CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL

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Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ

MODULE V

UNIT 16

Terrorism: Sector-specific conventions. Financing and money laundering

5th Edition

2013

AUTHOR

José Ricardo de Prada Solaesa

Senior judge, Criminal Division, National Criminal Court

Con el apoyo financiero del Programa de Justicia Penal de la Unión Europea
With the financial support from the Criminal Justice Programme of The European Union
Avec le soutien financier du Programme de Justice Pénale de l'Union Européenne

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1. SECTOR-SPECIFIC UN CONVENTIONS. SPECIAL REFERENCE TO TERRORISM

The international legal framework for combating terrorism. The international obligation for states to cooperate on a judicial level in the fight against terrorism

1.1. Introduction. Universal Scope

Terrorism is not a local phenomenon that affects just a few countries limited on a cultural or geographical level. It immediately became clear that it affected states in general, in one way or another. Therefore, albeit not in the same way or for the same reasons or with the same intensity, it has always been a source of concern for the International Community and, as a result, one of the ever-present items on the international political and legal agenda.

Nevertheless, it can be said that it has only been in recent times that the problems surrounding terrorism have come to the fore in all their intensity and crudity, although sufficient international consensus has not yet been achieved in order to establish a **universal definition of terrorism** nor, largely due to this reason, a **single global, universal convention on terrorism**. There are, however, as we have seen, several **Sector-specific Conventions** together with **other rules of international law** that attempt to establish a **universal system of cooperation** in the fight against terrorism.

1.2. Importance of the definition of terrorism. Acts and offences considered terrorist

Historically, the main obstacle to international cooperation in relation to terrorism has been the consideration of acts, which we today undoubtedly call

terrorist, as political offences or acts of a political nature or legitimated by purposes of this kind. In the international sphere, there was no minimum consensus regarding their punishment and criminal law treatment. They were generally considered a purely internal matter for each of the states and, as such, were not persecuted outside the borders of the state in question. As they were not recognised as offences by the rest of the states, they were not as such eligible for extradition. Meanwhile, their perpetrators often benefitted from protection and asylum on political grounds.

International cooperation in the fight against terrorism starts and runs parallel to the process of the de-politicisation of terrorism, i.e. the attempts to separate or disconnect it from political offences.

One of the main rules introduced by this new perspective in the internal sphere of a state was the French Act dated 22 March 1856, which did away with the classification of political offence in the case of attacks against foreign Heads of State and their families, which was obvious due to the essentially international nature of the victims of the crime. Extending this international status to other acts in which such clear international connections due to the subjects did not exist, proved more difficult.

It is logical that the first considerations on terrorism in international law are closely linked to international humanitarian law. This is particularly true in the case of the classification as terrorist acts of the conduct of foreign armies with regard to the civilian population in international armed conflicts. In this regard, the word terrorism was used for the first time at the end of the First World War when the Commission of Jurists set up to establish the violations of the law of war committed during this conflict considered that “systematic terrorism”[1] had been employed.

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[1] Fernández Sánchez, Pablo Antonio. *La obligación internacional de cooperar en la lucha contra el terrorismo* [*The International Obligation to Cooperate in the Fight Against Terrorism*]. Ministerio de Justicia. Madrid. 1992. Page 19.

1.3. The Convention of the League of Nations for the Prevention and Punishment of Terrorism[2]

The first major step towards the universal punishment of terrorism was taken by the League of Nations in 1934, with the preparation of the draft bill for the Convention for the Prevention and Punishment of Terrorism, which was finally approved in 1937[3], although it never entered into force.

From the outset, the Commission of Experts of the League of Nations responsible for drafting the bill realised that the main obstacle was finding an internationally accepted definition of terrorism. The special drafter?????? proposed a deductive method, seeking to establish an intermediate route between a general definition of terrorism, which seemed impossible, and the mere listing of specific acts which were considered terrorist. He limited his task to describing some general characteristics of terrorist acts, which, far from being unique and invariable, on the contrary, manifested themselves as a series of hateful acts of barbarism or vandalism, one of whose characteristics is that they tend to scare or depress a collective, paralysing its capacity to react and removing or attacking the leaders of these collectives.

The solution finally chosen was also a mixed one, combining an attempt at a general definition contained in Article 1.2, with a limited listing of terrorist acts in its articles. The general definition of terrorism read as follows: *"...criminal acts directed against a state and intended or calculated to create a state of terror in the mind of particular persons, a group of persons or the general public".* This definition, which is still of interest today, was criticised in its day for its tautological bent – terrorism is what causes terror among persons – (SOTTILE) and because it is at the same time too broad and too strict, in the sense that the

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[2] The immediate cause of this Convention was the assassination in Marseilles on 9 October 1934 of King Alexander I of Yugoslavia and the French Minister of Foreign Affairs, Louis Barthou. As a result of this historic episode, France took the initiative of drafting an International Terrorism Convention and of establishing an **International Court** for judging the individuals accused of the crimes envisaged. See Fernández Sánchez, Pablo Antonio, *op. cit*.

[3] Signed by only 24 countries, including Spain, and ratified only by India on 1 January 1941.

capacity to cause terror is in reality common to the majority of criminal acts, regardless of their purpose, and because it referred solely to states, when it was widely acknowledged that other subjects and institutions other than states or those dependent on states could also be the target of terrorism (DONNEDIEU DE VABRES).

1.4. Conventional rules of international humanitarian law

The second main landmark in the proscription of terrorism from the point of view of international conventions, as generally stated by doctrine, is that comprised by international humanitarian law. Although terrorism and war crimes, in theory at least, take place in different contexts, i.e., situations of war and peace respectively, they have always been conceptually related.

The IV Geneva Convention on the due protection of civilians in time of war, in Article 33, regarding "Individual liability, collective penalties, pillage, reprisals", establishes an express prohibition of terrorism. The text[4] is truly concise. The prohibition refers exclusively to terrorism against protected civilians, leaving doubt as to the legitimacy of the terrorism or whether actions affecting combatant military personnel could ever be considered terrorism. Meanwhile, the application of the convention only refers to international armed conflicts, although similar rules exist in relation to armed conflicts that are not international[5,6].

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[4] The text states that: "*No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited …".*

[5] See Articles 51, paragraph 2 of Additional Protocol I regarding the protection of victims in international armed conflicts and Articles 4-2d and 13-2 of Additional Protocol II regarding the protection of victims in armed conflicts not of an international nature. The latter expressly prohibits "*acts of terrorism*" or those whose ultimate purpose is to "*terrorise*" the civilian population.

[6] This area gives rise to situations and acquires dimensions that are very difficult to address and resolve legally. The imaginable possibilities are many: international and non-international armed conflicts, mixed ones, in which there is an uprising against the invading army and at the same time an internal division; armies fighting in peace missions, in missions with the approval and blessing of the UN in humanitarian intervention missions, guerrilla and other types of asymmetric warfare, etc.

1.5. Sector-specific universal international conventions on terrorism

The proliferation of events of a terrorist nature in the last quarter of the 20th century led to a re-emergence of the need for firstly international, then global approaches to terrorism.

Once the initial confusion had been overcome, and after the unviability of the entry into force of the League of Nations Convention on the Prevention and Punishment of Terrorism had been confirmed, the events of the sixties regarding activities that were in their infancy at that time and as such particularly vulnerable, such as air navigation, meant that from 1963 on, a series of Conventions were adopted which while sector-specific, had a universal vocation. The first were precisely for the protection of civil aviation.

This new way of internationalising the legal treatment of terrorism was certainly less ambitious that its forerunner, although it was far more practical and addressed the needs derived from technological advances and the new economic activities, particularly means of transport by air and sea.

A characteristic that these instruments share, unlike the League of Nations Convention, is their broad, general ratification, thus heralding a new era.

Together with others that will be studied later, they make up the body of instruments of a conventional nature with which, in the context of the UN and it specialised bodies, as well as the International Atomic Energy Agency (IAEA), the international community has equipped itself to effectively persecute, but also prevent, the commission of terrorist acts, although a single universal convention on terrorism has not yet been adopted.

Up to now **16 (13+3) instruments** of this kind have been drafted, including: **conventions, protocols and additional amendments**.

The latter, in 2005, introduced substantial changes in three of these universal instruments so that they specifically took the threat of terrorism into account. On

8 July of that year, the states approved the Amendments to the **Convention on the physical protection of nuclear material**, and on 14 October they approved the **2005 Protocol of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.**

Currently, through the **Legal Commission (sixth commission)**, the Member States are negotiating a **fourteenth international treaty.** It is an ambitious project for a general, universal convention on international terrorism that, instead of replacing, **supplements the current framework of international instruments** for fighting terrorism. It would be based on the main guiding principles that in reality are already present in the recent sector-specific conventions against terrorism: the generalisation of the incrimination of terrorist offences, the legal provision for such offences, the requirement for the prosecution or extradition of the perpetrators; the elimination of the legislation that establishes exceptions to punishment for political, philosophical, ideological, racial, ethnic, religious or other grounds; the intense call for Member States to adopt measures to prevent terrorist acts and emphasis on the need for them to cooperate, exchange information and give each other as much assistance as possible in the prevention, investigation and prosecution of terrorist acts.

In the **UN global counter-terrorism strategy**, approved by the **General Assembly on 8 September 2006**, the Member States highlighted the importance of all the international counter-terrorism instruments in force, undertaking to consider the possibility of joining them as soon as possible and applying their provisions immediately.

1.6. Other UN instruments on the fight against terrorism: Resolutions of the General Assembly and the Security Council under Chapter VII of the San Francisco Charter

1.6.1. Actions of the General Assembly in the fight against terrorism

The General Assembly has been addressing the international problem of terrorism since the 1970s. Initially, in the 1970s and 1980s the problem was addressed by means of different Conventions and Resolutions. During this period, the General Assembly approved two important Conventions regarding the fight against terrorism: the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons in 1973 and the International Convention against the Taking of Hostages in 1979.

We should not lose sight of the undoubted contributions made by several of the Resolutions of the UN General Assembly in this initial period. It is true that these Resolutions of the General Assembly are not obligatory, but internationalist doctrine has given the Resolutions and Declarations of this body a unique value, which means that they are halfway between International Treaties and international custom (CARRILLO SALCEDO). The Resolutions adopted by consensus have special value, as they represent the legal conscience of humanity, generating a repeated practice of the states and converting them into legal rules[7].

In this period, the following were particularly important: **Resolution 2625 (XXV) of 24 October 1970**, imposing on states the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts or acquiescing the commission of such acts in its territory. This same approach is repeated in other Resolutions (for example, Resolution 2734 (XXV) of 16 December 1970). **Resolution 3034 (XXVII) of 18 December 1972**, following the attack which took place at the Olympic Games in Munich, is worth a special mention as it was the first time the UN studied the matter of international terrorism *ex professo*. At that point there were already deep-seated disagreements between blocks of countries (with different ideologies, legal systems, political systems, economic systems, etc.) on very basic aspects when dealing with this area. The disagreement even affected calling the phenomenon international terrorism[8], a situation which, in one way or another, still

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[7] Fernández Sánchez, PA, *op. cit*., page 57.

[8] It is worth highlighting the significant disagreement which existed regarding the title of the resolutions, which instead of merely referring to International Terrorism, contained an entire programme of action: *"Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes".* The resolution reaffirms

exists today, notwithstanding the significant advances and approximations of positions on the part of the states, particularly after 11 September 2001. This Resolution creates a special committee on international terrorism.

In December 1994[9], the Assembly once again centred its attention on the question of terrorism in a Declaration on Measures to Eliminate International Terrorism. A supplementary declaration established a **Special Committee on Measures to Eliminate Terrorism in 1996**. Since the approval of this Declaration, the Assembly has been systematically addressing the problem of terrorism.

In recent years, the Assembly's *ad hoc* Committee on terrorism and the Working Group of the Sixth Commission have achieved noteworthy advances in the preparation of international instruments. Since 1997 (Resolution 51/210 of 17 December 1996[10]), the Member States have completed the work related to three specific instruments against terrorism and which cover three specific types of terrorist activities: the 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 International Convention for the Suppression of the Financing of Terrorism and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

At present, as we pointed out earlier, the Member States are negotiating a draft general Convention on international terrorism, which would supplement the current framework consisting of the international counter-terrorism instruments.

After the attacks of 11 September, 11 March and those occurred in Southeast Asia, at the 2005 Summit representatives of all the states expressed their unequivocal condemnation of terrorism in all its forms and guises, regardless of who commits it, where and for what purpose. Based on this historic platform, at the Summit the Member States were also asked to continue their work via the General Assembly and approve a counter-terrorism strategy based on the recommendations of the Secretary General, promoting broad, coordinated and coherent responses to terrorism on a national, regional and international level.

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the *"inalienable right to self-determination and independence"* and the legitimacy of the struggle of *"of all peoples under colonial and racist regimes and other forms of alien domination"*.

[9] Resolution 49/60 of 9 December 1994 approving the Declaration on Measures to Eliminate International Terrorism. Subsequent Resolution 50/53 of 11 December 1995.

[10] Resolution 51/210 of 17 December 1996 supplementing the Declaration on Measures to Eliminate International Terrorism, approved as an Annex to Resolution 49/60 of 9 December 1994.

On 2 May 2006, following these recommendations, Secretary General Kofi Annan presented a report to the General Assembly with a detailed series of recommendations. These recommendations constituted the essential basis for a series of consultations with Member States which concluded with the approval of a **United Nations Global counter-terrorism strategy**, adopted on 8 September 2006. The strategy is in the form of a Resolution (A/RES/60/288), with a plan of action in an Annex, and intends to be a single instrument for improving national, regional and international counter-terrorism efforts. Its value resides in the fact that for the first time all the members of the UN have reached an agreement on a strategy and operational approximation in the fight against terrorism. With this strategy, the General Assembly aims to reaffirm and extend its role in the fight on terrorism. The strategy also asks the Assembly to supervise its application and examine and update the strategy.

1.6.2. Action by the Security Council in the fight against terrorism. Triple path of action with Committee diversity[11].

As the executive body of the United Nations, the Security Council has been expressly addressing the matter of terrorism since the early 1990s. In the initial phase, its actions consisted of sanctions against certain states that were considered linked to terrorist acts: the Libyan Arab Jamahiriya (1992); Sudan (1996) and the Taliban (1999; extended to include Al-Qaida in 2000 in Resolution 1333). In Resolution 1269 (1999), the Security Council made a general call for cooperation between states for the prevention and punishment of all terrorist acts. In **Resolution 1267 (15 October 1999)[12], the Security Council created the 1267 Committee**, comprising the 15 members of the Council, responsible for supervising the application of the sanctions against the Taliban in Afghanistan for their support for Osama Bin Laden. The sanctions established initially were amended in subsequent Resolutions, being extended to Al-Qaida in December 2000 (Resolution 1333), and as of 2002 (Resolution 1390) they are not limited to Afghanistan. The sanctions refer to both persons and

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[11] Cano Linares, Mª Ángeles. The Work of the Security Council in the fight against terrorism: Three courses of action and the need for coordination between the different Committees implicated. In "New challenges of International Criminal Law. Terrorism, international crim and fundamental rights". Directed by Antonio Cuerda Riezu and Francisco Jimnénez García. Madrid.2009, pag 123 and above.

[12] As a result of the attacks of 7 August 1998 against the US embassies in Nairobi (Kenya) and Dar es Salaam (Tanzania) attributed to Bin Laden and Al-Qaeda.

groups and entities associated with Al-Qaida and the Taliban, included in a "Consolidated List" maintained by the 1267 Committee.

The sanctions require all states to freeze funds connected with individuals and entities included in the List, to prevent entry or transit through their territories and the supply, sale or delivery of arms or military equipment.

The Secretary General of the UN, at the request of the Security Council, appointed a team of experts on fighting terrorism and related legal matters (arms embargos, counter-terrorism, terrorist financing, etc.) in order to provide support to the Committee, carrying out the analysis and surveillance of the sanctions imposed.

In Resolution 1617 (2005) the Security Council extended the mandate of this Committee, clarifying the acts and activities of the individuals, groups and entities that were to be classed as associates of Al-Qaida, Osama Bin Laden or the Taliban.

The terrorist attacks of 11 September 2001 against the United States led to an intensification of the work of the Security Council. The first consequence was Resolution 1368 and later Resolution 1373 (28 September 2001), the latter issued under Chapter VII of the San Francisco Charter[13], which approves legal, institutional and practical measures of an obligatory nature for all states[14]. This Resolution obliges the Member States to adopt some important measures to prevent terrorist activities and criminalise different types of terrorist actions, as well as measures that assist and promote cooperation between countries, including joining the international counter-terrorism instruments. A **Counter-Terrorism Committee (CTC)** is set up as well, also comprising all the members of the Security Council. The Member States are obliged to periodically inform the Counter-Terrorism Committee on the measures they have adopted to apply Resolution 1373.

In order to support the Committee's work, in Resolution 1535 (2004) the Council approved the establishment of a Counter-Terrorism Committee Executive Directorate

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[13] Chapter VII of the San Francisco Charter refers to "Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression" and authorises the Security Council to adopt measures to maintain Peace and Security and is obligatory for States, and these must collaborate with the implementation as well as providing mutual assistance of enforcement.

[14] Article 25 of the Charter states that the decisions of the Security Council are obligatory for the states (who undertake to accept and comply with them).

(CTED), responsible for supervising the application of Resolution 1373 and facilitating the provision of technical assistance to Member States.

In Resolution 1540 (28 April 2004), the Council created a new counter-terrorism body: the Committee established by virtue of Resolution 1540 **(Committee 1540)**, also comprising all the members of the Council, which was charged with the task of supervising compliance with Resolution 1540 by all Member States. The Resolution called on the states to impede "non-state agents" (which includes terrorist groups) gaining access to nuclear, chemical or biological weapons of mass destruction.

The mandate of **Committee 1540** was extended and its objectives updated by the Security Council in Resolutions 1673 (2006), 1810 (2008), 1997 (2011, on this last occasion, significantly, for 10 years (until 25 April 2021).

Resolution 1566 (2004) asked the Member States to adopt measures against groups and organisations involved in terrorist activities other that those covered by the 1267 Committee. Another working group comprising all the members of the Council was created with the mission of recommending legislative measures, institutions and practices against those persons and groups, and of analysing the possibility of establishing an indemnification fund for victims of terrorism, funded by donations and amounts seized from the terrorist organisations.

In Resolution 1624 (14 September 2005), acting in parallel to the Global Summit, the Security Council, after holding a high-level meeting, approved the condemnation of any act of terrorism regardless of the reasons for it, as well as inciting the commission of such acts (incitement), rejecting any attempt at justification or glorification (apology) that may incite subsequent terrorist acts, calling on all states to adopt the necessary measures to prohibit acts that incite the commission of terrorist acts (apology) and the prevention of such conduct. It is in line with the Council of Europe Convention [CETS No. 196] on the Prevention of Terrorism of 2005 that establishes the need to criminalise the public provocation to commit terrorist offences (art 5.2) that constitutes a fusion between apology for and induction towards terrorism.[15]

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[15] Ben Saul, Speaking of Terror: Criminalising Incitement to Violence. University of Sidney, Sidney Law School, Legal Studies Research Paper, Nº 08/112, October 2008, pag. 2, poses the problems of the compatibility of these instruments with the right to freedom of expression. Countries must justify the legality (international), need and proportionality of their antiterrorist policies.

Addressing criticism[16] of the lack of basic guarantees in the procedures for inclusion on the lists, the Security Council adopted Resolution 1904 of 17.12.2009, which introduces the figure of Ombudsperson designated by the General Secretary of the UN in consultation with the UN Sanctions Committee (Committee 1267)[17] to rule on demands for *"delisting"*, in view of the opinions of the UN Human Rights Committee and the European Court of Justice regarding the lack of guarantees in the context of "terrorism listing" and the freezing of assets foreseen in the referred to UNSCR 1267 (1999). Notwithstanding, the jurisprudence of the EU Court of Justice *(Kadi v Commission)*[18] has established that the office of the Ombudsperson is not the equivalent of authentic contradictory legal proceedings.

Sanctions and asset freezing.

Both the Terrorist Financing Convention (1999) and UNSCRs 1267 (1999), 1373 (2001), (subsequently modified by 1526 (2004), 1566 (2004), 1617 (2005), 1730 (2006), 1822 (2008), 1904 (2009)) establish the obligation to cooperate on the part of all Countries in the prevention of terrorist financing. Various classes of proceedings are established. Those foreseen in Resolutions 1267 (1999), and 1390 (2002) are different to those of 1373 (2001) and following. Resolution 1267 established an Al-Qaeda Security Council and a Taliban Sanctions Committee and requires member States to freeze assets and establish travel restrictions and arms embargoes on entities or individuals designated by the Committee to have participated, financed or sustained terrorist acts. There is no establishment of the right to appeal the rulings of the Committee.

The proceedings foreseen in Resolution 1373 establish a wide obligation on the part of the Countries to prevent the financing of terrorism, without the need to establish any list of entities or individuals by the Al-Qaeda and Taliban Sanctions Committees for the adoption of asset-freezing measures.

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[16] http://www.ecchr.de/index.php/terror_lists.html

[17] Nabil Sayadi and Patricia Vinck v. Belgium CDHNU 1472/2006, CCPR/C/94/D/1472/2006, views, 22 October 2008.The Committee found a violation with regards to the right to freedom of movement and interference in the right to private and family life, but there was an appeal in internal Belgian law that should have been employed.

[18] Kadi and Al Barakaat International Foundation v Council of the European Union and Comission of the European Communities, 3 September 2008, cases C-402/05P y C-415/05P. Resolutions 3.09.2008. Organitation des Modjahedines du people d'Iran v. Council (2006) ECR II-4665, T-256/07 23, October 2008.

It should be said that there are no appeals against the resolutions, without these Committees having any legal position or control as regards their decisions.

Resolutions 1730 (2006) and 1904 (17.12.2009) establish “delisting” proceedings as a result of the proceedings established before the EUCJ and CDHNU for subjects submitted to a freezing of assets. However, the Ombudsperson designated by the Secretary General of the UN in consultation with the UN Sanctions Committee to rule on “delisting”, suffers according to exposure to legal and contradictory proceedings.[19]

1.7. Particular study of the sector-specific universal international conventions on terrorism

1.7.1. Common aspects of the 16 (13+3) Conventions:

1.7.1.1. Code of terrorist crimes

These Treaties regulate up to fifty crimes or types of criminal conduct (offences), including 10 references to civil aviation, 16 related to maritime navigation or continental platforms, a dozen crimes against persons, 7 crimes related to the use, possession or threat of use of bombs or nuclear material and 2 crimes of terrorist financing.

Therefore, there is a general tendency to consider that they make up a kind of code of terrorist crimes constructed progressively over time and as such eligible for use as a “reference text” for the preparation of other treaties. This is the case, for example, in the list annexed to the Convention on Terrorist Financing. The obligations established in this treaty refer to the activities defined in the treaties listed in the annexed list and is binding on all states, regardless of whether or not they have ratified said treaties. However, it allows states that are not parties to said treaties to make reservations limiting the scope of the obligations under the 1999 convention.

This technique was already used in the preparation of other treaties. This

[19] See previous note

method was used in the Second Treaty on Terrorism of the Organisation of American States in 2002[20], directly establishing obligations in relation to the crimes defined in the UN treaties.

Likewise, the European Convention of 1977 on the Suppression of Terrorism, amended by the 2003 protocol[21], adopts a similar approach: “obligation concerning acts of terrorism as defined in the international treaties”.

Paragraph 3 of Resolution 1566 of the UN Security Council of 2004 upholds the same idea that the acts contained in the UN treaties constitute a kind of “code of terrorist crimes”.

1.7.1.2. General obligations established in the UN treaties against terrorism

- The main one is that of incorporating the crimes defined in the different treaties into domestic criminal systems so that they are used as a basis for criminal judgments that reflect the seriousness of the conduct contemplated therein.
- It also grants a kind of "universal jurisdiction" over these crimes.

This universal jurisdiction is, however, different from that established in the case of crimes against humanity (genocide, crimes against humanity, war crimes[22]). In reality it represents the possibility to prosecute internally when extradition is not appropriate.
The regulations set out broad forms of attributing jurisdiction, either on the basis

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[20] *Inter-American Convention against Terrorism* adopted in Bridgetown (Barbados) on 3 June 2002, which entered into force on 10 July 2003.

[21] *Protocol amending the European Convention on the Suppression of Terrorism* [CETS no.190]. Opened for signing in Strasbourg on 9.10.2003.

[22] *There is no sufficient reason either in conventional international law or in customary law to affirm Universal jurisdiction in terrorism crimes. United Nations Conventions refer more to the principle of* ***aut dedere aut judicare*** *than to universal jurisdiction. Notwithstanding the expansion of the 1997 Terrorist Bombings Convention, no sufficient foundation exists for extracting the principle of universal jurisdiction in its articles 6.1 and 6.2.*

In: Stubbing Bates, Elisabeth and others.- Terrorism and International Law. Accountability, Remedies and Reform. A report of the IBA Task Force on Terrorism. Edited by IBA Task Force. 2011. Oxford University Press. Parraf. 4.22. Pag. 175

of territory, standing of the perpetrator or of the victims, or economic or other interest.

- Obligation to extradite or prosecute. (principle of *aut dedere aut juidcare).*

This obligation to extradite or, otherwise, to prosecute, constitutes one of the cornerstones of the cooperation established in the Treaties; these aim to leave no places where terrorism goes unpunished, establishing legal mechanisms to that end. The treaty itself establishes the definition of the offences and acts as a legal basis for extradition, transfer, surrender and international legal cooperation in general, notwithstanding the existence of specific extradition or cooperation treaties.

This obligation to extradite or prosecute is, logically, directly connected to the extent of the means and criteria for attributing jurisdiction or even the kind of "universal jurisdiction" that they establish.

- Non-consideration of these crimes as political crimes.

- Establishment of forms of international cooperation. Two clearly different types can be distinguished: cooperation for the prevention and cooperation for the prosecution of crimes.

- They also establish clauses on protection and respect for human rights. Three different routes or techniques are used:

    - By means of general provisions with the mention that the obligatory nature of the Treaties will be notwithstanding other international obligations established in other Treaties, in this case the protection of Human Rights.

    - Establishing the rights of the accused persons, specifically, a fair trial. On a supplementary level, some treaties also establish the right to receive visits from the corresponding consular representative.

    - Establishing provisions regarding extradition, the transfer of persons, surrender of persons, both ordinary and extraordinary, and the clause safeguarding the right of asylum (the provisions contained in the

treaty do not affect the right of asylum), particularly the more modern *non-refoulement* ones.

1.7.2. The 16 (13+3) Conventions:

1.7.2.1. Convention on Offences and Certain Other Acts Committed On Board Aircraft (“Tokyo Convention”)

1.7.2.2. Convention for the Suppression of Unlawful Seizure of Aircraft (“Hague Convention”)

1.7.2.3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (“Montreal Convention”)

1.7.2.4. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents

1.7.2.5. International Convention against the Taking of Hostages (Hostages Convention)

1.7.2.6. Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention”)

1.7.2.6.1. Amendments to the Convention on the Physical Protection of Nuclear Material. Signed in Vienna on 8 June 2005. Subject to ratification.

1.7.2.7. 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

1.7.2.8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

1.7.2.8.1. 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

1.7.2.9. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf

1.7.2.9.1. 2005 Protocol to the Protocol

1.7.2.10. Convention on the Marking of Plastic Explosives for the Purpose of Detection

1.7.2.11. International Convention for the Suppression of Terrorist Bombings

1.7.2.12. International Convention for the Suppression of the Financing of Terrorism

1.7.2.13. International Convention for the Suppression of Acts of Nuclear Terrorism

1.8. Regional international conventions on terrorism

Together with the sector-specific universal international conventions on terrorism, other legal instruments of a regional nature have been emerging, under the Council of Europe and the EU, which we will be looking at in particular, like with other regional spheres.

1.8.1. The American regional sphere

Within the framework of the General Assembly of the Organisation of American States (OAS), the "*Convention to Prevent and Punish the Acts of Terrorism*

taking the Form of Crimes against Persons and Related Extortion that are of International Significance", adopted in Washington on 2 February 1971 and above all the *Inter-American Convention against Terrorism*, adopted in Bridgetown (Barbados) on 3 June 2002, which entered into force on 10 July 2003.

1.8.2. African regional sphere

- The African Conference sponsored a *Declaration against terrorism* in October 2001.

- The Organisation of the Islamic Conference adopted the *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*, in Ouagadougou on 1 July 1999, in force since November 2002, and in April 2002 the *"Kuala Lumpur Declaration and Plan of Action on International Terrorism"*.

- The Arab League, meanwhile, adopted the *Arab Convention on the Suppression of Terrorism* on 22 April 1988 in Cairo.

1.8.3. European regional sphere

Here the classic distinction applies between the actions and legal framework regarding terrorism in the EU and in the Council of Europe. Both aspire to be supplementary to the universal UN framework already studied.

1.8.3.1. Legal framework of the EU in the fight against terrorism

The EU has been adopting several specific measures affecting terrorism for some time now, albeit initially in a fragmented manner and within other broader rules. The objective of making the fight against terrorism more effective throughout the EU with specific instruments was addressed at the Tampere European Council in 1999 and the Santa María da Feira European Council, in June 2000. Nevertheless, it was not until the attacks of 11 September 2001,

that the EU finally intensified the fight against terrorism. In this context, it has adopted measures that supplement the Resolutions of the UN Security Council, particularly 1373, in relation to which it adopted a Framework Decision inviting the Member States to approximate their legislations, in addition to establishing minimum rules on terrorist offences. After having delimited these offences, the text sets out the sanctions that the Member States should incorporate into their national legislation. At present, a project for the amendment of the framework decision is in process, which involves the inclusion of incitement to commit, or apology of, terrorist offences.

1.8.3.1.1. Freezing of property: list of terrorists and terrorist groups

1.8.3.1.1.1. Council Common position 2001/931/ CFSP, dated 27 December 2001, on the application of specific measures to combat terrorism[23,24,25]

This Common Position proposes implementing supplementary measures in application of Resolution 1373 (2001) the UN Security Council. In particular, it establishes a list of persons, groups and entities involved in acts of terrorism to

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[23] 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 [Official Journal L 344 of 28.12. 2001]. This Regulation constitutes a necessary measure at a community level and one that supplements the administrative and judicial procedures regarding terrorist organisations in the European Union and in third countries. It proposes fighting against all kinds of financing of terrorist activities; to that end, it defines the concept of "funds and other financial assets" that should be frozen, "banking and other financial services" and "controlling a legal person". It also sets out exceptions in order to allow the release of assets in some specific cases. Article 2, section 3, of this Regulation states that the Council will establish, review and amend the list of persons, groups and entities to which it applies. By virtue of this article, a series of regulations and decisions have been adopted in order to update the list.

[24] Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP [Official Journal L 16 of 22 January 2003].

[25] The **Luxembourg Court of Justice (CJEC)** cancelled, in a **Judgment dated 12.12.2008**, the decision of the EU to freeze the funds of the People's Mojahedin Organization of Iran (PMOI) in the context of the fight against terrorism. This freezing of funds was the direct result of its inclusion in the Blacklist, and is only applied in relation to non-EU groups **(it does not affect international organisations in the EU, such as ETA, Batasuna or GRAPO, whose assets are not frozen)**. The judgment considered that the Council's decision was not reasoned, infringed the right to defence and the right to due legal protection.

which it is necessary to apply the measure of the preventative freezing of funds and other financial assets in the context of the fight against terrorist financing.

Definition of "terrorist acts". The common position defines them as intentional acts which may seriously damage a country or international organisation by intimidating a population, exerting undue compulsion of various types or by destabilising or destroying its fundamental political, constitutional, economic or social structures. The list includes the following acts:

- attacks on a person's life or physical integrity;
- kidnapping or hostage-taking;
- causing extensive destruction to a public or private facility, including information systems;
- seizure of means of public transport, such as aircraft and ships;
- manufacture, possession, acquisition, transport or use of weapons, explosives or of nuclear, biological or chemical weapons;
- release of dangerous substances, or causing fires, explosions or floods;
- interfering with or disrupting the supply of water, power or any other fundamental natural resource;
- directing or participating in the activities of a terrorist group, including funding its activities or supplying material resources.

The mere threat to commit any of these offences is considered a terrorist act.

Definition of "terrorist group": a structured group of persons, acting in concert to commit terrorist acts, regardless of its composition or the level of development of its structure.

1.8.3.1.1.2. List of individuals and entities considered terrorists

The list in the annex to the common position is drawn up on the basis of investigations carried out by the competent judicial and police authorities in the Member States. The list may be added to and revised every six months, so as

to keep it up to date. The list includes ETA, the IRA, GRAPO, the terrorist wing of HAMAS, Palestinian Islamic Jihad and other revolutionary activist groups, as well as the names of individuals belonging to such groups.

Osama bin Laden and individuals and groups associated with him do not feature on the list, as they are already listed in Council Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Osama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them[26].

The Common Position of 17-5-2004, which updated the Annex, includes: AUC (Decision dated 2-5-2002), FARC (Decision dated 17-6-2002), ELN (Decision dated 2-4-2004), Islamic organisations and separatist organisations (internal or local terrorism).

Measures to be taken by the Member States and the EU: freeze the funds and other financial assets of the individuals and groups on the list. Mutual assistance between states, by means of appropriate police and judicial cooperation in order to combat and prevent acts of terrorism. With a view to investigating the persons and entities that appear in the list, the may exploit the powers conferred on them by acts of the European Union and under any other bilateral or international agreements.

1.8.3.1.2. Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism

Principles: The Framework Decision will apply to any terrorist act committed intentionally against an international organisation or country.

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[26] Council Regulation EC 881/2002, dated 27 May 2002, imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [Official Journal L 139 de 29.5.2002]. This Regulation defines the terms “funds”, “freezing of funds”, “economic resources” and “freezing of economic resources”. Article 7 states that the Commission may amend or complete Annex I (list of legal persons, groups or entities) on the basis of decisions from the UN Security Council or the Sanctions Committee.

These acts must be committed with a view to intimidating the population or destroying or seriously affecting the political economic or social structures of the country (murder, attacks upon the physical integrity of a person, kidnapping or hostage taking, arms manufacture, attacks, threats to commit such acts, etc.) committed by one or more individuals and against one or more countries.

The Framework Decision defines 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. Inciting, aiding or abetting and attempting to commit a terrorist act will also be punished.

With a view to punishing the terrorist acts, the Member States will establish in their national legislation:

- effective, proportionate and dissuasive criminal penalties, which may entail extradition;
- the mitigating and aggravating circumstances (collaboration with judicial police authorities; identification of evidence and of other participants in the offences).

Moreover, sanctions will be applied against legal persons when it is confirmed that the physical person has the power of representation of the legal person or the authority to control it.

The Member States undertake to adopt measures to:

- establish their jurisdiction in relation to terrorist acts;
- establish their jurisdiction if they refuse to extradite their own nationals;
- coordinate their actions and set the jurisdiction with a view to centralising the formalities when several Member States are responsible.

They will also guarantee appropriate assistance for the victim of the crime and the victim’s family (in addition to the measures already envisaged in Framework Decision 220/2001/JHA).

1.8.3.1.3. Council Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism [27]

The Commission extends the scope of the Framework Decision to three new offences: provocation (public incitement), recruiting for the purpose of committing terrorist acts and training for terrorist purposes.

It substantially amends Articles 3 and 4 of the 2002 Framework Decision. The new Article 3 of the amended Framework Decision is still entitled “Offences linked to terrorist activities”, although it now has substantial content in its own right and is far more developed that the earlier version. It reads as follows:

1. For the purposes of this Framework Decision:

   (a) "public provocation to commit a terrorist offence" shall mean the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed;

   (b) "recruitment for terrorism" shall mean soliciting another person to commit one of the offences listed in Article 1(1)(a) to (h), or in Article 2(2);

   (c) "training for terrorism" shall mean providing instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of committing one of the offences listed in Article 1(1)(a) to (h), knowing that the skills provided are intended to be used for this purpose.

2. Each Member State shall take the necessary measures to ensure that offences linked to terrorist activities include the following intentional acts:

   (a) public provocation to commit a terrorist offence;

   (b) recruitment for terrorism;

   (c) training for terrorism;

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[27] Official Journal of the European Union, L 330, of 9 December 2008 (pages 21 to 23).

(d) aggravated theft with a view to committing one of the offences listed in Article 1(1);

(e) extortion with a view to the perpetration of one of the offences listed in Article 1(1);

(f) drawing up false administrative documents with a view to committing one of the offences listed in Article 1(1)(a) to (h) and Article 2(2)(b).

3. For an act as set out in paragraph 2 to be punishable, it shall not be necessary that a terrorist offence be actually committed.

The term for transposition to national legislation expires on 9 December 2010.

1.8.3.2. Legal Framework of the Council of Europe (CE): Instruments: Council of Europe Convention on the Prevention of Terrorism [CETS no.196]

The fight against terrorism has also been one of the areas in which the Council of Europe has been active since 1970. The efforts of this European institution, in parallel to those of the EU, and within the context of the UN, have increased notably since 2001, taking the international initiative in drafting a Convention with measures that are specially aimed at preventing terrorism, expressly contemplating the **indirect incitement (apology) to commit terrorist acts**. It is important to point out that the foundations supporting the actions of the CE in the fight against terrorism are: the strengthening of legal action against terrorism, safeguarding fundamental democratic values and addressing the causes of terrorism.

It has created two committees of intergovernmental experts: the Multidisciplinary Group on International Action Against Terrorism (GMT), created in 2001, and the **Committee of Experts on Terrorism (CODEXTER)**, which replaced the former in 2003 and continues working and coordinating actions in the key areas in this field. The **CODEXTER** has promoted both the preparation and the actual scope of influence of the important **Convention on the Prevention of Terrorism**, to ensure it is ratified as widely as possible**.**

The most relevant Council of Europe instruments in relation to terrorism are the following:

- **European Convention for the suppression of terrorism** [no.90]. Opened for signing in Strasbourg on 27 January 1970, with general entry into force on 4 August 1978[28].
- **Protocol amending the European Convention for the suppression of terrorism** [CETS no.190], opened for signing in Strasbourg on 9 October 2003. Its entry into force requires ratification by all the states that signed the original Convention. Spain has not yet ratified it.

  Characteristic aspects:

  - First European terrorism treaty.
  - Enhances international cooperation.
  - Regulates extradition and judicial assistance.
  - Rules out considering terrorism political.
  - Establishes exceptions derived from the necessary respect for human rights.
  - Widespread acceptance and scope of influence.
  - Updated by means of the Protocol.

- **Council of Europe Convention on the prevention of terrorism** [CETS no.196], opened for signing in Warsaw on 16 May 2005. It entered into force on 1 June 2007. Spain signed it on 16 May 2005, ratified it on 27 February 2009, with entry into force on 1 June 2009.

It is worth highlighting that this Convention aims to transcend the establishment of mechanisms designed merely to sanction terrorism as a means of prevention and to that end it gives special attention to certain issues, such as international cooperation in the prevention and not only the persecution of terrorism. Within the central idea of the specific prevention of terrorism, it deliberately introduces the following as conducts to be prosecuted: public provocation to commit terrorist acts, recruiting terrorists,

[28] Signed by Spain on 27 April 1978, ratified on 20 May 1980 and valid since 21 August 1980.

training terrorists, the liability of legal persons or legal entities for said acts, and it establishes the obligation to include them as offences in the criminal justice codes of the states. It also establishes the obligation for the contracting states to introduce measures to protect the victims of attacks committed in their territory. It sets detailed rules attributing jurisdiction on the basis of classical principles, but also allows jurisdiction based on the internal rules of each state (Article 14.4). It contemplates the general obligation for states to investigate these kinds of offences. Rules of international cooperation, extradition, etc.

Characteristic aspects:

- Change of paradigm: suppression → prevention.
- It contemplates new offences: apology, recruitment, training.
- Only Convention with specific provisions regarding victims.
- In force since 2007: 40 + 14 ratifications.
- Significant influence on other instruments: UN (CS 1624), EU (2008 Framework Decision), OSCE.
- Cooperation with the CTC/CTED.

- **Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism** [CETS no.198], opened for signing in Warsaw on 16 May 2005. It entered into force on 1 Many 2008. Signed by Spain on 16 May 2005, ratified on 26 March 2010 and with entry into force for Spain on 1 July 2010.

  Characteristic aspects:

  - Modernisation of the existing Convention.
  - Incorporation of the special FATF recommendations on a binding basis.
  - Constitutes the only CE Convention in the area.
  - In force since 2008: 29 + 6 ratifications.

- Monitoring mechanism: MONEYVAL.
- Cooperation with CTC/CTED.

There are several other **Council of Europe Conventions** that, while not dealing specifically with terrorism, are related to the subject and are particularly important. They include:

- **European Convention on Extradition** [CETS no.24] and **First and Second Additional Protocols** thereto [CETS no.86 and CETS no.98]**;**
- **European Convention on Mutual Assistance in Criminal Matters** [CETS no.30] and **First and Second Additional Protocols** thereto [CETS no.99 and CETS no.182]**;**
- **European Convention on the Transfer of Proceedings in Criminal Matters** [CETS no.73]**;**
- **European Convention on the Compensation of Victims of Violent Crimes** [CETS no.116]**;**
- **Convention on the Participation of Foreigners in Public Life at Local Level** [CETS no.141]**;**
- **Convention on Cybercrime** [CETS no.185] and **Additional Protocol** concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems [CETS no.189].

There are also important Resolutions, Declarations and Recommendations of the Committee of Ministers and Recommendations and Resolutions of the Parliamentary Assembly adopted in this field and which represent the common, but also unique, point of view of the Council of Europe. The characteristics of the regional sphere that it covers should also be taken into account; they are obviously different to the far broader and conditioned ones of the UN and to the far more reduced scope of the EU.

2. INTERNATIONAL INSTRUMENTS FOR COMBATING MONEY LAUNDERING AND TERRORIST FINANCING

2.1. Introduction. International bodies and actions against money laundering

From the outset the UN has assumed a leading role in promoting the harmonisation of the measures for combating, and strengthening international cooperation in the fight against money laundering as a key factor in preventing and combating the crimes of drug trafficking and terrorism on an international level, through its sources of financing.

The UN Vienna Convention against the Illicit Trafficking of Narcotic Drugs and Psychotropic Substances of 1988 was the first international instrument that dealt with the problems of the proceeds of crime and ensured that all the signatory states classed money laundering as a crime.

The money generated by crime can be traced and if it is to be used or invested subsequently, it must be laundered, i.e., reintroduced into monetary circulation. On the other hand, the commission of new types of organised crime requires significant sums of money, the flow and movement of which can also be detected, meaning that it often needs to use clandestine channels. Therefore, it is essential to create different types of mechanisms to combat money laundering and to control the monetary flows that may be used to finance particularly serious organised criminal activities, particularly terrorism.

Bodies within the UN such as the Office on Drugs and Crime are responsible for ensuring there are no gaps or subterfuges in the international financial mechanisms and for providing technical assistance to states in their anti-money laundering policies and even in the approval of the necessary legislation to regulate financial services.

The political Declaration approved in June 1998 by the General Assembly of the UN during its special session dedicated to joint action to counteract the global drugs problem reaffirmed the validity of this strategy.

Ten years after the approval of the 1988 Vienna Convention, the General

Assembly improved and updated that instrument by passing a plan of action entitled “Measures against money laundering” to perfect and strengthen even further the action of the international community against the criminal economy on a global level.

In recent times the concern for the control of economic flows related to crime has not been limited only to funds coming from or related to drug trafficking. It has been extended to international organised crime and in relation to terrorism in particular, giving rise, in parallel to the general instruments regarding money laundering, to more specific ones aimed at terrorist financing. It is now considered – not just from the point of view of the control of the profits but also from that of the economic flows that support and finance terrorist activities – that their control via different methods may prove to be an essential instrument, together with others, for the prevention of terrorism.

Due to its specificity and the way it fits in with the rest of the Conventions, both on a UN and Council of Europe and EU level, we have considered it appropriate, for systematic reasons, to study and address the Conventions that specifically refer to the financing of terrorism in the sections corresponding to Conventions on terrorism, dedicating the following epigraphs to the universal and regional Conventions and instruments on laundering in general, but which can of course be applied in relation to terrorism.

2.2. International instruments against money laundering

2.2.1. UNIVERSAL SPHERE

2.2.1.1. UN Convention on the Illicit Trafficking of Narcotic Drugs and Psychotropic Substances of 1988

2.2.1.2. UN Convention on Transnational Organised Crime of 2000 (“Palermo Convention”)

2.2.1.3. Financial Action Task Force (FATF)

2.2.1.3.1. Introduction

The growing concern caused by the threat that money laundering represents for financial institutions and the banking system in general, and in particular the magnitude of the drugs problem, led the leaders of the G-7 to establish the FATF in July 1989.

The Financial Action Task Force on Money Laundering (FATF) is an intergovernmental body whose purpose is to prepare and promote measures to combat money laundering in order to prevent said funds from being used in future criminal activities and affecting other legitimate economic activities.

The FATF comprises 31 countries and two international bodies and is organised in regional groups. It is a multidisciplinary body with experts responsible for adopting measures on legal, financial and operational questions.

It does not form part of any international body and neither its budget nor its structure are particularly large. It is the only specialised body devoted exclusively to combating money laundering; it is highly regarded in international forums and its reports and recommendations are taken into account when legislating and devising measures to tackle money laundering.

Its famous Forty Recommendations, which have been adopted all over the world, were approved for the first time in 1990 and after several amendments, the latest ones are those of 20 June 2003.

The FATF is a body that not only has the mission of establishing theoretical recommendations, but also of evaluating different countries in relation to the degree of application of the international principles and tenets on money laundering in the respective national legislations in this field[29].

[29] On 23 June 2006 the FATF published its evaluation report on Spain, as part of the Third Round of Mutual Evaluations, in which it describes and analyses the measures in the Spanish system regarding the prevention of money laundering and terrorist financing.

2.2.1.3.2. The Forty Recommendations

In April 1990, the FATF issued a report with forty recommendations aimed at creating an international system for combating money laundering. The Report aimed to enhance and develop application of the UN Convention on the prevention and suppression of the laundering of the proceeds of drug trafficking (Vienna 1988). Between 1990 and 1995, the FATF prepared several Interpretative Notes on the Recommendations. They were revised in 1996.

They constitute the basic framework for combating money laundering and were designed to be applied universally. They cover the criminal and police legal system, the financial system and its regulation, and international cooperation. The application of the Recommendations is supervised by means of a two-pronged approach: an annual self-evaluation exercise and a more detailed mutual evaluation[30]. The FATF also carries out horizontal examinations of the measures adopted.

Following the review, the Recommendations now apply not only to the laundering of assets but also to terrorist financing, and are combined with eight special recommendations regarding this area, finally representing the establishment of a extended, global and coherent system of measures for combating both the laundering of assets and terrorist financing.

They are grouped in four different sections: the first section contains the general principles, in which the states are recommended to ratify the Vienna Convention on the illicit trafficking of narcotic drugs and psychotropic substances; remove obstacles, such as banking or professional secrecy; and intensify multilateral cooperation and mutual judicial assistance in proceedings brought in this regard.

The second section dealing with the role of the national legal systems calls on states to include money laundering offences in their national legal systems, and not just those related to drug trafficking and the proceeds of the same in order to be able to follow and confiscate the proceeds of money-laundering offences.

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[30] See the previous footnote regarding Spain.

The third section refers to the participation of the financial system in the fight against money laundering, and comprises the core of the Recommendations. Here the rules refer to the identification of clients and the conservation of transaction documents, surveillance or detection of cross-border transport of cash or bearer bills of payment; information obligation for operations that exceed a certain threshold, etc.

A final section comprises the recommendations referring to international cooperation, in particular the adoption of universal international Conventions such as the Vienna Convention, the Palma Convention on organised crime or the one on terrorist financing, as well as the Conventions and international instruments of a regional nature. Reference is also made to specific cooperation mechanisms, both extradition and mutual legal assistance, as well as other cooperation mechanisms.

2.2.1.3.3. Non-Cooperative Countries and Territories (NCCT)

The preparation of lists of non-cooperative countries and territories in the fight against money laundering since 2000 is particularly important, since they identify those jurisdictions that do not provide international cooperation.

Inclusion in the list has no legal effect but does constitute an important element of political pressure.

2.2.2. COUNCIL OF EUROPE

2.2.2.1. Recommendation No. R (80) 10 of the Committee of Ministers to Member States on Measures against the Transfer and the Safekeeping of Funds of Criminal Origin, of 27 June 1980

This is the first of the international initiatives on the prevention of money laundering via banking activity, by considering that the insertion of funds of illicit origin into the financial system and the transfer of such funds favours the commission of new criminal acts implying an expansive effect, both nationally and internationally.

2.2.2.2. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Strasbourg. 1990[31]

The most significant characteristic is the concept of laundering being extended to include any criminal activity and not just those drug-related crimes.

Participation was not included as an element of Article 6.1 a, b and c[32] regarding the acts which are punishable, as it was considered unnecessary due to the different approach in relation to other Conventions.

It is indifferent whether or not the predicate offence is subject to the criminal jurisdiction of the contracting state; or whether the states can establish that the predicate offence to laundering will not be punished, as there are states where it is not possible to accuse persons of the additional offence if they have committed a predicate offence.

No reference is made to inappropriate conduct of those who should have foreseen that the origin of the assets was illegal or to acts with a view to enriching oneself, which was considered irrelevant as it is implicit (DIEZ RIPOLLÉS).

The Convention is not limited to Europe, as Australia, Canada and the USA were involved in drafting it and it is considered an open convention that is not exclusively applicable to Europe.

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[31] In force for Spain since 1 December 1998.

[32] Article 6. Laundering offences. 1. Each Party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally:
a) the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;
b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds; and, subject to its constitutional principles and the basic concepts of its legal system;
c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;
d) participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

The core of the Convention is Chapter III on international cooperation. The measures of international cooperation contained in the provisions are aimed at attaining the highest degree of collaboration possible in the investigations and procedures aimed at the confiscation of the instrumentalities and proceeds of criminal actions.

2.2.2.3. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism [CETS no. 198]. See section 1.8.3.2.

2.2.3. EUROPEAN UNION

2.2.3.1. Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering

It constitutes the first measure of a normative nature adopted by the EU in this field[33]. The considerations proposed by the Directive are as follows:

- The use of credit entities for laundering the proceeds of criminal activities and the threat this represents for the solidity and stability of financial institutions in particular and the credibility of the financial system as a whole.
- The influence of money laundering on the increase in organised crime in general and the trafficking of narcotics in particular.
- The need for community rules to unify the criteria to be followed and prevent Member States from adopting measures that are incompatible with the community freedoms.
- It justifies the establishment of criminal measures and international cooperation between judicial and police authorities recommended in the 1988 Vienna Convention and the 1990 Strasbourg Convention.
- Reference to the measures for preventing the use of the financial system, as a supplement to the criminal measures, referring to the 1980 Recommendation from the Council of Europe and the 1988 Basel Declaration of Principles.

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[33] Generally accepted doctrine agrees that the directive is more administrative than criminal.

- Need for coordination of national measures to ensure money laundering is combated effectively. Said measures of international cooperation and coordination are sufficiently contained in the 1990 Strasbourg Convention, as the European Directive starts where the Convention leaves off.
- Adoption of the FATF recommendations and the request from the European Parliament for the preparation of a global community programme for combating drug trafficking.
- It extends the definition of money laundering contained in the Vienna Convention to organised crime and terrorism and places the onus on the Member States to prohibit it.

Article 1 of the Directive defines the basic terms used in it and pays special attention to the concept of money laundering, one of the basic pillars of the text.

It states that money laundering will cover the following actions committed intentionally:

a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action.
b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity.
c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity.
d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing paragraphs.

Article 1.3 also mentions the problem of the extra-territoriality of the crime of money laundering, in considering that the crime of laundering exists even when the criminal activities take place in the territory of another Member State or in that of a third country.

In the same article, the infringements defined in the Vienna Convention on the illicit trafficking of narcotics are defined as criminal activities as well as any other criminal activity defined as such by a Member States.

The essential core of the Directive consists of the obligations set for credit entities and financial institutions:

a) Identification of customers when entering into business relations or performing transactions for amounts above a certain threshold with the aim of avoiding anonymity and controlling certain operations.
b) The obligation to keep copies or references of identification documents for at least 5 years, as well as supporting evidence or records of operations admissible in court proceedings.
c) The obligation to carry out a special examination of transactions that may be linked to money laundering[34].
d) The necessary collaboration manifested in the obligation to notify, on the entity's own initiative, the corresponding authorities of any act that may indicate money laundering and provide the authorities, at their request, with all necessary information pursuant to the procedures established in the applicable legislation (lifting of banking secrecy).
e) Obligation to refrain from carrying out any operation when the entity knows or suspects that said operation is related to money laundering, although the possibility is envisaged for the operation to be carried out and subsequently notified to the authorities in the event it was not possible to refrain or in the event that the non-execution of the operation could hinder the action of the police and frustrate criminal prosecution.
f) The right to confidentiality of the financial directors in relation to the information supplied[35].
g) Extension of the obligations for credit entities to the professions and undertakings whose activities are particularly likely to be used for money-laundering purposes. (Article 12).

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[34] Article 5 of the Directive expressly states: "In the event of doubt as to whether the customers referred to in the above paragraphs are Member States shall ensure that credit and financial institutions examine with special attention any transaction which they regard as particularly likely, by its nature, to be related to money laundering".

[35] Regarding the processing of the information supplied by the obliged parties, the authorities responsible for the fight against laundering are empowered to use the information received for other purposes which are not related to the prosecution of the criminal acts contained in the Directive: drug trafficking, organised crime and terrorism (Article 6, last paragraph).

2.2.3.2. Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering - Commission Declaration

The amendments leave virtually all of Directive 91/308 still in force and include the following changes:

a) The concept of "financial institution" is extended to also include the activities of bureaux de change and money transmission/remittance offices; as well as authorised insurance companies and investment firms.

b) The obligations to which the entities are subject also apply to individuals or legal entities involved in money-laundering processes as a result of their professional activity, such as external auditors and accounts, tax advisors, real estate agents, dealers in high-value goods, casinos, notaries and other independent legal professionals, such as lawyers[36].

c) The obligation to punish laundering related not only to drug trafficking but to any kind of serious crime is extended, taking into account the FATF Recommendations in this regard. The serious offences are those already set out in Directive 91/308, in addition to fraud and corruption, that can generate considerable profit and are punishable with a serious prison term under the criminal legislation of each Member State, also adding the possibility for the Member States to consider any other offence to constitute criminal activity.

d) In relation to banking secrecy, all restrictions on the disclosure of information are removed, and both the entity and its directors and employees are released from any liability.

e) The obligation under Article 3 of the Directive is extended in relation to the identification of customers, particularly affecting direct banking or non-face to face banking, which makes it possible to perform financial transactions without being physically present.

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[36] In relation to notaries and legal professionals, an exemption to the obligation is envisaged in those cases in which the professionals obtain the information in performing their task of defending or representing that client, in legal or other proceedings, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, being subject to the provisions of the Directive when they participate in financial or business operations, including providing tax advice, where there is a risk that the services of said professionals in the legal field are used improperly to launder the proceeds of criminal activities.

As for lawyers, there was a very controversial debate in the European Parliament regarding the possibility of lifting professional secrecy in this collective. To that end, the 1998 Report from the UN Office on Drugs and Crime was taken into account, which detailed numerous cases of corruption and money laundering by lawyers and other intermediaries.

f) As for the supply of information, the possibility of collaboration between authorities for the exchange of essential information in the fight against money laundering is envisaged as well as the adoption of the model OECD Convention for the exchange of tax information, regarding the treatment of information held by lawyers and other independent legal professionals, which makes the interaction between money laundering and fiscal matters viable.

2.2.3.3. Directive 2005/60/EC of the European Parliament and the Council of 26 October 2005, on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

The new directive has two basic objectives: updating the definition of serious crimes regarding money laundering, those sanctions with more than one year's imprisonment, and including terrorist financing as part of the definition of money laundering[37].

The most noteworthy aspects are:

a) The definition of terrorist financing: it means 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.
b) As for the scope of application, following the recommendations of the FATF, express reference is made to service providers, trustees and companies as well as to life insurance brokers, as well as including the rest of obliged parties from earlier directives (credit entities, investment services companies, life insurance companies, bureaux de change, casinos, auditors, accountants, tax advisors and legal professionals) and any natural or legal person that trades or makes payments for amounts equal to or greater than 15,000 euros.
c) Concepts such as financial institution are defined in line with FATF criteria.
d) It establishes, in accordance with the FATF, that credit entities and financial institutions will not hold anonymous accounts.
e) It establishes more detailed requirements regarding the identification of customers and the understanding of their activities, specifying that the

[37] It aims to step up the fight against terrorist financing coming both from crime and via legal channels.

procedures may vary depending on the risk, specifically in relation to the actual beneficiary and increased surveillance for complex operations or those that are not particularly transparent.

f) It introduces the concept of simplified due diligence in the event there is a minor risk of money laundering.

g) The need for an enhanced due diligence and to introduce special measures for cases in which there is no direct contact with the customer, in the case of cross-frontier correspondent banking relationships and in the case of persons who are politically exposed, including also those persons with a political profile exposed to money laundering both in third countries and within the borders of the EU.

h) The need for Member States to take the necessary steps to prevent employees (of companies subject to these rules) being the object of threats or discrimination.

i) It obliges bureaux de change, service providers to companies and trustees and casinos to obtain a licence or registration.

j) It requires the identification of all those persons who make cash payments for amounts in excess of 15,000 euros.

Creation of Financial Information Units (FIU) in the Member States[38].

Imposition of penalties in the event of a failure to comply with legislation[39].

The Member States will apply the provisions necessary to comply with this Directive no later than 15 December 2007.

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[38] Each Member State will create a Financial Information Unit (FIU) as a central national unit. It shall be responsible for receiving, analysing and disseminating to the competent authorities, disclosures of information which concern potential money laundering, potential terrorist financing with access to the financial, administrative and judicial information they require.

The establishments and persons subject to the Directive will be obliged to inform the FIU as soon as possible when they know, suspect or have reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted.

In the event money laundering or terrorist financing is suspected, the establishments and persons subject to the Directive will refrain from carrying out any transaction until they have informed the FIU.

The Directive leaves it up to the Member States to decide whether or not to oblige the members of independent legal professions, notaries, comptrollers, external accounts and tax advisors to notify the FIU of the information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, etc.

[39] In the case of non-compliance with the national legalisation adopted in order to apply the Directive, the corresponding establishments and persons may be considered responsible for the infringements. The sanctions will be effective, proportionate and dissuasive.

2.2.3.4. Commission Directive 2006/70/EC, dated 1 August 2006

This Directive establishes provisions regarding the definition of PEPs or "politically exposed persons"[40] and the technical criteria applicable in the simplified due diligence procedures regarding customers as well as dealing with exemptions due to only occasional or very limited financial activity, all of which were questions that the earlier directive failed to define.

[40] Heads of State or Government, ministers, members of parliament, etc.

LEVEL II: TO LEARN MORE

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5. SECTOR-SPECIFIC UN CONVENTIONS. SPECIAL REFERENCE TO TERRORISM

3.2. Individual study of sector-specific universal international conventions on terrorism

3.2.1. The 16 (13+3) Conventions:

3.2.1.1. Convention on Offences and Certain Other Acts Committed On Board Aircraft ("Tokyo Convention")

Signed in Tokyo on 14 September 1963. In force since 4 December 1969. 182 contracting states. Spain delivered the ratification instrument on 1 October 1969.

- Very reduced scope. It only applies to acts that affect safety during flight.
- Considered the first de facto genuine international treaty on terrorism, although like some other treaties, it does not refer to terrorism as a phenomenon as such.
- It establishes obligations to provide assistance and the obligation to suppress terrorist acts.
- Each state must adopt the measures necessary to establish its jurisdiction in relation to offences committed in aircraft registered in that state.
- Offences committed on board aircraft registered in a contracting state will be considered, for extradition purposes, as if they had been committed not only in the place where they occurred, but also in the territory of the state where the aircraft is registered.
- The above notwithstanding, no provision of the Convention will be interpreted in such a way that it creates an obligation to grant extradition (no obligation to extradite is established).
- It authorises the aircraft commander to impose reasonable measures, including restraint, against anyone who gives him/her reason to believe that they have committed or are about to commit an act of that kind, provided that it is necessary to protect the safety of the aircraft; and
- It requires the contracting parties to assume custody of offenders and return the control of the aircraft to its legitimate commander.

3.2.1.2. Convention for the Suppression of Unlawful Seizure of Aircraft (“Hague Convention”)

Signed in the Hague on 16 December 1970. In force since 14 October 1971. 185 contracting states. Spain delivered the ratification instrument on 30 October 1972.

- Its scope is even more reduced that that of the Tokyo Convention.
- It considers an offence that any person on board an aircraft in flight “unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of, that aircraft, or attempts to perform any such act”.
- It requires that the parties to the convention punish hijacking of aircraft with “severe penalties”.
- It requires that the parties who arrest offenders either extradite them or prosecute them; and
- It requires the parties to provide mutual assistance in the criminal proceedings brought under the convention.

3.2.1.3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (“Montreal Convention”)

Signed in Montreal on 23 September 1971. In force since 26 January 1973. 185 contracting states. Spain delivered the ratification instrument on 30 October 1972.

- It establishes that a person commits a crime if he/she unlawfully and intentionally performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of the aircraft; places an explosive device in an aircraft; or attempts to commit such acts; or is an accomplice to a person who commits or attempts to commit such acts.
- It requires that the parties to the convention punish these crimes with “severe penalties” and
- It requires that the parties who arrest offenders either extradite the offender or bring him/her to justice.

3.2.1.4. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents

Adopted in New York on 14 December 1973. In force since 20 February 1977. 166 contracting states. Spain delivered the ratification instrument on 8 August 1985.

- Defines an “internationally protected person” as a Head of State, Ministry of Foreign Affairs, representative or official of a State or international organisation that is entitled to special protection in a foreign state, and members of his/her family; and
- It requires that the parties classify as crimes “the intentional commission of a murder, kidnapping or other attack upon the person or liberty of an internationally protected person; a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty; a threat to commit any such attack; an attempt to commit any such attack”; and any act “constituting participation as an accomplice”, and that they be punishable “by appropriate penalties which take into account their grave nature”.

3.2.1.5. International Convention against the Taking of Hostages (Hostages Convention)

Adopted in New York on 17 December 1979. In force since 3 June 1977. 168 contracting states. Spain delivered the ratification instrument on 26 March 1984.

It states that “any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention”.

3.2.1.6. Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention)

Signed in Vienna on 26 October 1979. In force since 8 February 1987. 130 contracting states. Spain delivered the ratification instrument on 6 September 1991.

It criminalises the unlawful possession, use, transfer and theft of nuclear materials as well as the threat to use nuclear materials to cause death or serious injury to a person or substantial material damages.

3.2.1.6.1. Amendments to the Convention on the Physical Protection of Nuclear Material. Signed in Vienna on 8 June 2005. Subject to ratification.

- They establish the legally binding obligation for the contracting states to protect national nuclear facilities and materials held for peaceful purposes, as well as the storage and transport of the same; and
- They establish greater cooperation between states in relation to the application of rapid measures to locate and recover stolen or contraband nuclear material, lessen the radiological consequences of sabotage and prevent and combat related crimes.

3.2.1.7. 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

Signed in Montreal on 24 February 1988. In force since 6 August 1989. 161 contracting states. Spain delivered the ratification instrument on 8 May 1991.
It extends the provisions of the Montreal Convention (see no. 3 above) to include terrorist acts committed in airports that provide services to international civil aviation.

3.2.1.8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

Done in Rome on 10 March 1988. In force since 1 March 1992. 146 contracting states. Spain delivered the ratification instrument on 7 July 1989.

- It establishes a legal regime applicable to acts committed against international maritime navigation, similar to the regimes established for international aviation; and
- It sets the legal basis for actions against those who commit illegal acts against ships. It states that a person commits a terrorist offence if that person unlawfully and intentionally seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; places an explosive device or substance on board a ship; and perpetrates other acts against the safety of ships.

- The Convention was originally designed to facilitate the prosecution of terrorists and pirates for their crimes without taking into account where they had been arrested or where the crimes had been committed.
- With the Convention, the contracting governments are obliged to extradite, try or prosecute the presumed offenders.

3.2.1.8.1. 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

Adopted in London on 14 October 2005.

- It criminalises the use of a ship as an instrument for committing an act of terrorism.
- It criminalises transporting various materials on board a ship in the knowledge that they are to be used to cause or in a threat to cause, death or serious injury or damage to further an act of terrorism.
- It criminalises transporting persons who have committed acts of terrorism by ship; and
- It introduces procedures to regulate the boarding of a ship believed to have committed an offence under the Convention.

3.2.1.9. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf

Done in Rome on 10 March 1988. In force since 1 March 1992. 135 contracting states. Spain delivered the ratification instrument on 7 July 1989.
It establishes a legal regime applicable to acts carried out against fixed platforms located on the continental shelf similar to the regimes established regarding international aviation.

3.2.1.9.1. 2005 Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf

Adopted in London on 14 October 2005.

It adapts the changes in the Convention for the suppression of unlawful acts against the safety of maritime navigation to the context of fixed platforms located on the continental shelf.

3.2.1.10. Convention on the Marking of Plastic Explosives for the Purpose of Detection

Done in Rome on 1 March 1991. In force since 21 June 1998. 136 contracting states. Spain delivered the ratification instrument on 31 May 1994.

- Its objective is to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am flight 103 bombing).
- The parties are obliged in their respective territories to ensure effective control of “unmarked” plastic explosives, i.e. those that do not contain any of the detection agents listed in the technical annex to the treaty.

In general terms, the parties will, inter alia: take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives; prevent the movement of unmarked plastic explosives into or out of their territory; exercise strict, effective control over the possession and transfer of unmarked explosives made or imported prior to the entry into force of the Convention; ensure that all stocks of unmarked explosives that are not in the possession of the military or police authorities are destroyed, consumed, marked or rendered permanently ineffective within a term of fifteen years; and ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the entry into force of the Convention for that state.

3.2.1.11. International Convention for the Suppression of Terrorist Bombings

Adopted in New York on 15 December 1997. In force since 23 May 2001. 153 contracting states. Spain delivered the ratification instrument on 30 April 1999.

It creates a regime of universal jurisdiction regarding the unlawful and intentional use of explosives and other lethal devices in, into or against various defined public places with intent to kill or cause serious bodily injury or with intent to cause extensive destruction of that place.

3.2.1.12. International Convention for the Suppression of Terrorist Financing

Adopted in New York on 9 December 1999. In force since 10 April 2002. 160 contracting states. Spain delivered the ratification instrument on 9 April 2002.

- Important from the point of view of the definition of terrorism.
- It requires parties to take steps to prevent and counteract terrorist financing, either directly or indirectly, through groups claiming to have charitable, social or cultural goals or that also engage in illicit activities, such as drug trafficking or gun running.
- It commits states to hold those who finance terrorism, criminally, civilly or administratively liable for such acts.
- In provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. Bank secrecy is no longer adequate justification for refusing to cooperate.

3.2.1.13. International Convention for the Suppression of Acts of Nuclear Terrorism

Adopted in New York on 13 April 2005. In force since 7 July 2007. 29 contracting states.

- It covers a broad range of acts and possible targets, including nuclear power plants and reactors.
- It covers threats and attempts to commit such crimes or to participate in them as an accomplice.
- It stipulates that offenders will be prosecuted or extradited.
- It encourages states to cooperate in the prevention of terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings; and
- It contemplates both crisis situations (assisting states to solve the situation) and post-crisis situations (rendering nuclear material safe through the International Atomic Energy Agency, IAEA).

6. INTERNATIONAL INSTRUMENTS FOR COMBATING MONEY LAUNDERING AND TERRORIST FINANCING

5.1. International instruments against money laundering

5.1.1. UNIVERSAL SCOPE

5.1.1.1. UN Convention on the Illicit Trafficking of Narcotic Drugs and Psychotropic Substances of 1988

It was the first of the international-level regulations that obliged the contracting states to include financial operations related to drugs as crimes in their national legislation, as set out in its text, where it establishes that all the contracting states will adopt the measures necessary to classify money laundering as a crime when committed intentionally, although it is only criminalised when in relation to funds which are the proceeds of the illicit trafficking of narcotic drugs.

The following are criminalised when committed intentionally:

- The conversion or transfer of property, knowing that such property is derived from any offence or offences established in the text, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions; (Article 3,1.b) i));
- The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in the text or from an act of participation in such an offence or offences (Article 3,1.b) ii), and
- The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in the text or from an act of participation in such offence or offences (Article 3,1.c)i)).

Article 5 contains a broad regulation of the confiscation of the proceeds of crime or property into which such proceeds have been transformed.

The Vienna Convention is considered to be one of the most important documents in the fight against money laundering, among other reasons because it links drug trafficking and the proceeds of crime for the first time[41].

5.1.1.2. UN Convention on Transnational Organised Crime of 2000 ("Palermo Convention") [42]

It is a response to the emergence and increase of organised crime and criminal activities with an increasingly transnational dimension, favoured by the new socio-economic panorama, with actions that surpass the barriers between states taking advantage of changes in sovereignty and jurisdiction, granting criminals a series of advantages, the most noteworthy of which are:

- Avoiding money laundering control policies that centred on the identification and reporting of certain operations.
- Those caused by the deficiencies in international regulations, using the possibilities offered by countries with weaker and more defective control systems.
- The deficiencies in relation to international judicial cooperation due to the existence of criminal procedures that differed depending on the state.
- The difference in the treatment of banking secrecy by the different states, motivated by the economic interests at stake.
- The use of professionals that do not belong to the criminal organisation for activities such as the incorporation of companies and money laundering.
- The absence of legal regulations, in many countries, in relation to new technologies, e-commerce, internet banking, all of them methods that are currently used to launder money.
- The absence of a central state registry of the accounts existing in financial entities, as well as the lack of a computer link between the bodies responsible for dealing with money laundering in the countries affected.
- A lack of specialised training for those responsible for dealing with laundering: customs and tax inspectors, judges and other public officials.

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[41] The widespread acceptance and ratification of the Convention by 106 signatory countries represents a decisive change in the way money laundering is seen internationally.

[42] Adopted by the UN General Assembly on 15 November 2000.

The Resolution from the UN General Assembly dated 9 December 1998 agreed to prepare an international convention against transnational organised crime and on 17 December it asked the Special Committee to continue its work on the draft convention and related protocols.

The Convention was approved by the General Assembly on 15 December 2000 and taken to the political conference held in Palermo between 12 and 15 December 2000. It is in force, having reached the necessary number of ratifications to that end.

The Convention covers:

- Participation in an organised group.
- Money laundering.
- The criminal liability of legal persons.
- Sanctions.
- Confiscations.
- The transparency of transactions.
- The establishment of jurisdiction, and
- Extradition, the obligation to extradite or prosecute, the extradition of nationals and the examination of cases of extradition.

The definitions contained in Article 2 include the following one: “Organized criminal group’ shall mean 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, financial or other material benefit”.

The same article also contains definitions of money laundering, trafficking in human beings and obstruction of justice, among others. It also covers the concept of controlled delivery, already contained in the Vienna Convention, which allows illicit or suspect consignments to pass out of, through or into the territory of one or more States, with a view to the investigation of an offence and the identification of persons involved. The peculiarity consists of the possibility for intervention of any state that feels it is entitled to prosecute a certain crime, which can on occasion create problems and possible situations of unjustified interference.

For the purposes of the Convention, a crime is considered transnational if:

- It is committed in more than one state.
- It is committed within a single state but a substantial part of its preparation, planning, management or control is carried out in another state.
- It is committed in one state but involves the participation of an organised criminal group performing criminal activities in more than one state,
- It is committed in a single state but has substantial effects in another state.

Article 6 of the Convention is entitled “Criminalization of the laundering of proceeds of crime” and states in its first paragraph that each state shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
- The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
- The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
- Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

Paragraph 2 states in relation to the application or implementation of paragraph 1 of this article: “Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences, Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups”.

The criminalisation of laundering in Article 6 includes as predicate offences the serious offences defined in Article 2 b) such as a crime punishable with a maximum term of imprisonment of at least four years or a more serious sentence. Moreover, participation

in an organised criminal group (Article 5), corruption (Article 8) and the obstruction of justice (Article 23) are considered predicate offences, notably expanding the universe of related crimes.

Meanwhile, Article 7 of the Palermo Convention, entitled “Measures to combat money-laundering”, develops an entire system in certain detail: for the supervision of financial entities, on the requirements to identify customers, on reporting suspicious transactions, on cooperation and the exchange of information, on the establishment of a financial intelligence unit, on the supervision of cross-border movements of cash, etc. and calls on the states to follow the initiatives of regional, interregional and multilateral organisations combating money laundering.

In 1997, the Office of Drug Control and Crime Prevention, now known as the United Nations Office on Drugs and Crime, established the Global Programme against Money-Laundering with a view to fulfilling UN mandates regarding money laundering based on the 1988 and 2000 Conventions. The Office is the centre for coordination of the UN system for matters related to the laundering of money and the proceeds of crime. It provides technical assistance to states so that they develop the necessary infrastructure to combat money laundering and can apply the provisions of the treaties addressing this area.

Spanish Law 10/2010, of 28 April, on the Prevention of Money Laundering and Terrorist Financing. (Official State Gazette 29 April 2010)

The transposition date for the third and fourth directives was 15 December 2007. The Spanish state failed to fulfil this obligation and was sentenced on two occasions by the CJEC[43]. It is precisely this law that was designed to transpose said directives, even though it goes beyond that. It refers not only to money laundering, but also to terrorist financing, although it does not deal exhaustively with the latter, as Law 12/2003 of 21 May on the prevention and blocking of terrorist financing remains in force.

It is important to highlight that it is neither a criminal nor a procedural law, but instead an administrative one, thus sitting better with Articles 301 to 304 of the Criminal Code.

[43] 24 September 2009 (CJEC 2009, 292) (case C-504/2008) and 1 October 2009 (CJEC 2009 301) (case C-502/2008).