

LEGISLATING TO MEET THE INTERNATIONAL NORMS AND STANDARDS

Countries that have already legislated to implement the obligations and standards related to combating the financing of terrorism have done so in many different ways. Some countries have enacted comprehensive legislation that deals with many aspects of combating terrorism and its financing, sometimes going well beyond the international requirements. Others have designed legislation to deal with one or a few of these requirements at a time—for example, adopting legislation dealing specifically with the requirements of the Convention, or those of the Convention and the Resolution taken together.

Each approach has its own advantages and it is up to each country to decide on how to proceed, depending on its own needs. In some cases, where the existing legal framework, and in particular the anti-money laundering laws, are weak or outdated, a comprehensive law covering in a unified manner both AML and CFT may be a good solution. It provides for a more coherent legislative response and reduces the risk of gaps or loopholes. In other cases, it may be preferable to make some amendments to the existing laws. This approach has the advantage of being quicker. But the resulting legal construction may lack clarity and coherence.

What follows is a very brief and general presentation of this topic. While a discussion of the criminal legislative policy issues related to the prevention, detection, and repression of terrorism is beyond the scope of this handbook, it is hoped that the very general presentation that follows will help clarify the issues facing authorities as they consider the possible scope of legislation, and will also help explain the wide variations in the scope of recent laws that contain provisions on the financing of terrorism.

General

The legislative policy response to the international obligations related to the prevention and repression of terrorism financing may be made part of a wider legislative initiative to combat terrorism generally, or it may be considered on its own. Some countries have decided to respond to the events of September 2001 by adopting a wide-ranging set of measures to facilitate the detection, prevention, and repression of terrorism. These comprehensive

laws emphasize preventive measures. Before the enactment of such comprehensive legislation, these countries generally dealt with terrorism by adopting provisions repressing specific acts, notably those criminalized under the international conventions on the suppression of terrorist acts, and by relying on general criminal law provisions, such as those relating to murder, sabotage, or unlawful use of explosives. Countries such as Canada, the United Kingdom, and the United States have adopted comprehensive anti-terrorism legislation. As the Canadian Minister of Justice put it before the Canadian Senate Committee considering the proposed legislation, “Our current laws allow us to investigate terrorism, prosecute and impose serious penalties on those who have engaged in various specific activities generally associated with terrorism.... However, these and other laws are not sufficient to prevent terrorist acts from occurring in the first place.... Our current laws do not adequately address the reality of how terrorist cells operate and how support is provided. Our laws must fully implement our intention to prevent terrorist activity and, currently, they do not.”⁸⁸ The Canadian Terrorist Act 2001⁸⁹ is intended to provide law enforcement authorities with the tools to identify and stop terrorist plots before they can be carried out.⁹⁰ In addition to measures designed to respond to the country’s obligations under the Resolution and the Convention, the Act “addresses the core needs for comprehensive criminal measures against terrorism, including provisions on the fundamental issue of definition.”⁹¹

The USA PATRIOT Act⁹² is also a wide-ranging law providing expanded powers to police authorities, passed in the immediate aftermath of the terrorist attacks of September 11, 2001 in the United States. The Act gives federal officials greater authority to track and intercept communications and vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to close U.S. borders to foreign terrorists and to detain and remove those within its borders. It creates new crimes and new

⁸⁸ The Honorable Anne MacLellan, Minister of Justice and Attorney General of Canada, appearance before the Senate Committee on the Subject Matter of Bill C-36, December 4, 2001, quoted in Richard G. Mosley, “Preventing Terrorism, Bill C-36: the Anti-Terrorism Act 2001,” in *Terrorism, Law & Democracy, How Is Canada Changing Following September 11?*, Canadian Institute for the Administration of Justice 147, 2002.

⁸⁹ Anti-Terrorism Act, Statutes of Canada 2001, Chapter 41 [Canada].

⁹⁰ Mosley, *supra* note 88, at 150.

⁹¹ *Id.* at 153.

⁹² United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Public Law 107-56, October 26, 2001.

penalties, for use against domestic and international terrorists.⁹³ The law implementing the Convention was adopted later.⁹⁴

Other countries, which had already criminalized various forms of terrorism, recently modified their legislation as necessary to implement the Convention, and included in the same law additional powers to the police in the detection of terrorist offenses. This is the case, for example, of France.⁹⁵

Still other countries have taken the requirements of the Convention and some of the requirements of the Resolution together and have legislated to incorporate their provisions into local law. An example is the Barbados Anti-Terrorism Act, 2002-6. The Act sets out a new terrorism offense, with a definition structured in a manner similar to that of the Convention and provides the legislative tools to repress such acts and their financing, as well as the freezing and forfeiture of terrorist funds.

Finally, some countries have adopted specific legislative measures to incorporate the Convention into their legislation, while limiting the scope of new legislation to what is needed to make the provisions of the Convention operational. For example, such legislation may specify to what extent legal entities are to be made criminally responsible for acts of individuals, a question left to the decision of each party to the Convention. Similarly, as the Convention does not specify the penalties for the acts parties are to criminalize, the law may specify such penalties. For example, Monaco's Ordonnance Souveraine No. 15.320 of April 8, 2002 on the repression of the financing of terrorism defines the offenses set out in the Convention and the treaties set out in its Annex, and contains provisions dealing with matters on which the Convention leaves options to the states parties.⁹⁶ A separate ministerial decree, based on the Ordonnance Souveraine by which Monaco made the Convention applicable internally, provides for the freezing of assets of persons and organizations listed in annexes to the decree.⁹⁷

⁹³ Charles Doyle, *The USA PATRIOT Act: A Sketch*, CRS, Library of Congress (2002), <http://fpc.state.gov/documents/organization/10091.pdf>.

⁹⁴ Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Public Law 107-197, Title II, §202(a), June 25, 2002, 116 Stat. 724, amended by Public Law 107-273, Div. B, Title IV, § 4006, November 2, 2002, 116 Stat. 1813 (18 U.S.C. §2339C).

⁹⁵ Loi no 2001-1062 du 15 novembre 2001 relative à la sécurité quotidienne, *Journal Officiel*, 16 novembre 2001 [France].

⁹⁶ Ordonnance Souveraine no 15.320 du 8 avril 2002 sur la répression du financement du terrorisme, *Journal de Monaco, Bulletin officiel de la Principauté*, no 7542, April 12, 2002 [Monaco].

⁹⁷ Arrêté Ministériel no 2002-434 du 16 juillet 2002 portant application de l'ordonnance souveraine no 15.321 du 8 avril 2002 relative aux procédures de gel des fonds aux fins de lutte
(continued)

Similarly, in Cyprus, a law authorizes the ratification of the Convention, and includes the legislative elements necessary to implement the Convention, such as the penalties and the provisions regarding the liability of legal persons.⁹⁸

These examples illustrate the variety of solutions to the problem of defining the scope of legislation to be enacted in connection with the coming into force of the Convention in a country, and in the elaboration of the country's legislative response to Resolution 1373 (2001). The decisions on the appropriate scope of such legislation are based on a number of factors. First and foremost are the criminal policy objectives pursued through the proposed legislation—do the authorities intend to develop a comprehensive response to the threat of terrorism to be included in the proposed legislation, or are they proposing to deal only with the issues related to the financing of terrorism as they are defined in the Resolution, the Convention, or some position between these two? Second, do the authorities intend to establish a separate investigatory and procedural regime for terrorism offenses, or is it the intention to have the general regime cover these offenses? Third, what is the current arsenal of legislative provisions dealing with terrorism, and can they serve as the basis for provisions criminalizing the financing of terrorism? Fourth, do the authorities also intend to deal with all FATF Special Recommendations in the same law? A fifth consideration may be how the legislation compares with that of other relevant jurisdictions. (This consideration was explicitly stated in the case of the Canadian Anti-Terrorist Act, 2001.)⁹⁹

Designing the Implementing Legislation

Matters to Be Covered

The purpose of this section is to provide some guidance as to the drafting of legislation implementing the Convention and responding to the Resolution (as well as Resolutions 1267 (1999), 1333 (2000), and 1390 (2002)), taking

contre le terrorisme, *Journal de Monaco, Bulletin officiel de la Principauté*, no. 7566, July 19, 2002 [Monaco].

⁹⁸ A Law to Ratify the International Convention for the Suppression of the Financing of Terrorism, including supplementary provisions for the immediate implementation of the Convention, No. 29 (III) of 2001 [Cyprus].

⁹⁹ “While [Bill C-36] did not have to be the same as legislation in other countries such as the United States and the United Kingdom, any differences had to be explainable and defensible”—Richard Mosley, quoted in Nicole Baer, “Act of Terror, Justice Department moves quickly to craft balanced anti-terrorism legislation,” in 2-1 *Justice Canada*, Department of Justice.

into account the FATF Special Recommendations on Terrorism Financing. Table 4 summarizes the matters dealing with the prevention and suppression of terrorism financing in the Convention, the Resolution, and the FATF's eight Special Recommendations that are likely to require a legislative response, and provides some suggestions as to which laws could be amended to fulfill these requirements. The discussion that follows is based on the assumption that authorities intend to submit legislation to the legislative body to cover these matters.

Table 4. Summary of Items for Legislation

Topic	Convention	Resolution	FATF	Legislation
Criminalize the financing of terrorist acts.	2–7, 9, 17, 18 1(a)	1(a), 1(b)	II	Criminal Code (see Chapter 4, page 43)
Prevent financial support to terrorists and terrorist organizations.		1(d)	II	Criminal Code (see Chapter 4, page 43)
Freeze, seize, and confiscate terrorist assets.	8	1(c)	III	Criminal Code or Code of Criminal Procedure (see Chapter 4, page 55)
Cooperate internationally in investigations of financing and support of terrorist acts.	10–16	2(f)	V	Criminal Code, Code of Criminal Procedure, Anti-Money Laundering (AML) Law, Mutual Legal Assistance Law, others (see Chapter 4, page 60)
Become party to the “relevant conventions” and fully implement them.		3(d), 3(e)	I	The Convention is one of the “relevant conventions.” In most countries, ratification requires an act of parliament.

Topic	Convention	Resolution	FATF	Legislation
Require financial institutions to take preventive measures to detect and report FT transactions.	18 1(b)		IV	AML Law (see Chapter 4, page 63)
Establish internal and external channels of communications on suspected offenses, including use of Interpol.	18 3(3), 18 4		V	Criminal Code, AML Law, others (see Chapter 4, page 61)
Take measures for, inter alia, registering or licensing all money transmission agencies and detecting transborder cash movements	18 2(a), 18 2(b)		VI	Financial Services Law, Customs Law, others (see Chapter 4, page 63)
Require financial institutions to include originator information on all funds transfers.			VII	AML Law or regulations, Financial Services Law (see Chapter 4, page 63)
Ensure that nonprofit organizations are not used for financing terrorism.			VIII	Charitable organizations law or similar law (see Chapter 4, page 70)

In deciding on the specific structure of the legislation to be drafted, taking into account the general considerations outlined above as well as the list of requirements of the Convention, the Resolution, and the Special Recommendations, authorities would need to consider a number of practical questions. First, depending on the legal system involved, it may be that some of the requirements may be implemented without legislation. This would be the case in a country where ratified international treaties have the force of law. Even in such countries, however, it may be necessary to specifically

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incorporate the required criminal offenses in the criminal code (as most countries have done), so as to ensure that the code contains all criminal offenses, and that there is no doubt as to the applicability of other parts of the code (on evidence, certain general defenses, etc.) to the new offenses. With respect to those provisions that are to be the subject of legislation, another consideration would be whether all of them would be set out in one comprehensive law, or, if this is not the case, how the legislative provisions would be grouped. Similarly, authorities would need to consider existing legislation to determine if such legislation could be amended to meet certain requirements, rather than adopting a new law. In any event, the links between any proposed new legislation and existing laws, including in particular laws on money laundering, will need to be considered.

Model Laws

In addition to this handbook, authorities may consult a number of sources in designing proposed legislation, or in drafting specific provisions. Some countries have put references to their relevant legislation on the website of the Counter-Terrorism Committee of the Security Council.¹⁰⁰ Authorities may also consult a number of model laws. For example, the Commonwealth Secretariat has issued a number of model legislative provisions and commentaries, and “Implementation Kits” on various aspects of combating terrorism.¹⁰¹ The United Nations Centre for International Crime Prevention (CAP) is preparing legislative and implementation tools for the 12 global anti-terrorism conventions.¹⁰² The Caribbean Anti-Money Laundering Program has also issued Draft Legislation to Combat Terrorist Acts and Terrorist Financing.¹⁰³

¹⁰⁰ These laws may be consulted on the Web at http://www.un.org/Docs/sc/committees/1373/ctc_da/index.html.

¹⁰¹ *E.g.*, Commonwealth Secretariat, Model Legislative Provisions on Measures to Combat Terrorism (September 2002); and Implementation Kits for the International Counter-Terrorism Conventions (2002).

¹⁰² It is expected that these tools will be issued in 2003.

¹⁰³ Fitz-Roy Drayton, Caribbean Anti Money Laundering Programme, *Draft Legislation to Combat Terrorist Acts and Terrorist Financing*.

Issues of Human Rights

The Convention contains an indirect reference to human rights in Article 21, which states that “[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.”¹⁰⁴ The purposes of the Charter of the United Nations include the promotion and encouragement of “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹⁰⁵ The reference to international humanitarian law, which also appears in the Terrorist Bombing Convention,¹⁰⁶ would appear to be intended to safeguard the rights of populations in situations of armed conflicts, which is dealt with in international humanitarian law conventions.

While issues of human rights are more likely to arise in the context of the drafting of a comprehensive law on terrorism,¹⁰⁷ even a narrower law, dealing only with the legislative response to the Resolution and the Convention may raise such issues. In some countries, there was a concern that the generic definition of terrorist acts set out in the Convention for purposes of establishing the offense of financing such acts could be susceptible of abuse in view of its broad character. In particular, it was felt that certain forms of public protests, whether legal or illegal, could fall under the definition of terrorist acts. These countries have attempted to deal with the issue by adding interpretative language to the definition clarifying that strikes or protests do not constitute acts of terrorism unless certain other elements of the offenses of terrorism are present (see Chapter 4, page 47, for examples). More generally, each country will need to balance the need for legislation giving police and other authorities sufficient powers to detect and

¹⁰⁴ Article 17 also refers to international human rights in the context of the treatment of persons taken into custody and regarding whom other measures are taken or proceedings are carried out pursuant to the Convention.

¹⁰⁵ Art. 1, para. 3 of the U.N. Charter states, “The purposes of the United Nations are: [...] 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

¹⁰⁶ International Convention for the Suppression of Terrorist Bombings, Art. 19, para. 1.

¹⁰⁷ In many countries, concerns have been expressed with respect to the expanded powers given to the police in terrorism matters, as well as to questions of detention without charges and the rights of detainees to legal counsel. *See generally* Economic and Social Council, Commission on Human Rights, *Other Issues, Terrorism and human rights, progress report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur*, paras. 112–17, E/CN.4/Sub. 2/2002/31.

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prosecute acts of terrorism, including their financing and their preparation, with the need to preserve individual liberties, including basic privacy rights and the rights of offenders. Authorities may consult the guidance note issued by the Office of the High Commissioner for Human Rights and the Council of Ministers of the Council of Europe in this respect.¹⁰⁸

¹⁰⁸ See Office of the High Commissioner for Human Rights, *Note to the Chair of the Counter-terrorism Committee: A Human Rights Perspective on Counter-Terrorism Measures*, <http://www.un.org/Docs/sc/committees/1373/ohchr1.htm>; and Council of Europe, *Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on July 11, 2002 at the 80th meeting of the Ministers' Deputies* (September 2002).