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THE INTERNATIONAL CONVENTION ON THE SUPPRESSION OF THE FINANCING OF TERRORISM

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BACKGROUND

A. History of the Convention

On 9 December 1999, the General Assembly of the United Nations adopted an international convention designed to cut off funding for terrorist activities. The 28-article *International Convention for the Suppression of the Financing of Terrorism* (document A/C.6/54/L.16) (see Appendix of this paper) was adopted on the recommendation of the Assembly's Sixth Committee (Legal).

The Convention requires States Parties to pass domestic legislation criminalizing the collection of funds for terrorist activities. As well, persons donating funds to groups which they know to support terrorist activities would also commit an offence. Although "terrorism" is not defined anywhere in the Convention, its meaning is made clear from the description of the activities the Convention aims at combatting:

> Any…act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

As well, the Convention appends nine other "anti-terrorism" Conventions, which outline other "terrorist"-type offences. In effect, a person contributing to any group which the person knows engages in any of the activities proscribed by the Convention or the appended Conventions, would commit an offence.

Subscribing states are also required to cooperate in investigations and extraditions regarding such offences. Funds known to be allocated for terrorist purposes would have to be frozen or seized.

The Convention opened for signature on 10 January 2000 and will enter into force on the 30th day following the date of the deposit of the 22nd instrument of ratification, acceptance, approval or accession with the Secretary-General. Canada signed the treaty on 10 February 2001. Ratification may take place only after domestic legislation has been enacted to implement the Convention.

B. The Problem of Terrorism

In its 14 January 1999 report, the Senate Special Committee on Security and Intelligence reviewed the current threat environment. In addition to evaluating the response capability of the federal government's security and intelligence community, it canvassed a number of emerging issues that posed particular challenges, including cyber terrorism. The Committee was chaired by Senator William Kelly, who also chaired the two previous Senate Special Committees on Terrorism and Public Safety that reported in 1987 and 1989. Senator John Bryden served as Vice Chair. The Committee conducted hearings from April through October 1998 and heard a total of 74 witnesses. An additional 42 people were interviewed by the Committee Chair and staff. Witnesses and persons interviewed included:

- senior government officials primarily from the federal security and intelligence community;
- senior officers from federal, provincial and municipal police forces;
- officials of foreign security and intelligence organizations; and
- private experts in various fields.

The Report discussed at length the difficulty of defining the term. It noted that definitions have changed dramatically in response to the ebbs and flows of domestic and international politics over the centuries. From its revolutionary origins, terrorism has been variously defined as, or equated with, popular revolutionary movements, mass repression practised by totalitarian states, anti-colonialist or nationalist insurrections, separatist movements, or low-intensity warfare mounted or supported by renegade states. Historically, terrorism has been equated with violence or at least the threat of violence. In an attempt to find a workable and accepted definition of terrorism, Schmid(1) studied the common elements of 109 definitions

(1) Alex P. Schmid *et al.*, "Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases," *Theories and Literature*, Transaction Books (1988), pp. 1-9.

and found a reference to "force" or "violence" in 83.5%; references to political motivations came next at 65%. Subsection 2(c) of the *Canadian Security Intelligence Service Act* which, although not referring to terrorism by name is usually taken to cover it, refers to:

> activities...directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state, …

The Senate Committee noted some difficulties with the CSIS definition: Why limit the scope of violence to "serious" violence; what constitutes "serious" violence; and who decides?

The Committee also noted that references to force, violence or the threat thereof as the common thread were also contained in: international conventions relating to terrorism; the United States *Antiterrorism and Effective Death Penalty Act*; and definitions used by the Federal Bureau of Investigation and the United States Department of Defence.

The UN Convention also reflects this common thread. As noted above, although the term "terrorism" is not a defined term *per se*, the Convention would criminalize

> any act intended to cause death or serious bodily injury to a civilian…not taking an active part in the hostilities…when the purpose of such act…is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.(2)

The Committee also drew attention to the problem of international crime:

> Another issue that bedevils the search for a workable definition of terrorism is the distinction between terrorism and criminality, especially in today's world of 'narco-terrorism' and transnational crime…. Terrorism is crime and should be treated as such. Terrorism is, however, a particular type or subset of crime, distinguished from other types of crime by the motivations of the perpetrators. While both use criminal (and often identical) means, terrorists are motivated by a 'cause'. Other criminals are motivated by the prospect of personal or organizational economic aggrandizement. The 'causes' advanced by terrorism include political or ideological objectives, religion, nationalism, ethnic separation, or any combination thereof.

The Committee ended by not explicitly defining the term, and advised that definitions of terrorism might best be rethought, particularly given the modern terrorist's access

(2) Article 2.

to tactics that would not be generally understood as "violence" or "force," but which could be equally devastating. For example, information warfare and cyber terrorism could not be said to fit into existing definitions that revolve around violence or the threat of violence; moreover, it is no longer necessarily the case that terrorist attacks are oriented towards communicating a political message or gaining allegiance to a political organization or cause. In recent incidents, retribution for perceived past wrongs, or destabilization, appear to be the objectives.

Within what it termed a "generic definition," the Committee identified four types of terrorism:

1. *State-Sponsored Terrorism.* States that fund, train, provide a haven for, or otherwise promote terrorism include Iran, Iraq, Syria, Sudan, Libya and regimes such as the Taliban in Afghanistan. States sponsor terrorism as a cost-effective method of advancing their interests and, in some cases, as a cost-effective alternative to conventional warfare. State-sponsored terrorism continues to be a major threat to nations such as the United States. State-sponsored terrorism is, under subsection 2(c) of the *Canadian Security Intelligence Service Act*, a threat to the security of Canada even if Canada is used solely as a base to support such terrorism directed at other countries.
2. *Agitational or Insurgent Terrorism* springs from non-state, but usually highly organized, groups. Such groups may have originated from guerrilla organizations in some areas of the world. Agitational or insurgent terrorist groups are usually transnational organizations with their own command structures, funding networks and training facilities. They are often affiliated with one or more "legitimate" political or benevolent organizations that act as their fundraising, propaganda or political lobbying wings. Because of their transnational structure, such groups are able to undertake legal actions in one or more countries in support of illegal activities elsewhere.
3. *Loosely Affiliated Terrorists* have been responsible for the 1993 bombing of the World Trade Centre and the bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Historically, in order to frustrate detection, some terrorist groups have organized their activists into small cells. These cells may be connected to a command structure that exercises some control and coordination over the cells' activities. However, because there is not necessarily an organized or well-defined command structure that can be infiltrated, the affiliations are often temporary and their *ad hoc* nature makes their activities very unpredictable. The phenomenon of completely autonomous individuals or terrorist cells represents a new and major type of threat. The common motivator could be a religion, ideology or some patriot militia ideology or millennialist philosophy.

4. *Terrorism for Hire* is a permutation or combination of the foregoing types of terrorism, also sometimes referred to as "subcontracting terror." Muammar Qadhafi is reputed to have pioneered this tactic when he hired the Red Army to carry out terrorist attacks on behalf of Libya in the early 1980s.

Among the Committee's preliminary observations was that "there does not appear to be a reliable list of terrorist incidents in Canada." The Committee was informed that a list was maintained until some time in 1992, but the project did not continue thereafter. The Department of Foreign Affairs and International Trade also provided the Committee with a list covering the period 1994 to October 1998, which included 17 terrorist incidents outside of Canada affecting Canadians. Foreign Affairs warned that the list should not be considered as definitive.

In a press release of 14 January 1999, the Committee reported that it "was impressed by the progress in competence, professionalism and preparedness made over the last decade within the Canadian security and intelligence community" but also reported that "there is no cause for complacency." Senator Kelly stated: "The tactics and tools available to terrorists have broadened and the threat posed by nuclear, chemical and biological weapons has increased."(3)

Senator Bryden commented, "The overall message we would like to convey to Canadians is that they are well-served by the security and intelligence organizations and officials within the federal government. However, rapid globalization is presenting new threats such as cyber terrorism and new challenges such as sophisticated encrypted communications which will demand increasing attention and resources."(4)

The Committee reported that, since the Senate Special Committee on Terrorism and Public Safety reported in 1989, a great deal had changed in terms of the extent and nature of the security threats facing the world. Figure 1 illustrates the number of terrorist incidents world-wide since 1989. It is important to consider this figure in the context of the unknown number of terrorist incidents that may have been aborted, or otherwise never came to fruition, because of counter-terrorism actions by police and security intelligence agencies.

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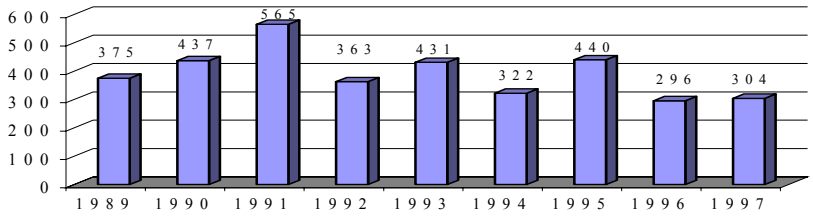
(3) Press release, 14 January 1999.

(4) *Ibid*.

Figure 1

Number of Terrorist Incidents World-wide, 1989-1997



Source: Data from the United States Department of State

Although the Committee found that Canada and Canadians are not a major target for terrorist attacks,

> Canada remains a 'venue of opportunity' for terrorist groups: a place where they may raise funds, purchase arms and conduct other activities to support their organizations and their terrorist activities elsewhere. Most of the major international terrorist organizations have a presence in Canada. Our geographic location also makes Canada a favourite conduit for terrorists wishing to enter the United States, which remains the principal target for terrorist attacks world-wide. In 1997, over one-third of all terrorist attacks were against United States targets.

Testimony by witnesses before the Committee indicated that the number of terrorist incidents in Canada has declined. This was considered consistent with the international trends in terrorism. In 1997, world-wide, there were 304 terrorist attacks, one of the lowest totals recorded since 1971.(5) Although this trend is clearly encouraging, the Committee noted that a single terrorist incident of the magnitude of the bombings of Air India flight 182 or Oklahoma City is cataclysmic. Furthermore, the Canadian Department of Foreign Affairs and International Trade employs 1,212 Canadian and 4,288 local employees at Canada's missions abroad; 1.5 million Canadians live outside Canada on a semi-permanent basis; and up to four million Canadians travel abroad each year. Canadians also visit areas of political instability with increasing frequency.(6) Canadians thus can become innocent and unintended victims of terrorism. For example:

- 60 Canadians were on an EgyptAir flight hijacked at Luxor (1996);

(5) United States State Department figures (April 1998).

- 4 Canadians were kidnapped in Colombia (1996-1997);
- 1 Canadian was kidnapped in Yemen (1993-1994);
- 1 Canadian was kidnapped in Chechnya (1998);
- 3 Canadian tourists were kidnapped by Rwandan rebels in The Congo (1998); and
- several local employees of Canadian High Commissions were injured in the bombings of the United States embassies in Nairobi and Dar-es-Salaam (1998).

C. Financing Terrorism

In its reports, the Senate Special Committees on Terrorism and Public Safety commented on the growth of "narco-terrorism," i.e., alliances between terrorist groups and drug cartels. Into this partnership, the terrorist organizations bring their paramilitary skills and organization to protect the drug operations and intimidate interfering governments. For their part, the drug cartels give the terrorist organizations access to vast sums of money from drug profits, far in excess of anything the terrorist organizations could raise through traditional means. The drug cartels also educated the terrorist organizations in the transfer and laundering of money. Today, almost all the major insurgent groups engage in drug trafficking as a method of fundraising. Colombia's FARC, Peru's Sendero Luminoso ("Shining Path"), Myanmar's Khun Sa Militia, Turkey's Kurdistan Workers' Party (PKK), Sri Lanka's Liberation Tigers of Tamil Eelam (LTTE) and Afghanistan's Hizbi-Islami are examples of terrorist groups that engage in drug trafficking, either on their own or in partnership with drug cartels. These activities are international in scope, but may occur in Canada as well. Drug money gives such groups access to wealth upon which sophisticated, world-wide organizations can be built to continue their insurgent or terrorist activities, regardless of the support in the homeland for those activities and regardless of the success of the insurgent activities in the field. For fundraising purposes, terrorist organizations often engage in criminal activities such as extortion, theft, bank fraud and money laundering. Many terrorist organizations engage in gun-running and smuggling, including the smuggling of illegal aliens.

Some witnesses before the Committee expressed concern about an apparent new trend for major international terrorist groups, namely the metamorphosis of some into full-blown criminal organizations. This may particularly be the case with insurgent terrorist groups. The

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(6) Figures from the Department of Foreign Affairs and International Trade.

political objectives that originally motivated such groups have been subordinated or completely lost to the attractions of the vast personal wealth that can be generated by criminal activities. Because some of these groups began as paramilitary organizations with some of their members having combat training and experience, they pose a particular threat as criminal organizations.

One might assume, furthermore, that the final phase in the evolution of such groups will be their active involvement in legitimate commercial enterprises as a cover for their criminal activities. In doing so they would follow the precedent established by La Cosa Nostra, the Russian Mafia and other organized crime groups. The Liberation Tigers of Tamil Eelam, for example, are alleged to have invested heavily in the stock and money markets, real estate, finance companies, farms, video rental shops and restaurants(7) – anything, in fact, that is highly profitable and gives access to pools of cash. The LTTE and the Irish Republican Army are said to own and operate fleets of deep-sea ships which, in addition to guns and other contraband cargo, carry fertilizer, timber, sugar, cement and other commercial goods for legitimate (and one assumes innocent) clients. Terrorist organizations that reinvent themselves as multinational commercial enterprises will present substantially greater challenges to law enforcement authorities and the protection of national and international security.

D. Identifying and Designating Terrorist Groups

In the United States, the *Antiterrorism and Effective Death Penalty Act of 1996* authorizes the Secretary of State to designate a list, every two years, of Foreign Terrorist Organizations (FTO). The Secretary may add organizations to the list at any time. In 1999, there were 28 such designations. Of these, 27(8) were re-designations, i.e., organizations placed

(7) Rahan Gunaratna, "International and Regional Security Implications of the Sri Lankan Tamil Insurgency," Alumni Association of the Bandaranake Centre for International Studies and the International Foundation of Sri Lankans, London, England (1997), p. 24 and interview with Dr. Peter Chalk on 9 July 1998.

(8) Abu Nidal Organization (ANO); Abu Sayyaf Group (ASG); Armed Islamic Group (GIA); Aum Shinriykyo; Basque Fatherland and Liberty (ETA); HAMAS (Islamic Resistance Movement); Harakat ul-Mujahidin (HUM); Hizballah (Party of God); Gama'a al-Islamiyya (Islamic Group, IG); Japanese Red Army (JRA); al-Jihad; Kach Kahane Chai; Kurdistan Workers' Party (PKK); Liberation Tigers of Tamil Eelam (LTTE); Mujahedin-e Khalq Organization (MEK, MKO, NCR, and many others); National Liberation Army (ELN); Palestine Islamic Jihad-Shaqaqi Faction (PIJ); Palestine Liberation Front-Abu Abbas Faction (PLF); Popular Front for the Liberation of Palestine (PFLP); Popular Front for the Liberation of Palestine-General Command (PFLP-GC); al-Qa'ida; Revolutionary Armed Forces of Colombia (FARC); Revolutionary Organization 17 November (17 November); Revolutionary People's Liberation Army/Front (DHKP/C); Revolutionary People's Struggle (ELA); Shining Path (Sendero Luminoso, SL); Tupac Amaru Revolutionary Movement (MRTA).

on the list two years prior which remained on the list. Redesignation is a positive act and represents a decision by the Secretary of State that the organization still meets the criteria specified in law. In the absence of action by the Secretary, the organization is removed from the list. Three organizations were dropped from the list because they no longer met the criteria. One organization was added to the list because it now met the criteria.

Being designated an FTO has considerable consequences:

- It becomes unlawful for a person in the United States or subject to the jurisdiction of the United States to provide funds or other material support to a designated FTO.
- Representatives and certain members of a designated FTO, if they are aliens, can be denied visas or excluded from the United States.
- U.S. financial institutions must block funds of designated FTOs and their agents and report the blockage to the Office of Foreign Assets Control, U.S. Department of the Treasury.

There are three criteria for designation:

1. the organization must be foreign;
2. the organization must engage in terrorist activity as defined in Section 212 (a)(3)(B) of the *Immigration and Nationality Act*; and
3. the Organization's activities must threaten the security of U.S. nationals or the national security (national defence, foreign relations, or the economic interests) of the United States.

Criticism has been levelled at the Department of State for the lack of transparency in the designation process. The Secretary of State makes the designations following an "exhaustive interagency effort," and designations are subject to judicial review. An administrative record is maintained of each recommendation to the Secretary; however, because the records would reveal intelligence sources and methods, they are classified.

The law also allows groups to be added at any time following a decision by the Secretary, in consultation with the Attorney General and the Secretary of the Treasury. Designations can also be revoked if the Secretary determines that there are grounds for doing so and notifies Congress. Congress can also pass legislation to revoke designations.

The law responds to concerns about foreign terrorist organizations raising funds in the United States. Some terrorist organizations try to portray themselves as raising money

solely for charitable activities such as clinics or schools. These activities have helped recruit supporters and activists and provided support to terrorists. Being aware of this, Congress included in Section 301(a)(7)) of the Statute:

> Foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.

Accordingly, any contribution to a designated foreign terrorist organization, regardless of the intended purpose, is prohibited by the statute, unless the contribution is limited to medicine or religious materials.

Some critics perceive a "double standard" in U.S. policy, as evidenced by the exclusion of the IRA from the U.S. list. The U.S. Office of the Coordinator for Counterterrorism makes the following response:

> There is a strong body of evidence documenting historic IRA involvement in terrorist activity. This evidence precedes the time, two years ago, when we first considered designating the IRA as an FTO. At that time, the Secretary of State took note of the IRA's unequivocal cease-fire, as well as the subsequent decision by the British government that the cease-fire was "genuine in word and deed." This permitted Sinn Fein to join inclusive, all-party talks in Belfast. The peace process in Northern Ireland continues, albeit not without obvious difficulties, and we have again determined that the IRA should not be designated at this time. We are, however, concerned over recent indications of increased terrorist activity in Northern Ireland… (9)

In Canada, unlike the United States, there is no single resources envelope for the security and intelligence community. Many organizations within the security and intelligence community exercise invasive powers that impact, or have the potential to impact, on personal rights and freedoms. The Senate Committee voiced its concern that investigation and enforcement powers be subject to some form of review to ensure they are being exercised in accordance with the law and the rules of natural justice. Similarly, it was considered important that people who felt aggrieved by the exercise of such powers should have recourse to an independent review. Currently:

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(9) http://www.state.gov/www/global/terrorism/fto_1999.html#designation (8 October 1999).

- Independent review or oversight bodies are in place for the Canadian Security Intelligence Service, the Communications Security Establishment, and the Royal Canadian Mounted Police.
- The Auditor General has the authority to conduct broad scope audits of any department and agency of the federal government and has conducted an audit of the Canadian security intelligence community.
- Specific recourse is also available through the Access and Privacy Commissioners and through statutes such as the *Canadian Human Rights Act* and the *Privacy Act*.
- Judicial review applies to the actions of the organizations within the security and intelligence community under the *Canadian Charter of Rights and Freedoms*, or as specifically provided for in individual statutes (e.g., the *Canadian Security Intelligence Service Act*).

As well, the Office of the Inspector General – established under the *Canadian Security Intelligence Service Act* – has a mandate to:

- monitor compliance by the Canadian Security Intelligence Service with its operational policies;
- review the Canadian Security Intelligence Service's operational activities; and
- submit certificates to the Solicitor General confirming that the Canadian Security Intelligence Service has conducted its activities lawfully and without unreasonable or excessive exercise of its powers.

The incumbent is appointed by the Governor in Council and reports to the Solicitor General. Both the Security Intelligence Review Committee (SIRC) and the Inspector General have unrestricted access to information generated or retained by the Canadian Security Intelligence Service. Both SIRC and the Inspector General indicated to the Senate Committee their complete satisfaction that CSIS is respecting their access rights.

Fundraising for terrorist activities would likely fall under the definition in subparagraph (c) of section 2 of the *Canadian Security Intelligence Service Act,* which defines "threats to the security of Canada" to include:

(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada, or activities directed toward or in support of such espionage or sabotage;

(b) foreign-influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person;
(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state; and
(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada.

However, the definition does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).

E. Canada's International Commitment

In its 1999 report, the Special Committee noted "that international negotiations concerning terrorism often became tangled in a debate around the definition of terrorism and philosophical or ideological debates over the root causes of terrorism. These debates [have] too often deflected negotiations from their course and delayed progress." This Committee was pleased to note that those debates have been largely surmounted. The *United Nations Declaration on Measures to Eliminate International Terrorism (1994)* witnessed a shift from a debate over definitions and root causes towards a concerted effort to deal with terrorism, with the result that most countries now acknowledge terrorism as a crime.

The report continues: "It has long been recognized that international agreements and international law to a significant degree are as effective as the very strongest nation allows them to be. For many years that nation has been the United States, counterbalanced somewhat by the Soviet Union until it collapsed." The example was considered of the United States' bombings of alleged terrorist targets in Afghanistan and Sudan, which it justified based on Article 51[(10)] of the United Nations *Charter*, and which, it was considered, might be said to be in conflict with the *International Convention for the Suppression of Terrorist Bombings***.** That Convention has been endorsed by the G-8 and 20 other nations and was signed by Canada on 12 January 1998, but has yet to be ratified. Some commentators view the United States' action as evidence that the United States will be the *de facto* standard for compliance with international law relating to terrorism.

(10) Self-defence.

The Committee considered that Canada, as the United States' main trading partner and next-door neighbour, "not only will be affected by the United States' support for international agreements on terrorism, but also because of the importance of our two countries' cooperation and support for each other in the fight against terrorism, Canada is uniquely positioned to influence United States' policy and actions in this regard." The Committee recommended that the Government of Canada continue to use all legitimate means at its disposal to continue to support those efforts.

F. Fundraising in Canada

In the course of its deliberations, the Senate Committee heard evidence that a variety of groups with terrorist affiliations conduct fundraising activities in Canada. Intimidation and various other forms of coercion within the various emigré communities are often used as fundraising tactics. Apparently, the policing of terrorist fundraising is difficult, perhaps because intimidation and other illegal tactics are rarely reported. As well, terrorist groups often use benevolent or philanthropic organizations as fronts for fundraising purposes. These may even be registered as charities or charitable foundations by Canada Customs and Revenue Agency (CCRA) under the *Income Tax Act*, thus enhancing their credibility and, ironically, creating a situation where Canadian taxpayers may subsidize their activities. Donors of funds usually have no idea that they will be put to illegal uses. As such, drawing a clear connection between funds raised in Canada and a terrorist action elsewhere is often impossible. Fundraising front groups are usually careful not to commit any crimes in Canada. Under current law, the only viable charge is conspiracy if a direct connection can be established between the funds raised in Canada by such groups and illegal activity elsewhere.

The Report refers to the U.S. experience:

> The United States has tried to get at terrorist fundraising through the *Antiterrorism and Effective Death Penalty Act, 1996* [but] it is too early to judge the effectiveness of the…*Act* in this regard. The Federal Bureau of Investigation allows investigations to establish relationships between legal front groups and terrorist groups and to trace funds which are complex, time-consuming and require substantial personnel and other resources.

The Committee was candid in its inability to propose a solution to the problem. It did consider, however, that the problem of ostensibly philanthropic organizations having charitable registration might be more effectively addressed with amendments to the *Income Tax Act* to allow CCRA to deny charitable registration to any group on the basis of a certificate from the Canadian Security Intelligence Service. CSIS would issue the certificate if the group is found to constitute a threat to the security of Canada, as defined in the *Canadian Security Intelligence Service Act*. Care would have to be taken in drafting the provisions to ensure that the Canadian Security Intelligence Service's decision is made according to a defined procedure, adequately reviewable by the Security Intelligence Review Committee and the Courts on application by the group, and in accordance with the *Canadian Charter of Rights and Freedoms*. It was also recommended that care should also be taken to avoid a situation where the certificate might become a bargaining chip in obtaining cooperation from such groups in matters of intelligence-gathering, investigation and law enforcement.

In light of the foregoing policy considerations, the paper now discusses the United Nations Convention.

THE UNITED NATIONS CONVENTION

A. Offences

Article 2 outlines the offences contemplated by the Convention. Article 2, Paragraph 1(a) of the Convention lists the basic offence: It is an offence for any person, directly or indirectly, unlawfully and wilfully, to provide or collect funds with the intention that they should be used, or in the knowledge that they are to be used, in full or in part, to carry out an offence, either as defined in the Draft Resolution or as defined in the nine terrorism-related treaties annexed to the draft.(11)

Paragraph 1(b) states that an offence is also committed if financing is provided for an act intended to cause death or serious bodily injury to a civilian or any other person not taking

(11) The complete draft resolution is attached hereto as the Appendix. Subject matter addressed in the annexed treaties include: seizure of, or acts against the safety of, civil aircraft or airports, or against maritime navigation or fixed platforms located on the continental shelf; crimes against internationally protected persons, including diplomatic agents; hostage taking; crimes involving nuclear material; and terrorist bombings. Additional treaties may be annexed as they are ratified, for example the 1998 Convention on Nuclear Terrorism.

an active part in an armed conflict, when the purpose of the act is to intimidate a population or to compel a government or international organization to do or abstain from some act. (For ease of reference, the above offences will be referred to collectively as "Paragraph 1 Offences.") This sub-paragraph, while not specifically purporting to be a definition of "terrorism," contains the essential elements of the offence, i.e., violence aimed at civilian populations for the purpose of compelling or dissuading state action.

For an act to be considered a Paragraph 1 Offence, it is not necessary that the funds be actually used in the commission of an offence. An attempt to commit a Paragraph 1 Offence is also considered an offence (under paragraph 4). Similarly, a person commits an offence who organizes or directs, or acts as an accomplice in, an actual or attempted Paragraph 1 Offence.

A person commits an offence who intentionally contributes to the commission of a Paragraph 1 Offence by a group of persons acting with a common purpose. The contribution must be intentional and made either: (a) with the intention of furthering the activity of the group aimed at the commission of a Paragraph 1 Offence; or (b) with the knowledge that the group intends to commit a Paragraph 1 Offence.

B. Application

Article 3 states that the Convention does not apply to offences committed within a single state where the offender is a national of, and present in, that state. The Convention will apply, however, where another state is entitled to exercise jurisdiction. Another state may exercise jurisdiction under the provisions of Article 7, paragraphs 1 or 2. These circumstances include offences:

a) committed on board a vessel flying the flag of, or an aircraft registered in, the other state;
b) committed by a national of that other state;
c) directed towards or resulting in the carrying out of an offence against that state abroad, including its government facilities, diplomatic or consular premises;
d) committed in an attempt to compel that state to do or abstain from doing any act;
e) committed by a stateless person with their habitual residence in that State;
f) committed on board an aircraft operated by the government of that state.

The effect of these provisions would appear to give a state the jurisdiction to prosecute under its domestic laws an offence occurring wholly within the territory of another

state where the offence targets, directly or indirectly, nationals or government facilities of that state, anywhere in the world. It might also be said to contemplate acts of terror directed against private multinational corporations, where the act is committed with the intent of compelling the state to do or abstain from doing an act.

C. Obligation of States Parties

Each State Party ratifying the Convention is required to notify the Secretary General of the jurisdiction it has established under Article 7. In most cases, the State Party where the offender is arrested or situated must either prosecute or extradite. Where more than one other state claims jurisdiction to prosecute an offence, the states "shall strive to coordinate their actions appropriately."

States Parties to the Convention are required to adopt measures necessary to establish as offences under their domestic law the offences defined in the Convention, and to make those offences punishable "by appropriate penalties which take into account the grave nature of the offences." As well, Article 5 requires that States Parties ensure the liability – criminal, civil or administrative – of any legal entity over which a person committing an offence has management or control.

The offences, when codified into domestic legislation, must also be specified to be extraditable offences, and States Parties are required to undertake to include them in every extradition treaty concluded between themselves and other states. There are similar provisions for cooperation and assistance among States Parties with respect to criminal investigations in connection with the listed offences, and to efforts made to prevent the offences being committed. The final outcome of prosecution of offences under the Convention must be communicated to the Secretary-General for transmission to other States Parties.

Article 6 requires that States Parties ensure that offences under the Convention are "under no circumstances justifiable by considerations of a political, ideological, racial, ethnic, religious or other similar nature."

As well, measures are to be taken to identify, detect and freeze or seize any funds used or allocated for the purpose of committing such offences. States Parties are to consider establishing mechanisms to use funds thus seized to compensate victims of terrorist offences, or their families. States Parties would call on financial institutions to pay special attention to

unusual or suspicious transactions and to report to the Government those that appear to stem from criminal activity.

The Convention specifies that its provisions are to be implemented without prejudice to the rights of third parties acting in good faith. Accordingly, consideration must be given to addressing the nature of contributions, and determining the meaning of "good faith."

ISSUES

Several issues arise in the context of the domestic enactment of the Convention. This paper does not purport to list or discuss these exhaustively, but rather serves to highlight them as subjects which may warrant further research and/or discussion.

A. Defining "Terrorism"

In addition to the definitional problems outlined in Part 1, the General Assembly debates (in particular, representatives from Pakistan, Syria, Lebanon, Iraq and Cuba) heard debate concerning possible abuses arising from the omission from the text of a specific definition of "terrorism." Although articles 2 (a) and (b) could be seen as setting out implicitly the activities contemplated by the Convention, the delegates wanted to see the Assembly's anti-terrorism initiatives clarified by a clear distinction between terrorism and the legitimate struggles of people for national liberation or freedom from foreign occupation.

The submission of these delegates highlights an important issue arising in the context of the Convention, specifically, who defines what is, and what is not, a terrorist organization. Although the definition in Article 2, paragraph 1(b) is reasonably clear in its conception, the application in individual cases could prove problematic. For example:

- The representative of Lebanon was of the view that the definition could in no way be used as a basis to characterize resistance against the Israeli occupation of Lebanese territory as terrorism. Nor should the text provide any excuse for the continuation of the Israeli occupation of Lebanese territory and the arbitrary actions against the Lebanese people.
- The representative of Cuba welcomed the amendment and said her country condemned all forms of terrorism, including those backed by states. She said her country's leaders, including its president, had been the targets of terrorist acts in which sophisticated means had been employed. The traditional impunity of the United States had facilitated the commission

of acts of terrorism through financial and organizational links to certain groups within its territory.

- The representative of Iraq echoed this sentiment, asserting that the text, lacking a definition of terrorism (including State terrorism), left open the possibility of abuse. Absent such a legal norm, countries could abuse anti-terrorism weapons to their own ends. Terrorism by states caused much more damage than terrorist acts by individuals, and Iraq "continued to be the victim of terrorist acts committed by members of the Security Council," including the imposition of a "no-fly zone" established without authorization by the Security Council and "continued illegal raids against his country by two Council members."

Other nations joined in accusing the United States of covertly funding and training terrorist groups. The United States, exercising its right of reply, denied the allegations.

Although the Convention does not provide an explicit definition of "terrorism" or "terrorist," it appears to imply a definition in Article 2.[(12)] However, the exact manner in which a State interprets and applies the Convention is left to the State itself to determine in accordance with its domestic law. Once a state decides that an organization operating within its jurisdiction is a terrorist fundraising organization, the state would not appear to require any further justification before it could direct punitive measures against the organization, provided, of course, that the legal conclusion is reached in substantial accordance with the Convention. The potential for abuse is clear: a state might, under the pretence of identifying and prosecuting so-called "terrorist" organizations operating within its borders, persecute legitimate non-terrorist organizations for political reasons. Of course, nothing in current international law – apart from the disapprobation and censure of other states – prevents a government from applying (or misapplying) the Convention principles in order to define an opposition group as "terrorist," thereby creating a pretext for proscribing its activities. By describing activities that are considered "terrorist," although not actually defining the term, the Convention appears to aim at setting a baseline standard for distinguishing terrorist activity from legitimate political activity.

(12) Article 2 (paragraph1) reads: "Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."

Still, this is no guarantee that some states might not misuse the Convention to suppress opposition parties under the guise of curtailing terrorism.

In the event that States Parties disagree on the application or interpretation of the Convention (including, one presumes, the determination by a State that a group operating within its borders is "terrorist" or engaging in terrorist-type activities), Article 24 requires that settlement should first be attempted through negotiation. Failing a negotiated settlement, either party may request that the matter go to arbitration. If, within six months of the request, the States Parties cannot agree on the manner of arbitration, either party may refer the matter to the International Court of Justice.

Finally, Article 15 permits a State Party to refuse to extradite or provide mutual legal assistance if that State Party has "substantial grounds" to believe that the request is made for the purpose of prosecuting or punishing a person on account of their race, religion, nationality, ethnic origin or political opinion or if compliance with the request would cause prejudice to the person's position for any of those reasons.

B. Transparency

As the Senate noted in its 1999 report:

> With very few exceptions, Parliament is not part of the loop in terms of receiving intelligence analyses or assessments generated by the intelligence community. In our system, the consumers of intelligence have been limited to policy makers and decision makers within the executive branch of government. Parliament, in being asked to approve legislation, budgets and policy initiatives, is largely deprived of direct access to any intelligence analyses or assessments. For example, in discussion of proposed legislation to address money laundering, should not parliamentarians be fully briefed on the security intelligence that helped identify the problem and the proposed solution? The Committee recommends that the security intelligence community explore ways by which parliamentarians may be brought at least partially into the intelligence loop without prejudicing national security.

As noted earlier, one justification for keeping the investigation process confidential is the desire to safeguard the integrity of the intelligence-gathering process. An ideal solution would aim to strike a balance between the twin objectives of transparency and security. Bill C-16, Charities Registration (Security Information) Act (discussed in greater detail below) – introduced in March 2001 – aims at striking this balance. On the one hand, it would

permit the government to rely on secret security and intelligence reports to revoke the charitable status of charities fronting for terrorist organizations; importantly, though, it would also require that a judge of the Federal Court review such government decisions for "reasonableness." The perceived lack of transparency in this decision process might conceivably give rise to *Charter* challenge (also discussed below).

C. Enforcement and Application

As noted above, terrorist organizations may establish "fronts," for example, a church, to raise funds. Certain of these may even have legitimate religious objectives, in addition to their terrorist activities. In ideological terms, the achievement of the religious objective and the political objective are often intertwined. An example of this might be seen in the concept of the "jihad," a term which, in traditional Islam, referred to the Holy War waged within the individual's soul, to conquer evil through the invocation of correct religious practice. Of course, that term has come to have a different connotation in the modern era, where it often refers to the holy struggle against perceived exploitation and oppression by the Christian nations of the West.

Moreover, how does one determine the ultimate purpose to which funds are put? An organization may have, in addition to legitimate aims of a political or religious nature, involvement with terrorist activities. Tracing these funds through to their ultimate use could cause enormous difficulties for enforcement authorities. Moreover, the point at which funds are received by the terrorists could be several steps removed from the original donor/recipient transaction, such that neither the donor nor the recipient are even aware of the ultimate use to which the funds are put. Although donations made under such conditions would not be considered a criminal offence (given the requirement of a *mens rea* element in the offence, i.e., the donor must know that the proceeds will, in whole or part, be used to support terrorism), the larger problem of preventing the flow of funds to terrorists is not addressed.

As well, there exists the possibility of innocent individuals or groups being wrongfully subject to sanctions, including freezing and seizure of their bank accounts. The inclusion of comprehensive provisions for judicial review is proposed as the best safeguard against miscarriages of justice.

D. Charter Issues[13]

It is anticipated that certain *Charter* issues could possibly arise based primarily on the guarantee of freedom of expression or religion.

1. Freedom of Expression – section 2(b)

Is the act of donating money to an organization known to support terrorism a form of expression protected by the *Charter*? The word "expression" has been construed by the courts to include some positive acts of non-verbal means of "communication." These include picketing and the establishment of a "peace camp" on Parliament Hill (*Weisfield*), or "postering" on public property (*Ramsden* v. *Peterborough (City)*). By fostering political and social decision-making, postering was found to further at least one of the values underlying section 2(b), which was infringed by the municipality's prohibition of the practice. The legislative goal of the prohibition, although meritorious, was held not to justify a complete ban on postering.

In other cases, the courts have placed some limits on freedom of action as political expression. The British Columbia Court of Appeal held in 1994 that the arrest of a group of environmentalists who blocked a logging road in violation of a court injunction did not violate their freedom of speech. The injunction did not interfere with lawful expression, and the accused were otherwise free to stand and express themselves verbally or symbolically anywhere along the side road (*MacMillan Bloedel*). In *Dieleman*, an Ontario court granted an injunction against anti-abortion protest activity in the vicinity of free-standing clinics and doctors' offices. Although this injunction infringed the guarantee of freedom of expression, the physiological, psychological and privacy interests of women about to undergo an abortion constituted objectives of sufficient importance to allow the freedom to be overridden. These cases demonstrate that certain actions are protected under "freedom of expression" but may give way in the face of a sufficiently substantial societal interest.

The specific question of fundraising for terrorist groups in the context of the *Charter* was addressed directly by Robertson J. of the Federal Court of Appeal in the 2000 decision *Suresh* v. *Canada (Minister of Citizenship and Immigration)*:[14]

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(13) For a more detailed review of fundamental freedoms under the *Charter*, the reader is invited to consult the paper prepared by the Parliamentary Research Branch, Library of Parliament, on the subject, available at http://lopparl/lopimages2/PRBpubs/cir1000/8416-e.htm.

(14) [2000] F.C.J. No. 5 Court File No. A-415-99 Federal Court of Appeal Toronto, Ontario, Décary, Linden and Robertson JJ., Heard: October 4 and 5, 1999. Judgment: 18 January 2000.

> As violent forms of expression do not receive constitutional protection, neither can fundraising in aid of terrorism. It is true that there are no allegations of criminal activity against the appellant, nor allegations that he engaged in terrorism in Sri Lanka or was involved directly in the procurement and supply of weapons for the LTTE. However, activities which are undertaken in support of and in furtherance of terrorist activities constitute reprehensible conduct outside the protections offered by the *Charter*. In my view, those who freely choose to raise funds used to sustain terrorist organizations bear the same guilt and responsibility as those who actually carry out the terrorist acts. Persons who raise funds for the purchase of weapons, which they know will be used to kill civilians, are as blameworthy as those who actually pull the triggers. Clearly, freedom of association and expression are rights accorded those who seek political goals. But those rights do not endure to the benefit of those who seek to achieve political goals through means which undermine the very freedoms and values which the *Charter* seeks to promote… In summary, fundraising in the pursuit of terrorist violence must by necessity fall outside the sphere of protected expression.

In *Suresh*, the applicant was a known fundraiser for the LTTE (the Tamil Tigers), a known terrorist group, who faced deportation to Sri Lanka (to almost certain torture).

Would the analysis be different if only a small portion of funds donated were to go to support terrorism and the remainder to legitimate political, humanitarian or social activities? Would a complete ban be justified? As noted above, the *Convention* requires criminalizing the act of donating where funds are used in whole or in part to support terrorism. It is quite conceivable that an organization could raise funds for legitimate non-violent political activities, or for humanitarian purposes, in addition to its terrorist objectives. It might be argued that the act of donating money to an organization is a protected form of expression; and where the group only incidentally or in small measure contributes to terrorism, it might be argued that a blanket prohibition on donating to any organization known to support terrorism, even in the smallest ways, would fail the "proportionality" part of the section 1 test.

The section 1 test involves three components which must be answered in the affirmative: 1) Is the law rationally connected to the objective? (the "rational connection test") 2) Does the law impair the right no more than is required? (the "proportionality test") and 3) Does the law have an unnecessarily severe impact on the infringed right? Clearly, the suppression of terrorism is a laudable objective, and legislation cutting off fundraising would appear to be a rational means for doing so; however, it might be argued that such a blanket

prohibition on donation would not survive the "proportionality" test, i.e., perhaps a less intrusive means might be devised of accomplishing the same objective. However, it is suggested that the distinction between a group that heavily finances terrorism and one that does so only infrequently or in small measure may not be a distinction of sufficient meaning to affect the *Charter* analysis.

As noted above, Bill C-16, if enacted, could give rise to *Charter* challenge under freedom of expression guarantees, based upon the lack of "transparency" in the process by which a charity is determined to be "terrorist" for the purpose of revoking its charitable status. The bill indicates that the decision to revoke charitable status is made by the Solicitor General and Minister of National Revenue based on CSIS reports. The investigation and reporting undertaken by CSIS is a process which, for security reasons, is not open to the public. In *Southam (No. 1)* (1983), the Ontario Court of Appeal held that section 12(1) of the federal *Juvenile Delinquents Act,* which required the trials of juveniles to be held *in camera,* was unconstitutional as it conflicted with section 2(b) of the *Charter*. It was determined that the rule of openness of courts fosters the necessary public confidence in the integrity of the court system and an understanding by the public of the administration of justice. The absolute ban of the public from the trial of a juvenile could not be demonstrably justified in a free and democratic society. The court did allow that there might be some basis for the exclusion of the public from certain hearings under the *Juvenile Delinquents Act*, but the absolute ban served too wide a purpose. This holding was repeated under the *Young Offenders Act* by the Ontario Court of Appeal in *Re Southam* (1986).

In the 1994 case *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney-General)*, the New Brunswick Court of Appeal considered section 486(1) of the *Criminal Code*, which allowed a judge to exclude any or all members of the public from a court when, in his or her opinion, it was "in the interest of public morals, the maintenance of order or the proper administration of justice." Although the section was found to limit freedom of expression, it was saved by virtue of section 1. Failure to have made the exclusion order would have permitted further victimization of the victims in the case, which involved charges of sexual assault and sexual interference. Although the result was overturned by the Supreme Court of Canada in 1996, on the grounds that the circumstances of the case did not justify the exclusion of the public from the courtroom, the *Charter* reasoning upholding section 486(1) was not reversed.

It might be argued that the opacity of the decision-making process violates the rights of the impugned organizations to carry on their business and of the individual's right to

contribute to that. However, the presence of mechanisms for complaint (SIRC), review and appeal to which CSIS itself is subject might remove some of the force from this argument. As well, CSIS might cite legitimate security reasons for keeping the process secret; this would be taken into account by a court in determining whether the law could be upheld under section 1.

In *R.* v. *Skinner,* a provision of the *Criminal Code* prohibiting communicating for the purposes of solicitation was upheld by the Supreme Court of Canada. Section 213 (until 1988, section 195.1) made it an offence to "in any manner communicate or attempt to communicate with any person" for the purposes of prostitution. On 31 May 1990, the Supreme Court of Canada rendered its decision in three appeals regarding this section: *Skinner* from Nova Scotia, *Reference Re Sections 193 and 195.1 of the Criminal Code* from Manitoba, and the *Stagnitta* case from Alberta. Only in the *Skinner* case had the provision been found unconstitutional, on the basis that it contravened the right of freedom of expression as guaranteed in section 2(b) of the *Charter*. The majority reasons were delivered by Chief Justice Dickson, with Madam Justice Wilson and Madam Justice L'Heureux-Dubé dissenting. The Chief Justice held that the impugned section infringed the freedom of expression guaranteed by section 2(b), but not the freedom of association guaranteed by section 2(d), nor the liberty guarantee in section 7. He found that the infringement of section 2(b) was justified under section 1.

In any event, the prohibition proposed by the Convention does not prohibit communication or association. An individual might freely communicate or associate with, for example, the LTTE, without committing an offence. Only where the individual contributes to the organization would the offence arise.

In two other decisions, the Supreme Court of Canada has upheld two provisions prohibiting different forms of hate-mongering.(15) The decisions, while not directly on point, might suggest a framework for analysis. In *R.* v. *Keegstra* and *R.* v. *Andrews*, the impugned provision was section 319(2) of the *Criminal Code*, which prohibited the wilful promotion of hatred toward any section of the public distinguished by colour, race, religion or ethnic origin.

The majority, after a thorough historical review of anti-hate legislation, upheld both provisions, but in each case by a narrow majority. The dissents in each case – written by Madam Justice McLachlin (now Chief Justice) and concurred with by Mr. Justice Sopinka and in

(15) The Parliamentary Research Branch of the Library of Parliament has prepared a current issue paper on hate propaganda (available online at http://lopparl/lopimages2/PRBpubs/cir1000/856-e.htm).

part by Mr. Justice La Forest – are well-reasoned and persuasive, indicating that the issue may arise again.

In *Keegstra* and *Andrews*, provincial Courts of Appeal had handed down contradictory results, the Ontario Court of Appeal upholding section 319(2) and the Alberta Court of Appeal finding it unconstitutional as an unjustifiable limit on the fundamental freedom of expression guaranteed by section 2(b) of the *Charter*. Chief Justice Dickson (as he then was) found that section 319(2) infringed the guarantee of freedom of expression. However, the Chief Justice determined that section 319(2) was saved by section 1; his reasoning included a consideration of the harmful effect on society of this form of communication, as well as Canada's commitments in international law to prohibit hate-mongering expression, and the principles underlying sections 15 and 27 of the *Charter*, which respectively guarantee equality and emphasize the importance of the multicultural heritage of Canadians. Both section 319(2), and the reverse onus provision in section 319(3)(a) which allows an accused to defend on the basis that his or her statements are true, were upheld under section 1 of the *Charter* as reasonable limits demonstrably justifiable in a free and democratic society.

Arguing by analogy, it might be said that hate-mongering is not unlike terrorism in the sense that it promotes hatred or violence, usually against an identifiable group. The action is often overtly "political." It is suggested that a court would be justified in considering "the harmful effect on society" of this form of expression, as well as considering "Canada's commitments in international law" in the section 1 analysis.

In her dissent, Madam Justice McLachlin held that the guarantee of free expression afforded by section 2(b) of the *Charter* should not be limited by any international instruments. Although finding that the legislative objective was sufficiently weighty to justify a limit on the fundamental freedom of expression, she held that it was not made clear that section 319(2) is an effective measure to prevent hate-mongering, but rather, often accomplished little but to provide free publicity. As such, the provision failed the proportionality test; it did not impair free speech only to the minimum extent permitted by its objectives. She concluded that any questionable benefit of the legislation was outweighed by the significant infringement on the constitutional guarantee of free expression.

McLachlin J.'s argument is perhaps the most potent argument against the prohibition on donations. Will it, in fact, stop or combat terrorism? As noted in the introductory sections, terrorists are very inventive when it comes to raising funds; tracing funds can be

difficult, and in some cases next to impossible. If a blanket prohibition on donation is shown to be ineffective in accomplishing the objective of cutting off terrorist funds, it might be said to constitute an unjustified or over-reaching limitation of a protected right. Similarly, if the legislation does not, or can not, solve the problem of terrorist fundraising, it might fail the "rational connection" test.

2. Freedom of Religion – section 2(a)

Specific legislative jurisdiction with respect to religion is not dealt with in the *Constitution Act, 1867* and the courts have had to characterize laws touching religion as coming either within section 92 or section 91 of that Act. The pre-*Charter* cases in this area mainly dealt with challenges by merchants to various Sunday closing laws.

The separation of "conscience" and "religion" in the section has led some commentators to suggest the *Charter* might grant constitutional protection to the right of civil disobedience when the route of opposition to law is sufficiently the product of an individual's deeply held system of moral beliefs, whether or not these are grounded in considerations normally regarded as religious. This could be said to include donating money to a terrorist organization if the dictates of one's religion or conscience demanded it. The issue was settled in *R.* v. *Big M Drug Mart*, where the Supreme Court indicated that freedom of conscience relates to freedom of conscience in matters of religion. The paragraph protects against all state-imposed burdens on the exercise of religious beliefs, whether direct or indirect, intentional or unintentional, foreseeable or unforeseeable, provided they cannot be regarded as merely trivial or insubstantial.

Although there has been no case directly on point, an overview of the leading cases decided under section 2(a) might again provide a framework of principles within which to analyze the issue in the current case, i.e., the right of the individual to contribute funds to a "religious" organization.

A number of cases, including cases from the pre-*Charter* era, involved legislation requiring Sunday closings. In *Big M Drug Mart*, the majority of the Alberta Court of Appeal decided that the *Lord's Day Act* was unconstitutional. It reasoned that this Act had a religious purpose in that it forced Sunday, which represented the holy day of the majority of the Christian religion, on minorities. The Court went on to say that at the very least the terms of freedom of religion and freedom of conscience in the *Charter* meant that, henceforth in Canada,

governments should not choose sides in a sectarian controversy. The minority opinion took a much wider view of this section of the *Charter*; it supported a concept of freedom of religion aimed at the elimination of oppression and repression by civil authority on account of religious belief, and eradicated compulsion to accept any particular doctrine. The purpose of the *Lord's Day Act,* it was found, was not compulsion or interference with the religion of others.

The Supreme Court of Canada upheld the majority view of the Alberta Court of Appeal in holding the *Lord's Day Act* to be unconstitutional. In disposing of the case, Chief Justice Dickson rejected the Alberta government's argument that Big M., a commercial operation, was not an individual and therefore did not enjoy religious rights. He stated that if the law is unconstitutional, it matters not whether the accused is a Christian, Jew, Moslem, Hindu, Buddhist, atheist, agnostic, or whether an individual or a corporation.

Consistent with his decisions in other *Charter* cases, the Chief Justice determined that the courts must look at the true purpose of the statute to determine whether it violates the *Charter*. The court held that it was clear that the Act was passed by Parliament to give legal force to a Christian religious observance of Sunday as a day of rest. It was not simply a law to make Sunday a uniform commercial closing day, nor could it be considered to be labour legislation intended to limit the number of days people are required to work. The Court concluded that, since the enactment of the *Charter*, it has become the right of every Canadian to work out his or her own religious obligations, if any, and it is not for the state to dictate otherwise.

In the current case, it might be argued – although probably without success – that the legislation, while not explicitly targeting a religious group, aims in pith and substance at the proscription of a religious organization and is, as such, unconstitutional.

What if a person's "religious obligations" require that they donate funds to a church which they know, even in some small measure, supports terrorism? Conceivably, a prohibition of a religious duty could run afoul of s. 2(a). The issue for the court would then be whether the prohibition would be upheld under a section 1 analysis.

In 1986, the Supreme Court of Canada dismissed the appeal of Thomas Larry Jones of Calgary, who had argued that provisions of the *Alberta School Act* that prevented parents from educating their children at home for religious reasons violated the guarantee of freedom of religion. Mr. Justice Gerard La Forest said that the province and the nation's compelling interest in the efficient instruction of children outweighs this freedom. In order for

Mr. Jones to continue teaching the children at home, he would first have to obtain the approval of provincial school authorities.

Although obviously very different, the *Jones* case is perhaps the closest analogy to the "religious" terrorist organization problem. In that case, an individual – compelled by conscience to do a particular act, i.e., home school his children – was denied the right to do so, based on "the nation's compelling interest." Similarly, an individual – compelled by conscience or religion to donate to a church – might be denied that right in light of a weightier societal interest.

In similar cases, the Supreme Court refused an appeal of a wardship order brought by parents who had refused a blood transfusion for their newborn child (*B.(R.)*). The child had been made a temporary ward of the Children's Aid Society, and a blood transfusion had been given, ancillary to other medical treatments. The parents appealed the wardship order, arguing that it violated their right to freedom of religion, but lost at the District Court and Court of Appeal levels. The Court unanimously dismissed their appeal; four judges held that section 2(a) of the *Charter* had not been violated because freedom of religion does not include freedom to impose upon a child religious practices that threaten his or her safety, health or life. Freedom of religion should not encompass activity that so categorically negates the freedom of conscience of another, including a child. The other five judges held that the right of parents to rear their children according to their religious beliefs is a fundamental aspect of freedom of religion under section 2(a) of the *Charter*. Even though the purpose of the *Child Welfare Act* is to protect children, its effect was to infringe the parents' freedom of religion. Any such infringement was, however, amply justified by the state's interest in protecting children at risk, which is a valid section 1 objective.

By similar reasoning, it might be argued that upholding, on religious grounds, the individual's right to contribute to a known-terrorist religious organization would have the effect of imposing upon society at large the corresponding obligation of tolerating a "religious" practice that threatens the safety, health or life of every citizen. Freedom of religion should not encompass activity that so categorically negates the freedom of conscience of another.

In 1985, a Manitoba Queen's Bench judge ruled that a baptized Sikh could not wear a *kirpan* (a religious symbol in the form of a dagger with a four-inch blade) in the court-room during his trial (*Hothi*). In 1994, amended regulations permitting exceptions from

the standard RCMP uniform, such as a turban instead of the usual felt hat, to be worn by members on religious grounds, were held not to infringe section 2(a) (*Grant* v. *Canada*).

From *Hothi* and the other foregoing decisions, it is clear that the religious freedom protected by the *Charter* extends beyond mere thought or conscience, but protects certain acts which the individual is compelled to do for reasons of religion. Clearly, though, the right is not without limitations. It is suggested that a prohibition on donations to known-terrorist organizations operating as churches, while it might arguably qualify for *Charter* protection, would likely be upheld under section 1 based on the importance to society as a whole of the legislative objective, providing it passes the "proportionality" test.

E. Implementation

Implementing the Convention in Canada involves a three-stage process:

- First, the document is *signed*. Canada signed the Convention on 10 February 2000.
- The second stage – *implementing* the Convention – will require changes to Canadian law, some of which have already been initiated or completed. Historically, however, this is the most time-consuming step. For example, the Convention on Terrorist Bombing, signed by Canada in 1998, is still apparently not yet implemented.
- Only when the Convention is implemented domestically can it be *ratified* (the third stage).

Article 18 requires States Parties to adopt measures requiring financial institutions and other professions involved in financial transactions to take measures for the identification of their unusual and occasional customers, to pay special attention to unusual or suspicious transactions, and to report transactions suspected of stemming from a criminal activity. To this end, Parliament has enacted significant new rules on reporting of money-laundering, as well as laws on charitable status.

In 2000, Parliament introduced, debated and passed the *Proceeds of Crime (Money Laundering) Act*. This new law was introduced as Bill C-22 and later amended by Bill S-16.(16) The purpose of the new law is to facilitate the combatting of "money-laundering"

(16) A legislative summary of Bill C-22 (LS-355) and of Bill S-16 (an amending bill) (LS-388) – both of which were prepared by the Parliamentary Research Branch – are available from the Library of Parliament or through the Library's website.

through Canadian banks and other financial intermediaries by requiring, among other things, mandatory reporting of "suspicious" and large cash transactions to a new agency to be known as the Financial Transactions and Reports Analysis Centre. The regulatory suggestions contained in Article 18 of the Convention are closely mirrored in the provisions of the new law. In all cases, the Convention states, such measures should be subject to strict safeguards to ensure proper use of information and without impeding freedom of capital movement. The new law contains such safeguards. As well, States Parties are required to cooperate in exchanging information as required. Again, the new money laundering legislation also contains provisions for mutual sharing of information, subject to rigorous guidelines.

A second new bill, the *Charities Registration (Security Information) Act* was introduced as Bill C-16[17] in March 2001. The law would go some way towards implementing Canada's commitment to investigate charitable organizations with possible terrorist ties and take steps to frustrate terrorist fundraising activity. The new law would permit the Solicitor General and the Minister of National Revenue to revoke charitable status based on their "opinion" that there are reasonable grounds to believe that a charity has made, or will make, funding available to anyone engaged in terrorism. The "opinion" would be based on security and intelligence reports, even though that information would remain confidential. The new law would attempt to safeguard affected charities' rights by requiring that the opinion be reviewed for reasonableness by the Federal Court. The charity could apply to the Court to have the information in the proceeding kept confidential (i.e., not published). The judge would be required to examine the reports upon which the decision was made and hear any other information or evidence presented by the Ministers. The Minister could apply to have the information or evidence heard in the absence of the charity. The charity would be entitled to a reasonable opportunity to be heard, and to have a written summary of the information available to the judge, provided that no injury to national security or personal safety would result. Where an "opinion" had been found reasonable by a judge and the charities' charitable status revoked, the charity could still apply to the Solicitor General and Minister for reconsideration of the matter where there had been a material change in circumstances.

Government officials have acknowledged that the bill does not go far enough to meet Canada's obligations under the Convention, which requires that signatories enact domestic

(17) A legislative summary of Bill C-16 (LS 400E), prepared by the Parliamentary Research Branch, is available from the Library of Parliament or through the Library's website.

legislation criminalizing the collection of funds for terrorist activities. Such changes would likely have to be implemented through amendments to the *Criminal Code*.

F. Cost of Operation

The cost of implementing the *Proceeds of Crime (Money Laundering) Act*, and more specifically the annual cost of operating the Financial Transactions and Reports Analysis Centre, was initially estimated by the sponsoring Department at $10 million. That estimate has since been revised upward. It is also anticipated that information processed by the Centre supplied to domestic enforcement agencies will result in increased investigation and enforcement costs to those agencies. The establishment and operation of the Centre, it is suggested, will accomplish domestically the purpose of the Convention, i.e., targeting and seizing terrorist sources of terrorist financing. It is not yet clear what other specific changes will be enacted to Canadian law as no other enabling legislation has yet been introduced.

G. Information-Sharing and Bank Secrecy

Article 12.1 requires that States Parties afford one another the "greatest measure of assistance" in connection with criminal proceedings. Article 12.2 specifically mandates that no request for mutual legal assistance may be refused on the grounds of bank secrecy. However, Article 12.5 requires only that States Parties carry out their obligations in conformity with any treaties or other arrangements in place between them. In the absence of such treaties or arrangements, States Parties are only required to provide mutual assistance in accordance with their domestic law. The Convention does appear to override state banking secrecy laws, unless the State has expressly negotiated a treaty to that effect with the requesting State. Moreover, in order to protect individual privacy rights, Article 12.3 prohibits States Parties from transmitting or using information of evidence for any other investigation, prosecution or proceeding without the prior consent of the State Party providing the information. Again, these provisions are reflected in the *Proceeds of Crime (Money Laundering) Act*.

APPENDIX

APPENDIX

International Convention for the Suppression of the Financing of Terrorism

Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999

Preamble

The States Parties to this Convention,
Bearing in mind the purposes and principles of the *Charter* of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States,

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,

Recalling the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, contained in General Assembly resolution 50/6 of 24 October 1995,

Recalling also all the relevant General Assembly resolutions on the matter, including resolution 49/60 of 9 December 1994 and its annex on the Declaration on Measures to Eliminate International Terrorism, in which the States Members of the United Nations solemnly reaffirmed their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States,

Noting that the Declaration on Measures to Eliminate International Terrorism also encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter,

Recalling General Assembly resolution 51/210 of 17 December 1996, paragraph 3, subparagraph (f), in which the Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds,

Recalling also General Assembly resolution 52/165 of 15 December 1997, in which the Assembly called upon States to consider, in particular, the implementation of the measures set out in paragraphs 3 (a) to (f) of its resolution 51/210 of 17 December 1996,

Recalling further General Assembly resolution 53/108 of 8 December 1998, in which the Assembly decided that the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 should elaborate a draft international Convention for the suppression of terrorist financing to supplement related existing international instruments,

Considering that the financing of terrorism is a matter of grave concern to the international community as a whole,
Noting that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain,

Noting also that existing multilateral legal instruments do not expressly address such financing,

Being convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators,

Have agreed as follows:

Article 1

For the purposes of this Convention:

1. "Funds" means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

2. "State or governmental facility" means any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.

3. "Proceeds" means any funds derived from or obtained, directly or indirectly, through the commission of an offence set forth in article 2.

Article 2

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

   (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

   (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

2. (a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;

   (b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

5. Any person also commits an offence if that person:

   (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

   (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;

   (c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

      (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or

      (ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

Article 3

This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction, except that the provisions of articles 12 to 18 shall, as appropriate, apply in those cases.

Article 4

Each State Party shall adopt such measures as may be necessary:

(a) To establish as criminal offences under its domestic law the offences set forth in article 2;

(b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

Article 5

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

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

3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

Article 6

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

Article 7

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

   (a) The offence is committed in the territory of that State;

   (b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;

   (c) The offence is committed by a national of that State.

2. State Party may also establish its jurisdiction over any such offence when:

   (a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State;

   (b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State;

   (c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act;

   (d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;

   (e) The offence is committed on board an aircraft which is operated by the Government of that State.

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2.

5. When more than one State Party claims jurisdiction over the offences set forth in article 2, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.

6. Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 8

1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.

3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.

4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families.

5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith.

Article 9

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

   (a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

   (b) be visited by a representative of that State;

   (c) Be informed of that person's rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 7, paragraph 1, subparagraph (b), or paragraph 2, subparagraph (b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 7, paragraph 1 or 2, and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 10

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

2. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

Article 11

1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 7, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this Convention.

Article 12

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings.

2. States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy.

3. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

4. Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 5.

5. States Parties shall carry out their obligations under paragraphs 1 and 2 in conformity with any treaties or other arrangements on mutual legal assistance or information exchange that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

Article 13

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence.

Article 14

None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 15

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Article 16

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences set forth in article 2 may be transferred if the following conditions are met:

    (a) The person freely gives his or her informed consent;

    (b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

2. For the purposes of the present article:

    (a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

    (b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

    (c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;

    (d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

3. Unless the State Party from which a person is to be transferred in accordance with the present article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred.

Article 17

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.

Article 18

1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:

(a) Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;

(b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

(i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;

(ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity;

(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international.

2. States Parties shall further cooperate in the prevention of offences set forth in article 2 by considering:

(a) Measures for the supervision, including, for example, the licensing, of all money-transmission agencies;

(b) Feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

3. States Parties shall further cooperate in the prevention of the offences set forth in article 2 by exchanging accurate and verified information in accordance with their domestic law and coordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in article 2, in particular by:

(a) Establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in article 2;

(b) Cooperating with one another in conducting inquiries, with respect to the offences set forth in article 2, concerning:

(i) The identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences;
(ii) The movement of funds relating to the commission of such offences.

4. States Parties may exchange information through the International Criminal Police Organization (Interpol).

Article 19

The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.

Article 20

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

Article 21

Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the *Charter* of the United Nations, international humanitarian law and other relevant Conventions.

Article 22

Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction or performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.

Article 23

1. The annex may be amended by the addition of relevant treaties that:

   (a) Are open to the participation of all States;

   (b) Have entered into force;

   (c) Have been ratified, accepted, approved or acceded to by at least twenty-two States Parties to the present Convention.

2. After the entry into force of this Convention, any State Party may propose such an amendment. Any proposal for an amendment shall be communicated to the depositary in written form. The depositary shall notify proposals that meet the requirements of paragraph 1 to all States Parties and seek their views on whether the proposed amendment should be adopted.

3. The proposed amendment shall be deemed adopted unless one third of the States Parties object to it by a written notification not later than 180 days after its circulation.

4. The adopted amendment to the annex shall enter into force 30 days after the deposit of the twenty-second instrument of ratification, acceptance or approval of such amendment for all

those States Parties having deposited such an instrument. For each State Party ratifying, accepting or approving the amendment after the deposit of the twenty-second instrument, the amendment shall enter into force on the thirtieth day after deposit by such State Party of its instrument of ratification, acceptance or approval.

Article 24

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 25

1. This Convention shall be open for signature by all States from 10 January 2000 to 31 December 2001 at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 26

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 27

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 28

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations Headquarters in New York on 10 January 2000.

Annex

1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.

2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.

3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.

4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.

5. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.

6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.

7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.

8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.

9. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.