASEAN Member States have created and developed, and are still developing, their counter-terrorist financing regime with the help and support, and

⁹⁸⁴ See for example, 14th EU-ASEAN Ministerial Meeting, “the Joint Declaration on Cooperation to combat Terrorism”, 27 January 2003. ASEAN-Australia Joint Declaration for Cooperation to Combat International Terrorism, 1 July 2004. ASEAN-US Joint Declaration for Cooperation to Combat International Terrorism, 1 August 2002.

⁹⁸⁵ See for example, 2002 Trilateral Agreement on Information Exchange and Establishment of Communication Procedures (adopted on 7 May 2002 by Philippines, Indonesia and Malaysia).

⁹⁸⁶ Article VI of ASEAN Convention on Counter Terrorism.

under the guidance, direction and supervision, of international organizations such as FATF or The Asia/Pacific Group on Money Laundering (a FATF-style regional body for the Asia/Pacific region).⁹⁸⁷ A significant attempt is being made by these international organizations to diffuse and promote the existing counter-terrorist financing regime established by the Terrorist Financing Convention, FATF recommendations and UN resolutions. This diffused regime, which in many respects, is the duplication of the US counter-terrorism law, provides a wide range of legal tools in the fight against terrorist financing.

Criminalization of terrorist financing as an independent offence is considered by the regime as the first and the most important step in countering terrorist financing. However, this conceptualization (terrorist financing as an autonomous crime) suffers from ambiguity. As already mentioned, financing of terrorism in its nature and according to general rules of criminal law, is a preparatory act which obtains its criminality from its connection with a terrorist act for which the financing is carried out. However, such a connection is not required to establish an independent offence of terrorist financing, otherwise terrorist financing would come close to the concept of complicity or an inchoate crime. In the absence of such connection, the main difficulty, as noted above, is identifying where the criminality of the offence originates from. As noted in chapters seven and eight, the offence relies on its mental element, targeting people who commit the offence for terrorist purposes. However, the term terrorist purposes is not defined. Similarly, as noted in chapter eight, the mental element of the offence of financing individual terrorists or terrorist groups is ambiguous; what complicates the application of the offence is the ambiguity over the definition of terrorism, terrorist acts, terrorists and terrorist groups (chapter five). These ambiguities also make the application of the seizure and confiscatory measures problematic as it is not clear what property should be subject to confiscation sanctions (chapter ten and eleven). In addition, the asset-freezing regime adopted and developed by the UN Security Council as described in

⁹⁸⁷ Jason Sharon argues that anti-money laundering policies, which later was expanded to include terrorist financing, have been diffused in developing states “through the direct effects and indirect effects of power, rather than through rational learning, in response to brute material pressure, or to address local policy problems”. He argues that International organizations such FATF have directly or indirectly shaped the circumstances and fates of developing states in this area.” “Direct coercion, mimicry, and competition” are three mechanisms used to diffuse the measures. See Jason Sharman “Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States” 2008 52(3) *International Studies Quarterly* 635, at 653.

chapter twelve is defective as, in addition to suffering from the definitional ambiguities explained above, it has resulted in arbitrary effects, labelling people suspected of being involved in terrorism or financing terrorist without a proper due process, and targeting all their assets for a potentially infinite time.

The following section briefly assesses four ASEAN Member States' (Singapore, Malaysia, Indonesia and the Philippines) laws on terrorist financing in order to discover how these states have conceptualized terrorist financing as an offence, and in the absence of any requirement to link funds with an actual terrorist act, on what basis they impose liability on the accused and freeze and confiscate their funds and property. It also examines whether they provide any definition of 'terrorist purposes'. It examines their approach to freezing of the assets of those listed as terrorists in accordance with the UN Security Council resolutions, to determine whether they afford the listed persons and entities with their fundamental rights protected by international human rights laws the ASEAN Human Rights Declaration. This examination does not take into account the motive of individual ASEAN Member States in adopting and implementing, or resisting implementation of the whole or parts of these measures.⁹⁸⁸

13.3.1 Singapore

There is a strong will in Singapore to fight terrorism and terrorist financing. While Singapore has not been the victim of any violent attacks in recent years, it is situated in a region where several separatist movements, guerrilla warfare and insurgency have been taking place.⁹⁸⁹ To prevent any possible threat that may endanger its citizens, sovereignty and its infrastructures, Singapore seems to have adopted a very broad definition of terrorism and terrorist financing. In terms of defining terrorism

⁹⁸⁸ States may adopt the measures for different reasons. For example, it has been discovered that the key motive behind Myanmar's adoption and implementation of anti-financial crime measures is to weaken the position of opposition groups and strengthen the power of the central government "over potentially disloyal groups". See Shahar Hameiri and Lee Jones "Regulatory Regionalism and Anti-Moneylaundering Governance In Asia" 2015 69(2) Australian Journal of International Affairs 144, at 155.

⁹⁸⁹ There is an Islamic militant group, called the Jemaah Islamiyah, in the region whose objective is to establish an Islamic state which comprises Malaysia Singapore and Indonesia, Brunei and the southern Philippines. The group was accused of planning to bomb US and other local targets in Singapore. See Government of Singapore Ministry of Home Affairs "White Paper; the Jemaah Islamiyah Arrests and the Threat of Terrorism" (01 January 2003) <<https://www.mha.gov.sg/Newsroom/others/Pages/White-Paper---The-Jemaah-Islamiyah-Arrests-and-The-Threat-of-Terrorism.aspx>>.

and terrorist acts, under the Singaporean law, ‘terrorist act’ means “the use or threat of action” where the action involves serious violence against citizens, endangers a person’s life, involves damage to property, involves the use of explosives, involves environmental damage, poses a serious risk to health and safety of the public, disturbs any public infrastructures, from public computer system, public transportation, financial services to public security or national defence.⁹⁹⁰ Although this definition does not include all the acts criminalized under the counter-terrorism conventions (such as hostage taking), similar to the definition provided by Terrorist Financing Convention, such use or threat of action should be carried out with the intention to coerce a government or international organization to do or refrain from doing any act, or intimidate a population.

Singapore’s Terrorism (Suppression OF Financing) Act (2003) also defines ‘terrorist’ as a person who “commits, or attempts to commit”, or participate in or facilitates the commission of, any of these acts.⁹⁹¹ ‘Terrorist group’ means “any entity owned or controlled by any terrorist or group of terrorists and includes an association of such entities, and any entity” designated by the UN or the government as a terrorist group.

With regard to the definition of terrorist financing, the laws on terrorist financing do not require connection between the act of financing and an actual terrorist act. In vague language, the law criminalizes a broad range of acts as terrorist financing offences with a heavy (but particularly vague) reliance on the mental state of these offences. Under the Terrorism (Suppression of Financing) Act, a person is criminally liable if he or she directly or indirectly collects or provides “property” or “financial and other related services”,

intending that they be used, or knowing or having reasonable grounds to believe that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist act, or for benefiting any person who is facilitating or carrying out such an activity; or knowing or having reasonable grounds to believe that, in whole or in part, they will be used by or will benefit any terrorist or terrorist entity.⁹⁹²

⁹⁹⁰ Terrorism (Suppression OF Financing) Act 2003 (Singapore), s 2(1).

⁹⁹¹ At s 2 (1).

⁹⁹² At s 4.

Similarly, use and possession of property “for the purpose of facilitating or carrying out a terrorist act” also triggers liability.⁹⁹³ Dealing in (or entering into any financial transaction related to) property of terrorists constitutes a terrorist financing offence if the financier (facilitator) “knows or has reasonable grounds to believe [that the property] is owned or controlled by or on behalf of any terrorist or terrorist entity”.⁹⁹⁴ A person will be punished (by a maximum of five years imprisonment) for failing to disclose the information about any of these terrorist financing offences.⁹⁹⁵

The provision is worded broadly enough that there is no need that the financier intend or know of any specific terrorist act. It is thus vulnerable to all the criticisms of the convention offence. It is not clear exactly what a financier of a terrorist act should know or intend to be criminally liable. How can a person finance a terrorist act when he does not know about or intend a specific terrorist act? What, again, is the definition and scope of ‘terrorist purposes’? With regard to the financing of terrorist groups and terrorists, although these laws aim at cutting off all possible financial resources of terrorists and terrorist groups, these laws do not distinguish the guilty and non-guilty mental states. What if a person, who knows the recipient is a terrorist group, engages in financing for lawful or humanitarian purposes, such as furthering the lawful activity of a group? Does knowledge of the identity of a person or a group justify criminalization of any association with such a person or group?

With regard to forfeiture measures, based on this vague mental state, property can be seized and consequently confiscated. That is, in Singapore, property is forfeitable if a court is satisfied, on a balance of probability, that the “property is owned or controlled by or on behalf of any terrorist or terrorist entity, or [the] property that has been or will be used, in whole or in part, to facilitate or carry out a terrorist act”.⁹⁹⁶ Under this provision, property which belongs to, or is controlled by, the person who finances terrorism or a terrorist organization can be forfeited if it is intended to be used for terrorist purposes. In the absence of an actual terrorist

⁹⁹³ At s 5.

⁹⁹⁴ At s 6.

⁹⁹⁵ At ss 8 and 9.

⁹⁹⁶ At s 21.

act, the main concern is how a court may order forfeiture of property when it is not clear whether (and how much of) the property forfeited would or could be used for the commission or preparation of a terrorist act. The same issued is raised: whether such forfeiture is fair and precise enough to distinguish a guilty from a non-guilty mind?

With regard to the implementation of the UN Resolutions, Singapore's law provides that all assets of persons or groups who become designated by the UN Sanction Committee are frozen immediately by Singaporean authorities, for an indefinite time until they are delisted by the Sanction Committee.⁹⁹⁷ Although Singapore has not yet established an independent terrorist list pursuant to the UN Resolution 1373, Singapore has empowered itself to list a person or a group designated by other states and freeze all their assets.⁹⁹⁸ No judicial review would be required. Instead, the Singaporean authorities (the Ministry of Home Affairs) (not a judicial body) would assess whether the information provided by a designating state supports the suspicion that the designated person or group is involved in terrorism. However, in the absence of intentional agreement on the definition of terrorism, and with regard to differences in the perception of terrorist threats, it is not clear based on what standards or definition the information provided would be assessed. What is obvious is that such an assessment would be carried out in a way to comply with the fundamental rights respected and protected by the international human rights laws and ASEAN Human Rights declaration, rights such as right to be heard, right to be presumed innocent, right to access to judicial review and right to property.

13.3.2 Malaysia

Similarly to Singapore, Malaysia has criminalized terrorist financing in accordance with the Terrorist Financing Convention and the FATF recommendations. Any provision or collection of property and funds for terrorist purposes is illegal.⁹⁹⁹ Any involvement with the property of terrorists and terrorist groups attracts criminal liability. No definition of terrorist purposes is provided. But, the definition of 'terrorist act' includes broad classes of acts. In addition to those acts regarded by

⁹⁹⁷ Monetary Authority of Singapore (Anti-Terrorism Measures) Regulations 2002 (Singapore), ss 7 and 8.

⁹⁹⁸ The United Nations (Anti-Terrorism Measures) Regulation 2003 (Singapore), ss 7 and 8.

⁹⁹⁹ The Penal Code of Malaysia, Sec.130N, 130O, 130P and 130Q.

Singaporean Law as terrorist acts, the Malaysian definition of terrorist act includes aviation offences such as hijacking.¹⁰⁰⁰ In comparison with Singaporean definition, it also has an additional mental state requirement. Such terrorist acts should be carried out “with the intention of advancing a political, religious or ideological cause” and intimidating the public or coercing a government or intentional organizations to do or prevent from doing an act. However, there is no need for an act of financing to be linked to any of terrorist acts. So, again, the offence relies heavily on the mental element of the offence (terrorist purposes).

In terms of forfeiture, any property which proved to be “terrorist property” is subject to forfeiture. ‘Terrorist property’ is defined very broadly and includes

proceeds from the commission of a terrorist act; property that has been, is being, or is likely to be used to commit a terrorist act; property that has been, is being, or is likely to be used by a terrorist, terrorist entity or terrorist group; property owned or controlled by or on behalf of a terrorist, terrorist entity or terrorist group, including funds derived or generated from such property; or property that has been collected for the purpose of providing support to a terrorist, terrorist entity or terrorist group or funding a terrorist act.¹⁰⁰¹

It is not clear when there is no terrorist act, how a court may determine that the suspected property “is likely to be used to commit a terrorist act”. What if the property owned or controlled by a terrorist suspect or a financier is not intended to be used for terrorist purposes (using for personal matters such a house where the terrorist’s family live in)? The law expands the scope of forfeiture, seemingly allowing civil forfeiture of suspected property. That is, when “there is no prosecution or conviction ... for terrorism financing offence”, a court can order forfeiture of the property if it is satisfied, on the balance of probability, that the property is “the subject matter of or was used in the commission of ... a terrorism financing offence”.¹⁰⁰² In the case of a *bona fide* third party’s (claimant’s) having interest in the forfeited property, a court should be satisfied that the claimant did not participate or engage in the offence with regard to which the property is

¹⁰⁰⁰ At s 130B (1).

¹⁰⁰¹ At s 130 B (1).

¹⁰⁰² Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Malaysia), s 56 (1).

forfeited; the claimant should also lack, at the time of the commission of the offence, “knowledge [,] and was not intentionally ignorant [,] of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use”; and he “did all that could reasonably be expected to prevent the illegal use of the property”.¹⁰⁰³ Under such requirements, a person’s house which is used, for example, by one of his family member for terrorist purposes is at risk of being confiscated if he fails to prove that he was diligent enough to take necessary steps in accordance to this law.

In the same draconian manner to the Singaporean approach, Malaysian law empowers the executive authorities (Ministry of Home Affairs) to blacklist, and order the freezing of assets of, those who are suspected of being terrorists or terrorist groups or terrorist financiers, without using a judicial procedure and without respecting their fundamental human rights.¹⁰⁰⁴ In other words, the Minister of Home Affairs may declare a person or a group to be a terrorist or terrorist group merely on the basis of information he receives “from a police officer”. As soon as he declares a person or a group as terrorist, all their assets are frozen, and provision of “any financial or other related service” to it is prohibited.¹⁰⁰⁵ Although the listed persons are allowed to ask the minister to delist them, the question is how they may defend themselves when they do not know why and on what grounds they have been listed. With regard to the UN Sanction list, the law allows the Ministry of Home Affairs to make an order that the persons and groups listed by the UN Sanction Committee are designated as terrorists, and their assets are frozen.¹⁰⁰⁶ It has been alleged that Malaysia has deployed these executive measures against the political opponents of the governments.¹⁰⁰⁷

¹⁰⁰³ At s 61.

¹⁰⁰⁴ At s 66B.

¹⁰⁰⁵ At.

¹⁰⁰⁶ At s 66.C.

¹⁰⁰⁷ For example, the designation of “Kumpulan Mujahidin Malaysia” as a terrorist organization was construed “as a bid by Mahathir[’s government] to crack down on Muslim oppositions”. The government claimed that the group had been plotting a number of attacks in Malaysia. However, no charges were pressed against them. See J.N. Mak “Malaysian Defense and Security Cooperation: Coming out of the Closet” in See Seng Tan and Amitav Acharya (eds) *Asia-Pacific Security Cooperation: National Interests and Regional Order* (M.E. Sharpe, Armonk, NY, 2004), at 149. See also James Cotton “Southeast Asia after September 11” in David Martin Jones (ed) *Globalization and the New Terror: The Asian Pacific Dimension* (Edward Elgar, Cheltenham, UK, 2004), at 192.

13.3.3 Indonesia

Until 2013, Indonesian law prohibited only the financing of terrorist acts.¹⁰⁰⁸ By the enactment of new legislation, the scope of the terrorist financing offence is expanded in order to be in line with the Terrorist Financing Convention and the FATF recommendations. According to the current legislation, financing of terrorism is an act of providing, collecting and loaning funds with the intention, or in the knowledge, that they will be used for a terrorist act, or by a terrorist individual or a terrorist organization.¹⁰⁰⁹ While no definition of ‘terrorist organization’ or ‘terrorist’ is given, Indonesian law provides a very broad definition of ‘terrorist act’, using undefined terms. A person commits a terrorist act when the person

intentionally uses violence or the threat of violence to create a widespread atmosphere of terror or fear in the general population or to create mass casualties, by forcibly taking the freedom, life or property of others or causes damage or destruction to vital strategic installations or the environment or public facilities or international facilities.¹⁰¹⁰

This definition is also expanded to include offences related to explosive, aviation security, explosive and firearms, biological weapons.¹⁰¹¹ Unlike the Singaporean law in which a terrorist act does not include activities undertaken by military forces of a State in the exercise of their official duties,¹⁰¹² any act which meets the criteria of the Indonesian definition of ‘terrorist act’ is punishable even if it is carried out by “military or police”.¹⁰¹³ However, the law does not define critical terms such as “widespread atmosphere of terror or fear”, “mass casualties”. The law also does not clarify that in the absence of commission or preparation of an actual terrorist act, what constitutes the mental element of terrorist financing offence.

In terms of seizure and forfeiture, the law uses ambiguous language. To freeze suspicious funds, the law provides two parallel and competing mechanisms.

¹⁰⁰⁸ Law No 15 of 2003 on the Stipulation of Interim Law No 1 of 2002 on the Eradication of Terrorism as a Law (Indonesia), art 11.

¹⁰⁰⁹ Law No 9 of 2013 on Prevention and Eradication of Terrorism Funding (Indonesia), art 4.

¹⁰¹⁰ Law No 15 of 2003 on the Stipulation of Interim Law No 1 of 2002 on the Eradication of Terrorism as a Law (Indonesia), art 6.

¹⁰¹¹ At ss 8,9 and 10.

¹⁰¹² Terrorism (Suppression OF Financing) Act (2003) (Singapore), s 2 (3).

¹⁰¹³ Law No 15 of 2003 on the Stipulation of Interim Law No 1 of 2002 on the Eradication of Terrorism as a Law, art 6 and 7.

According to the first mechanism, a national authority (a prosecutor, a judge or an investigator) may order the seizure of funds when it is known, or it ought to have been known, that they are used for the crime of terrorism.¹⁰¹⁴ Under the second mechanism, an authority may seek a freezing order from the Central Jakarta District Court.¹⁰¹⁵ However, it is not clear if an authority can directly order the seizure of suspended funds, why he or she needs to resort to the second mechanism, and seek a court order. While the suspected funds remain frozen only for 30 days, it is not clear how and under what circumstances the freezing would turn into confiscation and whether confiscation of suspected funds should be followed by a conviction for a specific offence (Criminal codification) or it can be granted in the absence of any conviction (civil confiscation).

In terms of issuing a list of terrorist suspects and ordering the freezing of their assets in accordance with the UN Resolutions 1267 and 1373, the law empowers the “Chief of the Indonesian National Police” to submit an application to the Central Jakarta District Court, requesting the inclusion of those identified by the Police as terrorist suspects.¹⁰¹⁶ The Court then decides on each case within 30 days on the basis of the information and evidence provided by the Police. In the case of the court’s permission to include the suspect in the list, all assets of the listed persons will be frozen. The listed persons have right to object the decision by providing reasons for the objection to the Police. In case the Police deny their objection, the persons can bring “civil lawsuits” in the Central Jakarta District Court.¹⁰¹⁷ This procedure of listing and freezing was criticized by FATF as it did not result in immediate listing, and freezing of assets of, those listed by the UN Sanction Committee.¹⁰¹⁸ After five years of being on the FATF’s list of “high-risk and non-cooperative jurisdictions”, in 2015, Indonesia adopted an “inter-ministerial joint regulation”, which allows the authorities to freeze the assets of those listed by the UN Sanction Committee within three days after they are listed by the Committee.¹⁰¹⁹ The assets remain frozen as

¹⁰¹⁴ At art 22 and 23(1).

¹⁰¹⁵ At art 23(2).

¹⁰¹⁶ At art 27.

¹⁰¹⁷ At art 29.

¹⁰¹⁸ Financial Action Task Force “Public Statement” (24 October 2014) <<http://www.fatf-gafi.org/documents/documents/public-statement-oct2014.html#indonesia>>.

¹⁰¹⁹ U.S. Department of State *Countries/Jurisdictions of Primary Concern - Indonesia; Bureau of International Narcotics and Law Enforcement Affairs: Vol 2 Money Laundering and Financial Crimes* (2016), viewed at 12/06/2016. See also Haeril Halim “PPATK Freezes Extremist-Related

along as the persons are in the UN Sanction list.¹⁰²⁰ Practically, the joint regulation deprives the listed persons of their right, given by the law, to object their freezing sanctions.

13.3.4 The Philippines

Until 2011, the Philippines applied the general principles of criminal law in criminalization and confiscation of terrorist financing;¹⁰²¹ that is, terrorist financing was regarded as complicity in a terrorist offence or an inchoate offence. So, not only was there a requirement to link the act of financing to a specific terrorist act, but also, financing of an individual or a terrorist would not be regarded an offence if it was not carried out for the commission or preparation of a terrorist act. Confiscation was also limited to the funds and property proven to be used, or intended to be used, for the commission of an actual terrorist act. However, by the enactment of the Terrorist Financing Suppression Act of 2011, the Philippines established an independent offence of terrorist financing in exact accordance with the FATF recommendations and the Terrorist Financing Convention.¹⁰²²

In addition, the Philippines provide a very broad definition of ‘terrorist act’. In addition to adoption of the generic definition of terrorism provided by the Terrorist Financing Convention, classes of acts, such as piracy, rebellion and insurgency, coup d'état and hijacking are also considered terrorist acts when they are “sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand”.¹⁰²³ Unlike the definition offered by the Terrorist Financing Convention based on which a terrorist act should be aimed at intimidating a population “or” compelling a government or an international organizations, under the Philippine definition, the cause of fear should be the consequence of an act, and it should be intended to coerce the government “to give in to an unlawful demand” (whether it is a personal, material, financial or political demand). However, there is no need to connect the

Accounts” *The Jakarta Post* (online ed, Jakarta, 21 April 2015) <http://www.thejakartapost.com/news/2015/04/21/ppatk-freezes-extremist-related-accounts.html>.

¹⁰²⁰ For example, in April 2015, Indonesia froze 20 bank accounts claimed to belong to “Al-Qaeda and Taliban-affiliated terrorist groups operating in Indonesia”. See Halim, above n 1019.

¹⁰²¹ See Section 5 of the Human Security Act of 2007, Republic Act No. 9372 (the Philippines).

¹⁰²² The Terrorist Financing Suppression Act of 2011, Republic Act No. 10168, (the Philippines), s 4.

¹⁰²³ At s 3(J).

funds collected or provided to any terrorist act.¹⁰²⁴ No definition of ‘terrorist purposes’ is, nonetheless, provided.

Despite this ambiguity, freezing and forfeiture can be granted not on the basis of the link between the suspected funds and an actual terrorist act, but based on an assumption (fiction) that they may be used for terrorism. The law permits the civil forfeiture of funds and property that

are in any way related to financing of terrorism or acts of terrorism; or (b) property or funds of any person, group of persons, terrorist organization, or association, in relation to whom there is probable cause to believe that they are committing or attempting or conspiring to commit, or participating in or facilitating the commission of financing of terrorism or acts of terrorism.¹⁰²⁵

This low standard of proof (probable cause) seems to allow the prosecution to request the seizure and forfeiture of the funds and property based on circumstantial evidence such as hearsay or an anonymous informant’s tip,¹⁰²⁶ or based on a mere listing by the UN sanction Committee,¹⁰²⁷ without a need to prove the actual guilt of the accused, or the actual criminal use of the funds and property.¹⁰²⁸ This also shifts the burden of proof to the accused to prove that the suspected funds or property were not intended to be used for a terrorist act, which is not proven or planned at all.

With regard to implementing the UN resolutions, executive authorities are empowered to issue freezing orders with regard to the property and funds of persons and entities listed by the UN Sanction committee or by other jurisdictions in accordance with the Resolution 1373. The funds remain frozen “until the basis for

¹⁰²⁴ At s 4.

¹⁰²⁵ At s 11.

¹⁰²⁶ At.

¹⁰²⁷ At.

¹⁰²⁸ Property or funds frozen in accordance with the UN resolutions can be forfeited, in a form of *in rem* civil forfeiture if they are “found to be in any way related to financing of terrorism or acts of terrorism committed within the jurisdiction of the Philippines”. The Philippine authorities emphasises that “a mere listing by the UNSC would likely be sufficient to establish preponderance of evidence and this to forfeit proceeds of listed individuals/entities”. See also Asia/Pacific Group on Money Laundering “Anti-Money Laundering and Combating the Financing of Terrorism; Republic of the Philippines” (2009) <http://www.apgml.org/documents/search-results.aspx?keywords=philippines>, at [275].

the issuance thereof shall have been lifted”.¹⁰²⁹ However, if the frozen funds are “related to financing of terrorism or acts of terrorism committed within the jurisdiction of the Philippines”, the funds will be the subject of civil forfeiture.¹⁰³⁰

The listed persons are allowed to “file with the Court of Appeals a petition to determine the basis of the freeze order”.¹⁰³¹ However, it is not very clear that, if a person or entity listed by the UN Sanction Committee succeeds in obtaining their delisting, whether the government would delist the persons or entities and unfreeze their assets at the cost of violating its international obligations.

13.4 Conclusion

ASEAN Member States, have been encouraged and pushed to incorporate the provisions from criminalisation of terrorist financing and for seizure/confiscation of suspect property into their law, and they have albeit in some cases tardily, reluctantly and partially, done so. While ASEAN lacks a cohesive counter-terrorist financing regime, individual ASEAN Member States have developed, and are still developing, their counter-terrorist financing regime in accordance with the Terrorist Financing Convention and the FATF’s recommendations. The laws and policies of four ASEAN Member States (Singapore, Malaysia, Indonesia and the Philippines) on criminalization of terrorist financing and confiscation of terrorist funds have been examined in this chapter. The legal issues that arise from the implementation of these laws and policies in these ASEAN Member States have been discussed. The adoption and implementation of the existing counter-terrorism measures by ASEAN and its Member States seem to face similar problems to the ones discussed in previous chapters.

It has been found that, first and foremost, it is not clear what exactly constitutes (or does not constitute) terrorism, a terrorist act or a terrorist group. The ASEAN

¹⁰²⁹ At [276]. The assets of the Rajah Solaiman Movement were frozen after being listed by the UN Sanctions Committee. It should be noted that the designation of this group the Committee was the result of a request by the Philippine government.

¹⁰³⁰ The Terrorist Financing Suppression Act of 2011, Republic Act No. 10168 (the Philippines), s 11. Following the UN designation of the Philippine Branch of the International Islamic Relief Organisation, the Philippine authorities submitted an application to the Court of Appeals requesting the freezing of the funds of the designated organization. The Court within a day issued a freezing order. The frozen funds were forfeited after few months. See Asia/Pacific Group on Money Laundering, above n 1028, at [275].

¹⁰³¹ At.

Member States' understanding of terrorism varies. Their definitions are vague and broad. As far as the principle of legality is concerned, this raises a concern that in determining terrorist financing offenses, there are multiple possible definitions of terrorism that can be used as grounds to impose liability or forfeiture sanctions.

In terms of the conceptualization of terrorist financing as an offense, the ASEAN Member States, examined by this chapter, have incorporated without considerable change the vague definition provided and promoted by the Terrorist Financing Convention and FATF's recommendation into their law. Terrorist financing is criminalized by these states, as an independent offence in the way that the Convention requires or FATF recommends - no need to link the act of financing to an actual criminal act for which the financing acts may be carried out. Therefore, having terrorist purposes is the main basis for imposing liability. As far as I could ascertain, the term "terrorist purpose" has not been defined by any court or authority of these states. This is also the basis for the seizure and forfeiture of funds and property regarded to be used for terrorist purposes. The consequences of such a law, as discussed in close detail in previous chapters, will be the violation of human rights and democratic values if it is implemented as it is made.

With regard to the implementation of the UN Security Council resolutions on freezing the assets of those listed as terrorists by the Sanction Committee, the ASEAN Member States seem to comply with the obligations imposed by the Security Council resolutions. However, their compliance can result in the violation of the fundamental rights and due process protected by international human rights laws under the ASEAN Human Rights Declaration.

Chapter Fourteen: Conclusion

This thesis has set out to examine two penal measures adopted by the Terrorist Financing Convention, and developed by the FATF and the UN Security Council to counter terrorist financing, namely criminalization, and allied seizure and confiscation measures. The main purpose of these measures is to prevent terrorist attacks before they are actualized; the main concept upon which these measures rely is that terrorist financing can be suppressed without connection to any actual terrorist act. The body of this thesis has examined how this concept has been applied through international law in the Terrorist Financing Convention and how it has been implemented in domestic law of states parties. It has spelled out the implications of reliance on this vague concept to criminalize terrorist financing and confiscate terrorist funds in terms of their compatibility with the rule of law (especially values of legal certainty), the principles of criminal law and human rights. This chapter sums up the key findings of the thesis and draws some general conclusions.

14.1 The phenomenon of terrorist financing

The thesis began with the examination of the nature and characteristics of terrorist financing as a transnational phenomenon. It explored that terrorist financing is deemed to include activities that result in financing a terrorist act or an individual or a group involved in terrorist activities. In other words, terrorist financing, under a broad interpretation, comprises of a wide range of activities, including raising, moving or resorting funds, which aim at facilitating, or contributing to, terrorist activities.

What distinguishes terrorist financing from other (organized) crimes is that terrorist financing, in many cases, is not involved in criminal activities; that is, terrorist activities, individual terrorists and terrorist groups can be funded by legitimate sources and through legal and normal financial processes. Therefore, a heavy reliance on the assumption that there is a close connection between terrorist financing and criminal activities such as organized crimes, thus making it justifiable and reasonable to legislate to criminalize terrorist financing based on analogies with those crimes, is not entirely apt.

Nevertheless, this assumption (crime-terrorism nexus) underlies the approach of the FATF's policy makers who wish and have attempted to resolve the problem of terrorist financing by analogy with their existing solutions to organized crimes and money laundering. Chapter four of this thesis discusses how this assumption has been built by the FATF into the criminalization of terrorist financing by calling on countries to criminalize terrorist financing as a predicate crime of money laundering.¹⁰³²

The emphasis on this inaccurate assumption can be said to have reinforced the diffusion of the approach that was developed through the Terrorist Financing Convention: the criminalization of terrorist financing as an independent offence. This approach to countering terrorist financing was unsuccessfully objected to during the negotiations on the draft of the Convention due to the preparatory nature of terrorist financing and due to the inconsistency of this approach to existing notions of criminalization.¹⁰³³ Nonetheless, the emphasis on the assumption that terrorist financing is closely and heavily involved in criminal activities so it can be distinctively categorised, has, over time, apparently convinced states that terrorist financing is a distinct criminal activity (a predicate crime to money laundering) which can and should be criminalized even when there is no link between terrorist financing and an actual terrorist act for which financing is carried out.

14.2 The criminalization of terrorist financing

As this study showed, the criminalization of terrorist financing is accompanied by two serious difficulties: 1) what is terrorism and what are terrorists or terrorist groups, the financing of which should be addressed, and 2) how should an independent offence of terrorist financing, a preparatory offence in its nature, be drafted so as not to be too narrowly defined as an inchoate crime or complicity, thus limiting the scope of the offence. With regard to the definition of terrorism, the international community has not reached a consensus on the nature, structure and elements of these terms (terrorist acts, terrorist groups and individual terrorists) because the concept of terrorism is elusive and subject to different understandings.

¹⁰³² Financial Action Task Force, above n 13, at 37.

¹⁰³³ See chapter 3.2.1.

This probably raises an issue as to whether and how the counter terrorist financing measures can be applied when there is such a big gap.

While the drafters of the Convention reached an agreement on a general definition of terrorism, the definition falls short of certainty and clarity; they have left vague all of those controversial aspects of terrorism, which have hindered reaching an agreement on a convention on terrorism. As a result, states have used their own definitions of terrorism, which may vary from one state to another and which may be different from the definition that the Convention provided. In addition, the drafters of the Convention failed to define “terrorist group” so they deleted the financing of terrorist groups from the scope of the Convention. However, this gap has been unjustly filled by the UN Security Council’s asset-freezing regime in which suspects may become designated by the consensus of members of a committee, established by the Council, as individual terrorists or terrorist groups without any judicial review. When they are designated, all of their assets are to be frozen by the state members for an indefinite time.

While reaching a consensual agreement on the definition of terrorism, its nature and elements could provide a solid platform for countering terrorist financing, the Convention seems to imply that such a definition is not necessary as terrorist financing can be criminalized without a link to terrorism. This raises two questions: 1) does this formulation of the offence satisfy the values of the rule of law (especially those of legal certainty) which require the predictability, learnability of law, fair notice, equality before the law, freedom from official arbitrariness, the dignity and efficiency of citizen self-direction under law?¹⁰³⁴ 2) Is such an approach to criminalization (criminalizing financing acts without connecting them to any terrorist act) justifiable in terms of the basic notions and principles of criminalization?

To answer the former, the thesis examined the structure and each elements of the offence extensively. It has been found that the offence poses two types of vagueness in the sense that it does not provide clear “standards for its exercise”¹⁰³⁵ or any

¹⁰³⁴ Summers, above n 22, at 1216.

¹⁰³⁵ Atiyah and Summers, above n 18, at 74.

“methodological tools”¹⁰³⁶ for its interpretation; the offence is *structurally* vague as it does not offer guidance as to where the criminality of the offence is derived from, or what is the basis of criminal liability when there is no connection between acts of financing and commission or preparation of a terrorist act. It has been argued that the structural vagueness of the offence has led to confusion over the certainty and determinacy of the meaning and application of each elements of the offence, which is called ‘definitional vagueness’. It is illustrated that the *actus reus* of the offence which consists of “collection” or “provision” of “funds”, may include innocent or lawful acts. Even if these acts involve criminal activities such as drug trafficking, the contribution of these funds to terrorism cannot be inferred from the nature of those acts. In addition, it has been showed how, in the absence a requirement to link financing or funds to terrorist activities, the *actus reus* of the offence can be interpreted very broadly so as to include collection and provision of almost anything to such an extent as to infringe some basic rights such as free speech. The US’s approach has been extensively examined in this regard. Even if the *actus reus* is interpreted to include financing of specific items of certain value (e.g. German’s interpretation of the Convention), the thesis shows that there is still the potential for citizens to become deprived of the basic rights, such as deprivation of free speech in the US, for being involved in the collection or provision of a narrower category of things regarded as funds.

The thesis argues that the relative indeterminacy of the *actus reus* means that greater attention is paid to the mental element of the offence. In other words, when the criminality of financing cannot be inferred from the *actus reus* of a financier, then that criminality comes to rely heavily on the mental element of the financier. This depends on what mental element is required when a terrorist act is neither committed nor attempted as a consequence of the funding. The Convention states that it suffices that the financier has the intention that funds should be used or in the knowledge that they are to be used for terrorist activities.

Seeking to determine the potential meaning(s) of the mental element of the offence, the thesis has examined the mental element in two circumstances within which financing can take place: financing of a terrorist act and financing of a terrorist

¹⁰³⁶ Wolff, above n 16, at 556.

group. The examination of such mental element in the context of financing a terrorist act has shown that relying on the mental state of a financier, without linking it to an actual terrorist act, significantly expands the concept of criminal responsibility beyond the scope of not only completed substantive offences but also the traditional inchoate offences. It has the potential to impose liability on a suspect who is remotely or indirectly are linked to a terrorist act or on someone with an unclear criminal intent. It may also result in an unfair and unjustifiable reversal of the burden of proof as it is vague what state of mind the prosecution should prove and with regard to what criminal terrorist act a suspect financier should adduce evidence to escape liability.

The expansion of this mental element to include the offence of financing terrorist groups, added to the definition of the offence by the UN Security Council and FATF, has proved to be even more problematic and controversial. In other words, if offence requires that a financier knows or intends the funds he or she collected or provided will be used for a terrorist activity, in the absence of the commission or preparation of such an act, it is not clear what exactly the financier needs to know or intend to be criminally liable. Is it enough if a financier knows the identity of the recipient of funds as a designated group or a group which involves in terrorist activities? What if the financier knows the recipient is a terrorist group, but intends to further the lawful purposes of the group? Does it require recklessness? Does having “terrorist purposes” on the part of the financier, required by the FATF, suffice? It has been illustrated that mere knowledge of the identity of the recipient of funds should 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-intentioned financiers who seek to provide resources to non-violent humanitarian and political activities of a group. Multiple legal challenges would also target any other intent requirements (recklessness or specific intent), including arguments based on vagueness, overbreadth and the requirement of the presumption of innocence. The application of “terrorist purposes”, left undefined, is as a mental requirement that could result in the creation of a whole new class of political crimes.

14.3 Why does the Terrorist Financing Convention get the scope of this offence so wrong?

Examining how such criminalization goes so wrong in comparison to liberal principles of criminalization allows us to draw a conclusion as to whether terrorist financing can be justifiably kept as a stand-alone offence. Limiting the scope of this normative analysis to a comparison with the principles of liberal criminal law, the thesis tested the offence against four principles of criminalization acknowledged by Anglo-American criminal law, namely the principle of harm, the wrongful requirement, the remoteness requirement, and the rule of law standard. It showed how the offence, in its current form which requires the criminalization of terrorist financing without linking it to any actual terrorist act, fails to meet the minimum requirements of these principles which requires some degree of connection between an act nominated for criminalization and the substantive offence for which they are carried. This leaves no doubt that the offence, in its current form criminalized independently and in the absence of a link to terrorist activity, should not be diffused internationally and embedded in domestic law, if there is still a commitment to adhere to these values and principles.

14.4 Seizure and confiscation of terrorist funds

To discover whether and how other terrorist financing measures can be affected by the poorly-defined and vague offence and the notion on which it is based, the thesis then turns to an analysis of the linked measures adopted by the Terrorist Financing Convention and the UN Security Council providing for obligations to seize and confiscate terrorist funds. In a similar way to the imposition of criminal liability for the commission of the terrorist financing offence, these freezing and confiscation measures rely on the notion that terrorist funds do not necessarily have to be linked to any specific terrorist activity. So, the accused's knowledge or intention that his or her funds or assets will (or could) be used for terrorism plays a decisive role in determining what should be frozen or confiscated. But, when there is no any terrorist act committed or attempted, this leaves unanswerable the question of what or how much the accused should know or what exactly he or she must have intended to be exposed to a confiscatory sanction. It also leaves unanswerable when there is

no link to any terrorist act, which of her or his assets should be regarded as terrorist funds.

The implications of this approach to confiscation of terrorist funds have been examined in the context of the practice in the EU, a valued-based community which expresses a strong commitment to fight against terrorism while maintain fundamental principles and democratic values. The outcome is far from convincing. Relying on the vague formulation and structure of the offence defined by the Terrorist Financing Convention, and on the FATF's interpretive guidance on how to implement the sanction, the EU and many of its Member States permit the imposition of confiscatory sanctions when the accused has "terrorist purposes". But, no definition for "terrorist purposes" is provided. It has been shown how the bagginess of the EU's and its Member States' approach (as well as the practice of some jurisdictions outside the EU) to confiscating terrorist funds may have detrimental consequences in terms of violation of the rule of law and rights to property; they may result in the deprivation of the accused of his or her funds and property on the basis of the fiction of guilty property (the common law concept of deodand), even when they are not proved to be used, or intended to be used, for commission or preparation of any criminal activity.

Similarly, the EU's adoption of the UN Security Council's asset-freezing measures, based on the same notion (freezing all of the assets of those designated as terrorists or terrorist groups without linking them to terrorist activities), has been shown to be inconsistent with human rights values such as principle of presumption of innocence, principle of legality and the rule of due process and right to property.

14.5 Final Remarks

There is a strong commitment from liberal Western states and inter-governmental organizations backed by them to push states to harmonise their domestic laws with the counter-terrorist financing regime adopted by the Terrorist Financing Convention, and developed by the UN Security Council and the FATF. As Chapter 13 on the ASEAN' approach to terrorist financing shows, the Terrorist financing regime is diffused through international law rapidly and is embedded in domestic non-western national laws in the same way as it is in Western states. However, the notions on which the regime is based, the regulatory problems that arise from its

implementation, and the reasons why it goes so wrong have not been well addressed. This research sought to closely and exhaustively examine two penal counter-terrorist financing measures (criminalization and confiscation), which involve criminal law in the fight against terrorist financing. It is not unfair, to conclude that the measures fail because of the indeterminate nature of the concepts they rely on, to meet basic requirements of accepted notions of criminalization, thus leading to the potential violation of individual human rights.

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