

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

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Prior to the adoption by the United Nations General Assembly, on December 9, 1999, of the International Convention for the Suppression of the Financing of Terrorism (Financing Convention or Convention),<sup>1</sup> the community of states had made arduous efforts, which are being pursued, to cope with international terrorism in a collective manner. This has been done through two basic modalities. The longest established one is embodied in an impressive series of complex and wide-ranging multilateral treaties, most of them open to all states, that seek to cope with the phenomenon by depriving terrorists of sanctuaries and ensuring international cooperation in suppressing their activities and bringing them to justice. Each of these treaties is directed towards a specific type or area of terrorist activity.<sup>2</sup> The other, far more recent of the two modalities takes the form of two comprehensive declarations on measures to eliminate international terrorism, adopted without a vote by the United Nations General Assembly in 1994 and 1996 and which may be a source of customary law.<sup>3</sup> Since 1998 the Security Council also has become engaged.<sup>4</sup>

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<sup>1</sup> The text of the Financing Convention is contained in the Annex to resolution 54/169, adopted on the date indicated. In accordance with paragraph 1 of article 26, it will come into force thirty days after 22 states have taken action to become parties.

<sup>2</sup> The existing global, as distinct from regional, counterterrorism treaties are the nine listed in the Annex to the Financing Convention (and in note 14 *infra*), as well as the Convention on Offences and Certain Other Acts committed on Board Aircraft, of 1963 (text in 704 UNTS 219) and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, of 1991. Another multilateral treaty against terrorism is the 1971 Organization of American States Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, which, although adopted within a regional organization, is, pursuant to its article 9, open to participation by all members of the United Nations or of a specialized agency. (There are three purely regional treaties, one of which is the 1977 European Convention on the Suppression of Terrorism.)

<sup>3</sup> The two declarations, adopted on reports of the Sixth Committee, are annexed, respectively, to General Assembly resolutions 49/60 and 51/210, of December 9, 1994 and December 17, 1996, respectively.

<sup>4</sup> Cf. the general pronouncements on terrorism contained in the preambles of Council resolutions 1189 (1998) and 1267 (1999), of August 13, 1998 and October 15, 1999, respectively, as well as operative paragraph 5 of the former, and, more important, the resolution dealing with terrorism as a whole that the Council adopted on October 19, 1999, i.e. resolution 1269 (1999).

It may be added that, although the 1998 Rome Statute of the International Criminal Court (ICC) does not include terrorism among the crimes falling within the jurisdiction of the ICC, the crime of terrorism was provided for in proposals considered in the course of the preparatory work.<sup>5</sup> Moreover at the close of the Rome conference a resolution was adopted without a vote by which it was recognized, *inter alia*, that "terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community" and recommended further "that a Review Conference pursuant to article 123 of the Statute ... consider" (together with drug crimes) the crime "of terrorism with a view" to its "inclusion in the list of crimes within the jurisdiction of the Court."<sup>6</sup>

The Financing Convention, the most recent addition to the series of treaties mentioned, takes an altogether different approach from its forerunners in that, instead of addressing, as they do, specific types or areas of terrorism, it seeks to cripple the phenomenon as a whole. It does so not by addressing acts of terrorism proper, but by striving to cut off what can be regarded as the lifeblood of terrorism of all types, i. e. the provision of material, chiefly financial, resources to terrorists. This feature of the Financing Convention puts it in a class by itself among counterterrorism treaties.

This note aims to provide a critical overview of the latter and other principal features of the Financing Convention.

### I.

In paragraph 3 (f) of the second of the two resolutions referred to in note 3, entitled "Measures to Eliminate International Terrorism," the United Nations General Assembly called "upon all States 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

<sup>5</sup> The draft statute initially prepared by the International Law Commission included the crime of terrorism, but only by way of a reference to so-called "treaty crimes," i. e. those provided for in the counterterrorism treaties whose titles are listed in the annex to the draft statute. (For the text of the latter see GAOR, 49th session, Supplement No. 10, para. 91.) In contrast, in including that crime among those over which the ICC was to have jurisdiction, the draft statute elaborated at the intersessional meeting held in the Netherlands in January 1998, gave a definition thereof. (Text in M. Cherif Bassiouni, *The Statute of the International Criminal Court, a Documentary History*, 221, at 234–235 [1998].) This text found its way, between brackets, into the draft statute that was the basis of the work of the Rome Conference. (Cf. UN doc. A/CONF.183/2/Add.1, p. 27–28.) (The core element of this definition does not differ from the one by India referred to in note 19 *infra*.) At the plenary meetings of the Conference and those of its Committee of the Whole the majority of representatives (including those belonging to the Western European and others Group) opposed recommendations by a minority advocating the inclusion of the crime of terrorism in the Statute. (Its final exclusion is, needless to say, not unrelated to the political problems involved in its definition and referred to in note 19 *infra*.)

<sup>6</sup> For the text of the resolution (numbered "F"), see p. 7–8 of the Final Act of the Conference (UN doc. A/CONF.183/10).

or claim to have charitable, social or cultural goals or which are also engaged in [other] unlawful activities ... including the exploitation of persons for purposes of funding terrorist activities.” In the same provision the General Assembly also called on states “to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes ... and to intensify the exchange of information concerning international movements of such funds.” On September 23, 1998, at the 53rd regular session of the General Assembly, the French foreign minister echoed those concerns by emphasizing the “need to define concrete mechanisms for legal measures and mutual judicial assistance against those who finance terrorism” and proposed that negotiations on the matter be launched before the end of the year.<sup>7</sup> In November 1998, the Permanent Representative of France to the United Nations followed up on this statement by submitting a draft international convention for the suppression of terrorist financing and proposing that it be considered by the open-ended *Ad Hoc* Committee established by the above-mentioned General Assembly resolution 51/210.<sup>8</sup> This Committee dealt with the proposal at a two-week session in March 1999.<sup>9</sup> Its work was completed, in September-October 1999, by an open-ended working group of the General Assembly’s Sixth Committee, which, on the recommendation of the working group,<sup>10</sup> adopted without change a draft convention later submitted to the plenary, which also adopted it as submitted. Pursuant to its testimonium, the Financing Convention was opened for signature at United Nations Headquarters on January 10, 2000.

## II.

### 1. Basic Features Common to the Financing Convention and Prior Counterterrorism Treaties

Broadly speaking, one can consider global counterterrorism treaties, particularly the most recent ones, as consisting of a fairly standard element and a set of provisions specific to each treaty.<sup>11</sup> The core of the latter provisions is the definition of the offences sanctioned by the particular treaty.

<sup>7</sup> Cf. UN Doc. A/54/PV.11, p. 18.

<sup>8</sup> Cf. UN Doc. A/C.6/53/9, of November 4, 1998.

<sup>9</sup> For the report of the *Ad Hoc* Committee, see GAOR, 54th session, Supplement No. 37. A revised version of the French proposal whose symbol is given in the preceding note was before the *Ad Hoc* Committee. (For the text see Annex II of its report.)

<sup>10</sup> For the report of the working group (which for all practical purposes is indistinguishable from the *Ad Hoc* Committee), see UN Doc. A/C.6/54/L.2.

<sup>11</sup> The first postwar global counterterrorism treaty, i. e. the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, does not follow this pattern. This treaty concerns itself more with the allocation of jurisdiction of states parties over and the coordination of actions by them with respect to the wrongful acts with which it deals than with ensuring cooperation among those states with a view to the suppression of those acts. The 1991 Convention on the Marking of

The standard element contains provisions requiring states to criminalize those offences and make them punishable by appropriate penalties, as well as provisions that specify a wide range of cases in which states parties are required to or may establish their jurisdiction over the offences. These provisions are complemented by one to the effect that whenever an alleged offender is present in the territory of a state party it shall either prosecute or extradite that person, as well as by other provisions seeking to ensure, particularly through mutual legal assistance and other forms of cooperation among the states parties, that no person suspected of having committed an offence covered by the treaty can find refuge in the territories of any of them. Also part of the standard element are provisions that criminalize, in addition to the primary offences defined in each particular treaty, ancillary offences, typically attempts to commit and participation as an accomplice in the commission of the primary offences. Other important provisions of the standard element prohibit the characterization of the offences covered, for purposes of extradition or mutual legal assistance, as political offences, as well as their justification on other grounds of a general nature (e.g. their alleged ideological character). The standard element also includes certain miscellaneous provisions, such as savings, dispute settlement and final clauses, as well as a few other sundry provisions.

It is on the standard element of the most recent prior global counterterrorism treaty, i. e. the 1997 International Convention for the Suppression of Terrorist Bombings (Bombing Convention),<sup>12</sup> that the corresponding provisions of the Financing Convention are based.<sup>13</sup>

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Plastic Explosives for the Purpose of Detection, whose objective is merely to prohibit acts that facilitate but do not constitute acts of terrorism, deviates even more markedly from the normal pattern of counterterrorism treaties. As used in the remainder of the text, the expression "counterterrorism treaties" does not include these two treaties. (A 1937 counterterrorism treaty that did not come into force is referred to in note 19 *infra*.)

<sup>12</sup> Adopted by the United Nations General Assembly, on December 15, 1997, as the annex to its resolution 52/164, of that date. In respect of this treaty, cf. Samuel M. Witten, *The International Convention for the Suppression of Terrorist Bombings*, 92 AJIL 774–781 (1998). Interestingly, the treaty contains a provision (paragraph (a) of article 15) that, among other things, requires states parties to "prohibit in their territories illegal activities of persons, groups and organizations that ... knowingly finance ... the perpetration of offences" covered by it.

<sup>13</sup> Most of the provisions of the Financing Convention, pertaining as they do to what has been termed the "standard element," are identical with or very similar to provisions of the Bombing Convention. Thus: (a) article 4 of the former, requiring a state party "to adopt such measures as may be necessary ... [t]o establish as criminal offences under its domestic law the offences" covered and "make them punishable by appropriate penalties which take into account their grave nature," is identical with article 4 of the Bombing Convention; (b) article 2 (4 and 5) of the Financing Convention, on ancillary offences (i. e. attempts to commit an offence, acts of complicity therewith, organizing or directing others to commit an offence, and contributing to the commission of an offence by a group of persons acting with a common purpose), is almost identical with article 2 (2 and 3) of the Bombing Convention; (c) article 6 of the Financing Convention, precluding certain abstract considerations from justifying the offences covered, is *mutatis mutandis* identical with article 5 of the Bombing Convention; (d) articles 7 (4) and 10 (1) of the Financing Convention set out the fundamental *aut dedere*

## 2. Primary Offences Provided for in the Financing Convention

Each of the prior counterterrorism treaties complemented its predecessors in what could be described as a self-contained manner, the offences covered being autonomous, i. e. entirely distinct from the ones defined in those treaties. In contrast, the offences that the Financing Convention covers are, in a sense, grafted upon other wrongful acts, i. e. either the offences defined in those prior counterterrorism treaties, or another wrongful act, namely one that the Financing Convention defines in the abstract and, although in the nature of a terrorist act, does not coincide with any of the offences defined in the prior counterterrorism treaties.

The relevant provision of the Financing Convention is paragraph 1 of article 2, in conjunction with the Annex to the Convention. These provisions are, together with paragraph 1 of article 1 of the Convention, which defines a fundamental term figuring in paragraph 1 of article 2, i. e. the term "funds," the key elements of the Convention. Paragraph 1 of article 2 reads 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 within the scope and as defined in one of the [counterterrorism] trea-

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*aut judicare* principle in the same terms as articles 6 (4) and 8 (1) of the Bombing Convention; (e) article 9 of the Financing Convention, on the treatment by states parties and the rights of alleged perpetrators of offences covered by it, is identical with article 7 of the Bombing Convention; (f) article 10 (2) of the Financing Convention, on service of sentences imposed in one state that extradited the person sentenced, is identical with article 8 (2) of the Bombing Convention; (g) article 11 of the Financing Convention, on extradition, is identical with article 9 of the Bombing Convention; (h) article 12 (1 and 5) of the Financing Convention, on reciprocal assistance between states parties in criminal investigations, or criminal or extradition proceedings, is identical with article 10 (1 and 2) of the Bombing Convention; (i) articles 14 and 15 of the Financing Convention, prescribing, respectively, that requests for extradition shall not be denied on account of the alleged political nature of the corresponding offences and prohibiting requests for extradition or legal assistance from being denied on the grounds that they are improperly motivated, are identical, respectively, with articles 11 and 12 of the Bombing Convention; (j) articles 16, 17 and 19 of the Financing Convention, on, respectively, the transfer from one state party to another, for certain purposes, of persons serving sentences in the former, fair treatment of persons in respect of whom measures are taken or proceedings are carried out, and communication to the United Nations Secretary-General of the outcome of prosecutions under the Convention, are identical with articles 13, 14 and 16, respectively, of the Bombing Convention; (k) articles 20 and 22 of the Financing Convention, which aim to prevent states from abusing their rights under the Convention, are identical with articles 16 and 18 of the Bombing Convention; (l) article 21 of the Financing Convention, providing for the prevalence of general international law, and in particular the United Nations Charter and international humanitarian law, over the Convention, is identical with article 19 (1) of the Bombing Convention; (m) article 24 of the Financing Convention, which, subject to the possibility of opting out, mandates arbitration as a means of settling disputes on the interpretation or application of the Convention (and recourse to the International Court of Justice if no agreement is possible on the terms of arbitration), is identical with article 20 of the Bombing Convention; (n) article 27 of the Financing Convention, which allows states parties to denounce it, is identical with article 23 of the Bombing Convention.

For a summary of and comments on the provisions of the Bombing Convention referred to in this note, see Witten, *supra* note 12, at 777-781.

ties listed in the annex;<sup>14</sup> or (b) Any other act intended to cause death or serious bodily injury to a civilian, or 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." (Emphasis added.)

*a) The notion of "funds"*

In regard to the scope of the above-quoted paragraph, attention must be drawn to the definition to which reference has been made, namely that of the third of the words underlined in the quotation, that is, the term "funds."

The inclusion in multilateral treaties adopted under United Nations auspices of definitions of the terms they use, which definitions are akin to the logical category of "stipulative definitions,"<sup>15</sup> is a fairly common feature of those treaties. There is, however, a significant difference between the definition of "funds" contained in the Financing Convention and the definitions that normally figure in other multilateral treaties. The latter definitions do not as a rule depart considerably from the common or dictionary definitions of the terms defined, or, if they do, the departure is not very significant.<sup>16</sup> The contrary is, however, the case with the definition in the Financing Convention to which reference has been made, i. e. that of the term "funds." Thus, as defined in the relevant provision of the Convention, i. e. paragraph 1 of article 1, this term 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." (Emphasis added.) The meaning of the term in question is thus stretched very far beyond its dictionary meaning, which is that of "pecuniary resources,"<sup>17</sup> to cover any tangible or intangible "asset." Thus, animals, buildings

<sup>14</sup> These treaties are the following: 1. Convention for the Suppression of Unlawful Seizure of Aircraft, of 1970; 2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, of 1971; 3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973; 4. International Convention against the Taking of Hostages, of 1979; 5. Convention on the Physical Protection of Nuclear Material, of 1980; 6. 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, of 1988; 7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, of 1988; 8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, of 1988; and 9. International Convention for the Suppression of Terrorist Bombings, of 1997.

<sup>15</sup> Cf. Irving M. Copi/Carl Cohen, Introduction to Logic, 132–133 and 486–488 (1990).

<sup>16</sup> An exception is the definition of the "continental shelf" in article 76 of the United Nations Law of the Sea Convention; this article expands the concept of continental shelf to include the continental slope and the continental rise.

<sup>17</sup> Cf. Merriam-Webster's Collegiate Dictionary, 10<sup>th</sup> ed., which defines the term "funds" to mean "available pecuniary resources."

or vehicles of any kind are "funds" for the purposes of the Financing Convention. A curious corollary of the violence thus done to the meaning of a rather precise term, which is made to cover virtually anything under the sun,<sup>18</sup> is that the title of the Financing Convention is a misnomer: in this title the meaning of the term "financing," which normally designates the provision of pecuniary resources, is stretched to the same extent as the definition of the term "funds," so that the title would be more appropriate if it referred not to "financing" but rather to "material assistance."

The act of terrorism that, as has been pointed out, is defined by the Financing Convention in the abstract, is the one specified in subparagraph (b) of paragraph 1 of article 2. This subparagraph creates a residual category whose purpose is to "catch" any act that clearly corresponds to what the layman normally understands by terrorist act but is not one of the offences defined in any of the treaties listed in the Annex to the Financing Convention. An example of such an act would be one by which individuals, without any attempt at kidnapping, would, in order to create terror in the general public, indiscriminately use firearms against a crowd in a public place (other than an airport) of any city or a rural area. This act (assuming that no explosive bullets are used) would be covered neither by the Bombing Convention, nor by any other of the counterterrorism treaties listed in the Annex to the Financing Convention.

An interesting characteristic of the residual class of wrongful acts in question is that their definition in subparagraph (b) of paragraph 1 of article 2 could well serve as a general definition of terrorism.<sup>19</sup>

The overall definition in paragraph 1 of article 2 of the Financing Convention is manifestly a complex one.

#### *b) The necessary mens rea*

The dichotomy between subparagraphs (a) and (b), already commented on, is clear and can hardly raise major difficulties. It is necessary, however, to break paragraph 1 down into its other basic elements.

<sup>18</sup> The only objects that, conceivably, might not be covered by paragraph 1 of article 1 would be those that, having no pecuniary value whatsoever, cannot be regarded as assets. (One wonders, however, if, assuming that such objects exist, any of them are likely to be of assistance to terrorists.)

<sup>19</sup> Although the need or usefulness of such a definition has long been emphasized, it has thus far proved impossible to adopt one. As is well known, the reason for this failure is that the question is a politically charged one. This arises, primarily if not exclusively, from the urging by many developing countries that the definition exclude acts of violence by national liberation movements and include so-called "state terrorism." (In respect of which cf. UN General Assembly resolution 39/159 of December 17, 1984.) For what could also be regarded as a general definition of terrorist acts cf. paragraph 2 (1) of the draft international convention on the suppression of terrorism submitted by India to the United Nations in 1996. (UN doc. A/C.6/51/6, Annex, of November 11, 1996.) (This definition borrows from the one contained in article 1 (2) of the 1937 Convention for the Prevention and Punishment of Terrorism. [Text in 19 League of Nations O. J. 23 (1938), and in 1 R. Friedlander, Terrorism: Documents of International and Local Control 253 (1979)].)

The first point to be noted in this respect is that the definition contained in the paragraph has two distinct branches, an active and a (largely) passive one, i. e. the provision of "funds" and the collection of "funds," each of which corresponds to a separate offence.<sup>20</sup> Moreover, the commission of either offence involves, in addition to certain acts done by the offender (i. e. providing or collecting "funds"), a certain type of awareness by the latter that his action can or will entail certain wrongful consequences. This additional element constitutes the *mens rea* of each of the two offences.

The additional element, which is the same for both offences, subdivides into two variants. One is providing or collecting, as the case may be, "funds with the intention that they should be used ... in full or in part, in order to carry out" (emphasis added) an offence covered by either subparagraph (a) or subparagraph (b) of paragraph 1 of article 2. The other variant consists in likewise providing or collecting, as the case may be, "funds ... in the knowledge that they are to be ... [so] used" (emphasis added).

What is the basis of the distinction between these two variants? It would seem that the former is in the nature of a desire (or conviction of the appropriateness) that the funds provided or collected be used for supporting an act of terrorism, coupled with a belief that they probably will be so used, whereas the latter is in the nature of a certainty that they will be so used. It should be noted, however, that the distinction between the two variants appears to be one without much of a difference. For, on the one hand, there can never be absolute certainty as to how anyone will behave, and, on the other, it is inconceivable that someone who does not desire that material assistance provided to terrorists be used to further their criminal activities should knowingly provide any such assistance to them.<sup>21</sup>

<sup>20</sup> 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). Thus if, in accordance with paragraph 1 of article 2, someone first collects "funds" for terrorists and then provides them to the latter, he will have (successively) committed two separate offences. Moreover, in each particular case where "funds" have been collected and then provided to terrorists, the perpetrator of the "collection" offence need not be the person who has perpetrated the "provision" offence (since the transfer of the "funds" from one person to another cannot normally be regarded as a collection). From all these considerations it follows that each of the two offences is an altogether freestanding one. (For which reason it might have been wise for the drafters of the Convention not to have lumped them together.)

<sup>21</sup> A conceivable difference between the two variants might appear to be that, in a prosecution under the "intention" variant, lack of evidence that the recipients of the "funds" (or their intended recipients, if the charge is that of collecting) are terrorists would not necessarily prevent the defendant's conviction, whereas in a prosecution under the "knowledge" variant the contrary would be the case. (I can have the intention of murdering a person who, unknown to me, is dead; but in no case can I possibly have the knowledge that by doing a certain act I will have murdered that person.) In the opinion of the present author, however, such a difference between the "intention" and the "knowledge" variants, consistent as it may be with the letter of paragraph 1 of article 2, cannot be accepted: one cannot hold a person accountable for merely intending, wishing or believing that an act done by him will have consequences that are entirely outside the realm of possibility. Accordingly, under either variant, lack of evidence that the recipients (or intended recipients) of the "funds" are terrorists should be a valid defense in any criminal action brought under paragraph 1 of article 2.



The lack of a real difference between the two variants is corroborated by a contextual analysis of the key term of the former variant, i. e. the term "intention". It appears that there is some abuse of language here. For the general concept of intention is a reflexive one, in the sense that the intention of a person normally refers only to what that person plans to do himself, not to future actions by others.<sup>22</sup> This can nevertheless be countered, censurable though this abuse of language may be, by resorting to the well known concept of *dolus eventualis*, or (roughly) recklessness. This Latin term (a French synonym for which is *insouciance*) designates the criminal offence committed by a person who, knowing that an act he plans to carry out involves the risk of (generally physical) damage to others, nonetheless carries out the act.<sup>23</sup> In such cases one may consider that the actor has, indirectly, intended such harmful consequences as may arise from his behaviour. Thus the notion of *dolus eventualis* has been rendered in English by the expression "oblique" or "indirect" intention.<sup>24</sup> Similarly Swiss criminal courts have considered that the concept of intention can encompass the *dolus eventualis*.<sup>25</sup> But, whatever its nature, intention cannot exist without some degree of knowledge, for no criminal act takes place in a vacuum and, as has been pointed out by a well-known British author, "an act is not intentional as to a circumstance of which the actor is ignorant,"<sup>26</sup> which ties in with the German doctrine of *Tatbestandsvorsatz*.<sup>27</sup> We are thus brought to the knowledge variant.

It follows from the foregoing that the drafters of the Convention could well, without in any way changing the thrust of paragraph 1, have done away with the distinction between the two variants. This could have been done by adopting a single formulation, namely the one contained in the second of the two draft con-

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<sup>22</sup> One would normally experience some puzzlement on hearing someone, say John, state that he intends that someone else, say Peter, is to do something. Such a statement might make sense to the layman if, but only if, John has control so complete over the behaviour of Peter that the latter can be regarded, at least so far as the intended act is concerned, as his instrument. (Thus one might not be overly surprised to hear the master of a ship state that he intends that in exercising his duties the first mate is to do this or that.)

<sup>23</sup> Cf. Jean Pradel, *Droit pénal comparé*, 261 (1995). Two differences may be noted between the normal features of a *dolus eventualis* offence and the one dealt with here. In the normal case the reprehensible act or omission giving rise to the offence becomes criminal only upon the occurrence of a harmful result. Moreover the actor will not at all desire that result. In the case under consideration here, however, the offence is consummated by the culprit's action, whatever occurs later being irrelevant. In addition, the actor will not normally look askance at the harmful consequences of his act.

It can thus be considered that the *dolus eventualis* that is part of the offence defined in paragraph 1 of article 2 of the Convention is, to a certain extent, virtual (or otherwise *sui generis*) in nature.

<sup>24</sup> Cf. Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AJIL 573, at 590 (1999).

<sup>25</sup> Cf. Pradel, *supra* note 23, 261. Similarly, some American courts, in finding criminally liable motorists who as a result of speeding involuntarily hit pedestrians, have grounded their decisions on the idea that the motorists were deemed to intend the natural consequences of their acts. (Cf. Glanville Williams, *Criminal Law, The General Part*, 2<sup>nd</sup> ed., 35, note 5 [1961].)

<sup>26</sup> Cf. Williams, *supra* note 25, 148.

<sup>27</sup> Cf. paragraph 16 (1) of the German *Strafgesetzbuch*, as well as article 30 of the Rome Statute of the ICC.

ventions successively proposed by France, which formulation would have merely called for knowledge by the person charged with the offence that the financing provided by that person "will or could be used" to commit the terrorist offences in question.<sup>28</sup>

Another formulation that could have been used would have been one along the lines of what appears to have been the wording of a British Second World War Regulation. This would have consisted in defining the primary offence as that of providing funds with the intent to assist terrorists in the commission of terrorist offences.<sup>29</sup>

At any rate, given the inherent subtlety of the questions that the "intention" and "knowledge" variants elements of paragraph 1 of article 2 may raise, as well as the differences between the ways in which different national criminal laws envisage the criminal state of mind, it would appear that discrepancies in the application and interpretation of that key provision are likely to arise as between national criminal justice systems.

*c) The "unlawfulness" of the provision of funds*

Another difficulty may result from the use, in the introductory sentence of paragraph 1, of the adverb "unlawfully" to qualify the actions that constitute the collecting and providing offences. If paragraph 1 is, in this respect, taken literally, the effect of the adverb would be that if the conduct described in the paragraph is, under the law of a state concerned, unlawful but not criminal at the time of its becoming a party to the Financing Convention, then that state would not, after acquiring this status, be under a duty to criminalize that conduct. This would of course be the height of absurdity. The adverb in question, which did not figure in the draft originally presented by France (cf. note 8 *supra*), might however give rise to difficulties. To be sure, the adverb is also included, to qualify the primary offence sanctioned by the Bombing Convention, in the provision thereof that defines that offence. (Cf. the introductory sentence of paragraph 1 of article 2 of the Bombing Convention.) But in this case its inclusion can be justified (at least to a certain extent) on the ground that in all countries persons other than the military can lawfully use explosives in certain cases (e.g. in civil engineering work). It appears that the adverb in question was included in paragraph 1 of article 2 of the Financing Convention, at least in part, to meet concerns expressed by the UN High Commissioner for Refugees and the International Committee of the Red Cross, which feared that in providing assistance, under their mandates, to

<sup>28</sup> Cf. the introductory part of paragraph 1 of article 2 of the draft convention in Annex II of the report referred to in note 5 above. The same formulation is contained in language proposed by Brazil for that paragraph at the meetings of the *Ad Hoc* Committee.

For the full text of this proposal, see the report referred to in note 9 *supra*, 38, No. 28. Adoption of the formulation would have had the advantage of eliminating the word "intention," which, regard being had to its context, could prove perplexing in some countries and thus give rise to problems of interpretation.

<sup>29</sup> Williams, *supra* note 25, 40–41.

groups of individuals they might fall afoul of that paragraph.<sup>30</sup> In United States criminal statutes the adverb is used as a shorthand reference to grounds excluding criminal responsibility that are to be developed by the courts. The extrapolation of such authority to national courts as interpreters of paragraph 1 of article 2 might, conceivably, be helpful to those organizations. One wonders, however, whether it could not, by leading national courts to use the adverb as a pretext for acquitting individuals financing terrorism in certain cases, be harmful in other respects.<sup>31</sup>

*d) The link between the provision of funds and the terrorist acts*

Another point that should be noted is that the primary offences covered by the Financing Convention are defined in such a way that they may, in specific cases, render the perpetrators of those offences guilty of complicity (or attempted complicity) pure and simple with respect to offences within the scope of one of the treaties listed in the Annex to the Convention (or offences covered by subparagraph (b) of paragraph 1 of article 2, which defines an act that cannot but be sanctioned by the general criminal law of any state).<sup>32</sup> Thus, for instance, if the owner of an automobile were to make it available to terrorists for the specific purpose of its being used as a car bomb at a certain place at a certain time, as well as with the knowledge that it is to be so used, and the vehicle is in fact so used, then that person would, in accordance with paragraph 3 (a) of article 2 of the Terrorist Bombing Convention, be an accomplice to an offence covered by it. The owner of the automobile could thus be charged with having committed an ancillary offence under the Bombing Convention and another, primary, offence under the Financing Convention.

Another question, far more important than but not unrelated to the overlap just adverted to, deserves to be discussed at greater length. This question is the link that, in accordance with paragraph 1 of article 2 of the Financing Convention, should exist between the offences covered by the Financing Convention and those covered by the treaties listed in its Annex, or coming within the residual category

<sup>30</sup> Cf. UN docs. A/AC.252/1999/INF/2, Annex, and A/C.6/54/WG.1/INF/1, of March 26 and November 9, 1999, respectively, as well as paragraph 67 of Annex III to the report referred to in note 10 *supra*.

<sup>31</sup> The *travaux préparatoires* of the Convention show that the reason for the inclusion of the adverb in question was similar to the one that, as has been noted, justifies its inclusion in United States criminal statutes. (Cf. paragraph 67 of the Informal Summary of the Discussions in the Working Group that is contained in Annex III to the report referred to in note 10 *supra*; the reference in this paragraph to "ransom payments" as being lawful is quite noteworthy; equally worthy of being pointed out is the reference in paragraph 81 to "lawful acts of national liberation movements.")

<sup>32</sup> In fact the language of subparagraphs (a) and (b) of paragraph 1 of article 2, which begin with the words "[a]n act" and "[a]ny other act," respectively, seems to suggest that what the drafters of these provisions had in mind were no more than acts of complicity pure and simple. Such an interpretation (which at any rate may not be entirely consistent with paragraph 3 of article 2) should nevertheless be rejected, as largely depriving the Financing Convention of useful effect.

defined in subparagraph (b) of that paragraph.<sup>33</sup> As provided by the latter, in order that an act (whether of providing or of collecting "funds") falling within the definition contained in the introductory sentence of the paragraph constitute an offence covered by the Financing Convention, it is necessary that the person who, as the case may be, has provided or collected the "funds," have done so with the "intention" or in the "knowledge" that they are to be used, in full or in part, to carry out an offence covered by one of the treaties listed in the Annex, or falling within the residual category.

This would mean that if in the trial of a person charged with an offence under the Financing Convention the prosecutor proves that the defendant has provided or collected "funds" as laid down in paragraph 1 of article 2, that the actual or intended recipient or recipients of the "funds" were terrorists and as such have committed and/or are willing and able to commit any of the terrorist offences referred to in subparagraphs (a) and (b) of that paragraph, and that the defendant was aware of this, the evidence will fall short of what is needed to secure the conviction sought. The prosecutor will still have to prove that all has gone as further specified in paragraph 1, namely that in providing or collecting the "funds" the defendant has intended that they should be used or known that they are to be used to carry out an act within the purview of one or the other of those subparagraphs.

The interpretation of paragraph 1 underlying this conclusion is buttressed not only by the letter of paragraph 1, but also by paragraph 2 of article 2, as well as article 23 of the Financing Convention. In conformity with paragraph 2, if a state, on becoming a party to the Convention, is not a party to one of the treaties listed in its annex, that state may, at that time, declare that "in the application ... to" it of the Convention that "treaty shall be deemed not to be included in the annex;" paragraph 2 complements the latter provision by laying down that if a state party to the Convention ceases to be a party to a treaty listed in its annex, it may make a declaration having the same effect "with respect to that treaty." Article 23 of the Convention lays down, for its part, a procedure for adding future global multilateral treaties to its Annex. These provisions seem to reflect considerable rigour on the part of the drafters of the Convention with respect to the link established in paragraph 1 of article 2 between the offence of providing or collecting "funds" and their use to carry out an offence precisely covered by subparagraphs (a) or (b) of paragraph 1 of article 2.

There are several reasons why, regrettably, it will, in many if not most cases, be impossible to prove the existence of the one-on-one link that thus appears to be required between an act of collecting or providing "funds" and an offence specifically covered by one of the treaties listed in the annex or falling within the residual category.

<sup>33</sup> Subject to paragraph 2 of article 2 of the Financing Convention, a provision to be commented on later, for a treaty listed in the annex to apply with respect to any particular state party to the Financing Convention it is not necessary for that state to be a party to that treaty.

The specific use to which the recipient or recipients will put the “funds” received will as a rule be a matter of indifference to whoever provides material assistance of any kind to a terrorist or a terrorist group or organization. What will determine that person to render the assistance is usually no more than that person’s desire to support the particular cause that the recipient or recipients promote. It is moreover unlikely that the latter will specialize in acts covered by this or that counterterrorism treaty (or subparagraph (b)). In addition, it may be the case that at the time they receive the “funds” the terrorist or terrorists have not yet decided on their next strike. Finally, it is quite probable that, for obvious security reasons, terrorists may be unwilling to reveal their plans to persons outside their inner circle, even when they are a source of assistance. It follows that very frequently, if not normally, whoever provides “funds” or (*a fortiori*) collects them for terrorists will have virtually no idea about the precise use to which they will be put.

Besides, and perhaps more importantly, it will often be very difficult if not impossible to establish a precise link between items provided to terrorists and a particular act or acts of terrorism committed by the recipient(s). What will happen in the instances where the “funds” provided take the form of pecuniary resources, which will generally be the case, is that the resources, being perfectly fungible, will, in the hands of the terrorist or terrorists that received them, merge with their other pecuniary resources in a way that makes it impossible to link the particular provision of “funds” with a particular terrorist act.<sup>34</sup> And clearly this is *a fortiori* the case with the collection of “funds.” Such difficulties will be compounded whenever a terrorist group or organization carries out activities, lawful or unlawful, other than terrorist acts. One could accordingly, in respect of the provision or collection of purely pecuniary resources, argue that, in strictness, it does not normally make sense to speak of an intention or, *a fortiori*, of knowledge, that they are to be used to carry out a specific act of terrorism or one of a specific type.<sup>35</sup>

For all these reasons it would appear that, regard being had to the importance attributed by article 31 (1) of the Vienna Convention on the Law of Treaties to the

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<sup>34</sup> A colorful simile that is apropos here is the impossibility of unscrambling scrambled eggs. (It may be noted that, as shown by paragraph 6 (b) of article 5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the authors of this treaty realized that financial resources could become “intermingled”. [Text in 28 (I) International Legal Materials 497 (1989)].)

<sup>35</sup> One can hardly expect terrorists to use a specific financial contribution to set up a trust fund that would receive only monies destined for defraying the commission of a particular terrorist act. More realistic would be the case where a cheque received by terrorists would be endorsed to a purveyor of weapons or explosives used for committing a particular terrorist crime. An analogous but simpler case would be that where the contributor of an amount of money to terrorists would himself pay the purveyors. But such cases are not likely and at any rate the facts would often be difficult to prove.

“object and purpose” of a treaty, paragraph 1 of article 2 of the Financing Convention, whose object is epitomized by its very title,<sup>36</sup> should be interpreted to mean that to convict a person of a primary offence under the Convention it is sufficient to prove that the recipient or recipients, actual or intended, of the “funds” are terrorists, that that person was aware of this, and that accordingly he or she had to know that the “funds” would probably be used (or could be used) to commit an offence or offences covered by one of the treaties listed in the Annex to the Financing Convention, or falling within the residual category. It is submitted that the discrepancy between this liberal interpretation of the Convention and the letter of paragraph 1 of article 2 of the Convention is sufficiently minor to justify that interpretation.

This raises a difficulty, however. If a state party to the Convention, either because, treaties being self-executing under its legal system, paragraph 2 of article 1 of the Convention may be applied directly by its courts,<sup>37</sup> or, this not being the case, it has enacted a statute defining the offences provided for in paragraph 1 of article 2 of the Convention in substantially the same way as that paragraph, then its courts could not adopt the liberal interpretation of the Convention that has been advocated without violating the principle *nullum crimen sine lege*.<sup>38</sup>

It follows that every state should, on becoming a party to the Convention, enact a statute embodying that interpretation, i. e. one prescribing that to commit an offence under the Convention it suffices that the accused has knowingly provided funds, as defined in the Convention, to individuals likely to use them to commit offences as defined in subparagraphs (a) or (b) of paragraph 1 of article 2 of the Convention.

#### e) Specific issues

Strictly speaking, the offences to which the Financing Convention applies, as defined in paragraph 1 of article 2, are victimless ones. The reason is that no harm comes within the objective elements of those offences, as thus defined. It may be noted, moreover, that, unlike the offence of providing funds, the separate offence of collecting them cannot in and of itself be an even indirect source of

<sup>36</sup> Cf. also the second, ninth, tenth and twelfth paragraphs of the preamble of the Financing Convention, in which, respectively, states parties declare themselves to be “[d]eeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,” state that “the financing of terrorism is a matter of grave concern to the international community as a whole,” note “that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain,” and express their conviction “of the urgent 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” (emphasis added).

<sup>37</sup> There are likely to be few, if any, states parties to the Convention for which paragraph 1 of article 2 is self-executing.

<sup>38</sup> Cf. the provision in article 22 of the Rome Statute that “the definition of a crime shall be strictly construed.” The article adds that “[i]n case of ambiguity, the definition shall be interpreted in favour of the person being ... prosecuted or convicted.”

harm.<sup>39</sup> It was therefore not absolutely necessary for the drafters of the Financing Convention to have provided in it, as they did in paragraph 3 of article 2, that “[f]or an act to constitute” an offence under the Convention, “it shall not be necessary that the funds were actually used to carry out an act of terrorism.”

The nature of the offences criminalized by the Financing Convention accounts for a significant difference between it and the counterterrorism treaties it complements. Being as they are grave instances of violent behavior (murder or manslaughter, mayhem, wounding, kidnapping, or the destruction of or severe damage to property), the offences criminalized by those treaties can hardly not be punishable under the general criminal law of any state. It therefore seems that, in order to fulfil its obligation to criminalize the offences defined by a particular one of the treaties in question, a state party for which treaties are not self-executing need not normally take any specific legislative action.<sup>40</sup> Such is clearly not the case, however, with the offences criminalized by the Financing Convention, which, given their nonviolent, victimless and extremely specific nature, are not likely to constitute offences under the general criminal law of states.

Another difference between the Financing Convention and prior counterterrorism treaties may also be noted. Since those treaties normally define the offences they cover without any reference to terrorism, they may apply in practice to offences committed for purposes unrelated to terrorism. (Thus someone placing a bomb on an airliner for the sole purpose of collecting on a life insurance policy taken out by a passenger falls afoul of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.)<sup>41</sup> The contrary is the case with the Financing Convention.

### 3. Jurisdiction of States Parties over Offences under the Financing Convention

Under either the Financing or the Bombing Convention a state party is, by virtue of a provision that can be regarded as part of the standard element, obligated

<sup>39</sup> In respect of the “collecting” offence, two points may be noted. It would appear, in the first place, that in this case the all-embracing definition of the term “funds” is hardly appropriate: Can one take up a collection of, say, weapons in aid of terrorists? Nor does it seem possible that a collection of “funds” could be carried out “indirectly.”

<sup>40</sup> Cf. Gilbert Guillaume, *Terrorisme et droit international*, Recueil des Cours, Hague Academy, vol. 215, 327 (1989). Thus, as stated in the general report on terrorism submitted by the UN Secretary-General to the General Assembly in 1999, Austria and Sweden, which are parties to the majority of global counterterrorism treaties, have no specific criminal legislation against terrorism and accordingly sanction terrorist acts under their general criminal law. (UN doc. A/54/301, paras. 7 and 31.)

<sup>41</sup> It is submitted that there is nothing wrong with this wide casting of the net. So long as an offence falling within the definition of one of the treaties has not been completely cleared up (and even a conviction will not necessarily achieve this), the public (and the authorities) will suspect that the offence has been a terrorist one, for which reason it will, by arousing or stimulating fear of terrorist acts, have promoted the aims of terrorism.

to establish its jurisdiction over an offence covered by them in any of the following three cases: whenever it is committed in its territory,<sup>42</sup> by one of its nationals, or on board a vessel or an aircraft flying its flag or registered under its laws, respectively.<sup>43</sup> Equally under either Convention a state party may establish its jurisdiction over the offences covered by it if the perpetrator of the offence is a stateless person residing habitually in its territory, or the offence is committed on board an aircraft operated by its government.<sup>44</sup> Under the Bombing Convention a state party may further establish its jurisdiction over an offence covered by it if the offence is committed against a national of the state or against the state or one of its facilities abroad, including its diplomatic or consular premises, or in an attempt to compel the state to do or abstain from doing any act.<sup>45</sup> Since, as has been observed, the offences covered by the Financing Convention are in themselves, as therein defined, victimless ones, the Financing Convention could not possibly contain provisions duplicating exactly the ones just referred to. It does, however, contain provisions based on them. They are to the effect that a state party to the Financing Convention may establish its jurisdiction over an offence covered by it if the offence is directed towards or resulted in the carrying out of an offence referred to in subparagraphs (a) or (b) of paragraph 1 of article 2 of the Financing Convention, provided that the offence falls into one of three categories: (1) the offence is committed in the territory or against a national of the state, (2) it is committed against the state or one of its facilities abroad, including diplomatic or consular premises, or (3) it is committed in an attempt to compel the state to do or abstain from doing an act.<sup>46</sup>

#### 4. Scope of the Financing Convention

As provided in article 3 of the Financing Convention, which is *mutatis mutandis* identical with article 3 of the Bombing Convention, the Financing Convention applies only in cases other than those where "the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under" article 7 to exercise jurisdiction. Paralleling article 3 of the Bombing Convention, article 3 of the Financing Convention exempts from this limitation, however, the applicability, "as

<sup>42</sup> This may create difficulties in cases of transboundary financing.

<sup>43</sup> Paragraph 1 of article 7 of the Financing Convention, identical with paragraph 1 of article 6 of the Bombing Convention.

<sup>44</sup> Subparagraphs (d) and (e) of paragraph 2 of article 7 of the Financing Convention, identical with subparagraphs (c) and (e), respectively, of paragraph 2 of article 6 of the Bombing Convention.

<sup>45</sup> Subparagraphs (a), (b) and (d) of paragraph 2 of article 6 of the Bombing Convention.

<sup>46</sup> Subparagraphs (a), (b) and (c) of paragraph 2 of article 7 of the Financing Convention. (It may be noted that in this respect difficulties may arise from the link [unfortunately] required by paragraph 1 of article 2 between the offences it defines and those covered by the treaties listed in the Annex [or defined in subparagraph (b) of that paragraph].)



appropriate,” of its articles 12 to 18, on legal assistance and other forms of cooperation between states parties.<sup>47</sup>

#### 5. Position of Legal Entities in Respect of the Commission of Offences under the Convention

A significant difference between the Financing Convention and the prior counterterrorism treaties lies in that, unlike what is the case with the offences defined in the latter treaties, all of which are acts for whose commission legal entities could hardly be held directly responsible, the offences defined by the Financing Convention, which consist in providing or collecting pecuniary resources, may well be attributed directly to such entities. And, as is well-known, in certain countries legal entities are subjects of the criminal law.

One might therefore have expected the Financing Convention not to differentiate, in the sanctioning of the offences it defines, between natural persons and legal entities. And one could indeed, by reading paragraph 1 of article 2 in complete isolation, be inclined to feel that the term “person,” as used in the introductory sentence of that paragraph, encompasses legal entities.

Since, however, in many if not the majority of states only natural persons can incur criminal responsibility, the drafters of the Financing Convention steered clear of putting legal entities on a footing of equality with natural persons insofar as the perpetration and sanctioning of the offences it covers are concerned. They did so by including in the Convention article 5, which reads as follows:<sup>48</sup>

“1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.

2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.

3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.” (Emphasis added.)<sup>49</sup>

<sup>47</sup> Regarding these articles, see note 13 *supra*, as well as the relevant parts of the remainder of the text.

<sup>48</sup> This article of the Financing Convention largely parallels article 5 of the Revised draft United Nations Convention against Transnational Organized Crime. (Text in UN doc. A/AC.254/4/Rev. 4, of July 19, 1999.)

<sup>49</sup> The underlined phrase of paragraph 1 is of particular importance, since it lays down the condition precedent to the applicability of article 5. In so doing it adopts the narrow version of corporate criminal responsibility found in certain common law jurisdictions. It may further be noted that the country where the offence to which the phrase refers is committed will normally be the country where the legal entity concerned is “located” or under whose laws it is “organized,” but that this will

It is interesting to note that, although all states are legal entities, the language of paragraph 1 of article 5 clearly precludes a state party to the Convention from holding another one, under that paragraph, liable for committing offences as set forth in article 2 of the Convention. For, whatever may be meant by the location of a legal entity, no state can possibly be deemed to be "located" in "the territory" of another one or "organized under its laws." Thus if the embassy of a state party in another state party carries out in the territory of the latter state acts falling within the definition of paragraph 1 of article 2, the latter state could not reasonably consider that the former should (assuming that state immunity does not stand in the way) be held liable under paragraph 1 of article 5. For embassies, in addition to lacking legal personality, are not "organized under" the laws of the state where they carry out their activities.

As regards public authorities or public entities of a state party to the Convention acting in the territory of a foreign state also a party to the Convention, it would also appear that paragraph 1 of article 5 precludes the latter state from holding them liable thereunder for the commission in its territory of offences set forth in article 2, even if they have branches or offices in the territory of that state. Needless to say, every state party is obligated to apply paragraph 1 of article 5 to any of its public authorities or public entities.

#### 6. Control of "Funds"

Another article of the Financing Convention not forming part of what has been called the standard element should also be noted. This is article 8, which is based on an OECD treaty, namely the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, of 1990. Article 8 obligates states parties to the Financing Convention to take measures to identify, detect, freeze, seize or decree forfeiture of "funds" used or allocated to commit offences covered by the Convention and proceeds therefrom.

#### 7. Cooperation between States Parties

In its introductory sentence and subparagraph (a), paragraph 1 of article 18 of the Financing Convention requires states parties to cooperate against offences covered by the Convention by preventing and countering "preparations in their respective territories for the commission of those offences within and outside their territories, including measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize, or en-

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not necessarily be the case. It may be observed further that the nebulous notion of a legal entity being "located in" a certain territory, which, in addition to jarring with the *corpus mysticum* nature of any legal entity, is not among the criteria normally applied to determine the law governing the status of legal entities, is liable to cause difficulties of interpretation. (It should be recognized, however, in fairness, that use of more orthodox criteria would not have entirely eliminated those difficulties.)

gage in the commission of" those offences.<sup>50</sup> The remainder of article 18 contains provisions of a specifically financial nature that aim to strengthen cooperation between states parties. In particular those provisions obligate them to take measures requiring their financial institutions to identify their customers, whether usual or occasional, paying special attention to unusual or suspicious transactions. Article 18 also imposes on those states the obligation to exchange, through Interpol if they so wish, information to prevent offences covered by the Convention, in particular by cooperating in the conduct of inquiries. In addition article 18 sets forth a number of specific measures that are not mandatory for states parties but which they are required to "consider" in that connection.

It should be noted further that particular importance appears to attach to paragraphs 2 and 3 of article 12 of the Financing Convention. These provisions deny states parties the possibility of turning down requests for legal assistance on the ground of bank secrecy (limiting, however, use by a state party of information obtained from another to the purposes stated in the corresponding request, unless the state party that complied with it otherwise consents). A somewhat comparable provision is article 13, which precludes states parties from refusing in specific cases to comply with the provisions of the Convention on extradition or mutual legal assistance in respect of offences it covers by characterizing them as "fiscal offences."

### III.

As has been noted, the core provisions of the Financing Convention, namely those that define the primary offences it is intended to suppress, are liable to raise difficulties of interpretation and application (not all of which have been commented on). Moreover it is to be regretted that, if taken literally, the link that paragraph 1 of article 2 establishes between acts sanctioned by the Convention and specific terrorist acts could, as has been observed, inhibit its application to certain modalities of terrorism financing. One can hardly expect these difficulties not to be compounded by the discrepancies in the application of the Convention that the diversity of national criminal systems are apt to generate (to say nothing of the fact that they will be interpreted in different countries through the different language versions). The drafters of the Convention would, moreover, have been well-advised to leave out paragraph 2 of article 2. In addition certain weaknesses in the provisions that call for cooperation between the parties are to be regretted.<sup>51</sup>

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<sup>50</sup> Cf. the introductory sentence and paragraph (a) of article 15 of the Bombing Convention, which parallel the provisions of the Financing Convention referred to.

<sup>51</sup> These are provisions that, instead of requiring states parties to take certain measures, obligate them merely to consider taking them or are otherwise merely permissive. (Cf. paragraph 4 of article 8 [a provision that is, however, of little practical importance], paragraph 4 of article 12 [a provision already mentioned], and, particularly, the measures numbered (i) to (iv) in paragraph 1 (b) of article 18, as well as paragraph 4 of the same article.)

It is nevertheless to be hoped that given good faith on the part of the states parties and a genuine desire to accomplish the objectives of the Financing Convention, it will make a significant contribution to the struggle against the scourge of international terrorism.<sup>52</sup>

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<sup>52</sup> It would seem that only with the assistance of persons with a solid background in finance, as well as expert knowledge, not only of terrorism in general, but also of the methods by which terrorists finance their nefarious activities, of the importance to them of such financing, and of the degree of effectiveness attained in the application of earlier counterterrorism treaties, could one, with a modicum of confidence, hazard a prediction about how effective the Financing Convention is likely to be.