

EXPLANATORY MEMORANDUM

RATIFICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM, THE OAU CONVENTION ON THE PREVENTION AND COMBATING OF TERRORISM AS WELL AS THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS.

1. HISTORY

On 28 September 2001, after the unfortunate incidences at the World Trade Centre, the Pentagon and in Pittsburgh, the Security Council of the United Nations, adopted a Chapter VII Resolution, Resolution 1373/2001 binding on all Member States. This Resolution is significant for a number of reasons, including the fact that it reproduced some of the provisions of the International Convention for the Suppression of the Financing of Terrorism, thereby creating the same legal obligations separately from the Convention. It also created an obligation for all member States to ratify all the Anti-Terrorism Conventions of the United Nations.

The Council also established a Committee of the Council to monitor the Resolution's implementation and called on all States to report on actions they had taken to that end not later than 90 (ninety) days from the 28 September 2001.

The following obligations were placed on member States in terms of UN Resolution 1373/2001:

- ☐ the prevention and suppression of financing of terrorism;
- ☐ the criminalizing of the willful provision of funds for such acts;
- ☐ taking the necessary steps to prevent the commission of terrorist acts;

- denying a safe haven to those who finance, plan, support, commit terrorist acts and provide safe havens as well;
- bringing to justice those who have participated in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts (the seriousness of such acts must be duly reflected in the sentences);
- affording one another the greatest measure of assistance in criminal investigations and proceedings relating to the financing or support of terrorist acts;
- preventing movement of terrorists or their groups by effective border control;
- intensifying and accelerating the exchange of information regarding terrorist actions or movements, forged or falsified documents, trafficking in arms and sensitive material, use of communication and technologies by terrorist groups and the threat posed by the possession of weapons of mass destruction;
- before granting refugee status, to take appropriate measures to ensure that the asylum seekers had not planned, facilitated or participated in terrorist acts;
- ensuring that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts;
- that claims of political motivation shall not be recognized as grounds for refusing requests for the extradition of alleged terrorists.

South Africa has supported, also in the Non-Aligned Movement, the combating of terrorism.

Presently, terrorism can be addressed by section 54 (1) of the Internal Security Act, Act 74 of 1982. The South African Law Commission, in Project 105, is busy reviewing security legislation, especially legislation with regard to terrorism.

The International Convention on the Suppression of the Financing of Terrorism was signed by the President on 10 November 2001. Although the signing of the Convention placed no legal obligations on South Africa, the Chapter VII Resolution, taken on 28 September 2001, places obligations as mentioned above on the Republic of South Africa as a Member State. The OAU Convention on the Prevention and Combating of Terrorism was signed in 1999 as was the International Convention for the Suppression

of Terrorist Bombings.

2. OBJECTIVES

2.1 THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM.

This Convention was negotiated during 1999 and unlike the previous nine counter terrorism conventions, the new Convention does not deal with terrorism crimes, but with the financing of such crimes.

2.1.1 What is of importance in this Convention, is that the word "funds" is widely defined and includes:

"...assets of every kind, whether tangible [eg. cash] or intangible [eg. a bank account], movable [eg. diamonds] or immovable [eg. land], however acquired [legally or illegally], 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, travelers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit."

2.1.2 The following offences are identified in article 2 of the Convention:

- A person who, by any means, directly or indirectly, unlawfully and willfully, 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.
- Any act as appear in the scope of and as defined in the treaties listed in the annexure (attached to the Convention for your convenience).
- Any act intended to cause death or serious bodily harm to non-combatants, where the purpose of such an act, by its nature or context, is to intimidate a population, or compel a Government or an international organisation to do or abstain from doing any act.

2.1.3 If a member State is not a signatory, or has not acceded or ratified the Conventions indicated in the annexure, the treaty shall be deemed not to be included in the annexure. The Conventions are listed for the sole purpose of defining the offence of financing of terrorism. A State thus has an option of making a declaration to exclude any treaties mentioned in the annexure, which it is not a party to.

2.1.4 It should be mentioned that the offence of financing of terrorism could also be committed by a legal entity, such as a company. The reason for this is that usually, large sums of money are involved and it is likely that at some stage a legal entity, such as a bank or trust, will be the means by which the money is made available, directly or indirectly, to the terrorists. When this has been done with the help of a person responsible for the management or control of the entity, it is important that the entity should be accountable. This is a deterrent and clear warning for banks and other entities to ensure that they are not being used, with the active involvement or knowledge of the persons in management or control in of them, to transmit funds to terrorism.

2.1.5 The Convention, in article 8, provides for funds to be seized and forfeited. This also applies to the proceeds deriving from terrorist financing. State parties are encouraged to establish mechanisms whereby such funds can be used to compensate the victims of terrorist offences.

2.1.6 Article 12 prohibits the refusal of a request for mutual legal assistance on the ground of bank secrecy. This is in line with the Palermo Convention's article on money-laundering, as the financing of terrorism, as well the money-laundering in the case of transnational organized crime, are regarded as very serious offences.

2.1.7 Article 13 provides that financing of terrorism, for the purposes of extradition and mutual legal assistance, shall not be regarded as fiscal

offences. Usually no extradition can take place in the case of fiscal offences.

2.1.8 International cooperation, as is contained in article 18, is intended to enhance further practical cooperation between the State parties to prevent and counter preparations for terrorist financing, whether inside or outside their territory. The measures include identification by financial institutions of unusual or suspicious transactions, and reporting transactions suspected of stemming from crime.

- No unidentified or unidentifiable holders should be allowed to open an account and the identity of "real owners", particularly legal entities, must be determined.
- Financial institutions must promptly report all complex, unusually large transactions and unusual patterns of transactions, which have no apparent economic or obvious lawful purpose, and
- Financial institutions must keep record of transactions, both domestic and international, for at least five years.

State parties are also required to consider

- supervisory measures, such as the licensing of all money-transmission agencies,
- measures to detect and monitor the physical cross-border transportation of cash and bearer negotiable instruments,
- exchanging accurate and verified information concerning all aspects of terrorism financing, and
- conducting inquiries with respect to terrorist financing concerning the identity, whereabouts and activities of suspected persons and the movement of funds involved.

2.1.9 The legal obligations on State parties, after it has ratified the Convention in terms of article 25, will have to be dealt with in either the Financial Intelligence Centre Act, which was partially enacted, which would have to be amended, or, as was suggested by the South African Law Commission, in the Anti-Terrorism Bill, which criminalizes the financing of terrorism. Currently, 31 Member States have ratified this Convention and the Convention is in operation.

2.2. THE OAU CONVENTION ON THE PREVENTION AND COMBATING OF TERRORISM

2.2.1 The abovementioned Convention was signed by South Africa, as a Member State of the Organization of African Unity (now the Africa Union), after it was adopted at in Algiers on 14 July 1999.

2.2.2 What is of importance in this Convention is:

- (a) The definition of "terrorist acts" is, at the moment, in conformity with the Comprehensive Convention on International Terrorism, which is currently being negotiated by the Sixth Committee, a Working Group established by the General Assembly of the United Nations.
- (b) Struggles waged by people in accordance with the principles of international law for their liberation or self-determination, including armed struggles against colonialism, occupation, aggression and domination by foreign forces, shall be considered as terrorist acts.
- (c) Political, philosophical, ideological, racial, ethics, religious or other motives shall not be a justifiable defense against terrorist acts.
- (d) The Convention strives to strengthen the exchange of information between State Parties regarding:

- terrorist groups, their activities and arrests;
- communication and propaganda methods, movement of their leaders and their travel documents;
- studies, researches and expertise relating to control of terrorism acts;

(e) Article 6 requires extra-territorial jurisdiction. In Article 8, extradition is discussed and the Convention provides that this will take place under extradition agreements between State Parties and within the limits of their national laws.

(f) Provisions are made for extra-territorial investigations (*commission rogatoire*) and mutual legal assistance, which will allow for criminal investigations to be carried out with the assistance and cooperation of another State Party. These extra-territorial investigations must be executed in compliance with and subject to the national laws of the requested State.

(g) To date only a few State Parties have ratified this Convention. As the African Union has high regard for South Africa, it is strongly recommended that South Africa ratify this Convention as soon as possible, and thus set the example.

2.3. RATIFICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORISM BOMBINGS

2.3.1 The abovementioned Convention was negotiated during 1997 and adopted by the General Assembly of the United Nations on 15 December 1997. South Africa signed the Convention on 21 December 1999.

2.3.2 The importance of this sectoral Convention is that it deals with terrorist bombing, as terrorist attacks by means of explosives or other lethal devices have become increasingly widespread.

- (a) The main aim of the Convention is the prevention of such terrorist acts and the prosecution and punishment of the perpetrators.
- (b) The activities of military forces of States are not covered by this Convention.
- (c) Offences within the scope of the Convention are defined in Article 2. This includes the delivering, placing, discharging or detonating explosives or other lethal devices with the intent to cause death or serious bodily injury in order to compel a State to do, or abstain from doing, any act. The scope includes an offence committed on board an aircraft.
- (d) The "prosecute or extradite" principle, as is found in all the sectoral Conventions on Terrorism, is also followed in this Convention (see Article 8).
- (e) Political offences are not regarded as a defense in terms of this Convention and extradition may not be refused on this ground.
- (f) The prevention of acts of terrorism bombing has priority in terms of this Convention. In Article 15, State Parties have the obligation to prevent and counter preparations for the commission of these offences within and outside their territories. Accurate and verified information must be exchanged under certain circumstances. Research and development of methods of detection for explosives, including the marking thereof, must take place.

2.2.3 To date 59 Member States have ratified the Convention and the Convention is in operation.

2.2.4 A clause was inserted in the Explosives Bill to deal with terrorist bombings (with explosives) but the Anti-Terrorist Bill takes the matter further to include ... "other lethal device."

3. IMPLICATIONS

Should the Conventions be ratified or acceded to by Parliament, the Republic of South Africa will have regional as well as international obligations to fulfil concerning terrorist acts. The legislation concerning "terrorism" are addressed in the Anti-Terrorism Bill which is in the final stages of drafting.

4. LEGAL OPINIONS

The State Law Advisers (their opinion is attached hereto) as Annexure "A", has reservations with regard the ratification of the Conventions, because South Africa will not be able, although it is willing, to implement the Conventions.

The Chief State Law Adviser's (International Law) opinion is attached as Annexure "B".

5. SECTION 231(4) OF THE CONSTITUTION

The Conventions contain no self-executing provisions.

6. FINANCIAL IMPLICATIONS

In respect of most Departments the enforcement and implementation of the Conventions will be done in terms of normal line-function responsibilities, for which Departments have budgeted. The additional monitoring, intelligence and policing

functions required, cannot be quantified and expressed in terms of budgetary implications. In respect of the International Convention on the Suppression of Financing of Terrorism, the Financial Intelligence Centre to be established in any event in terms of the Financial Intelligence Centre Bill, 2001, will play a major role.



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Annexure 'A'

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RATIFICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS, THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM AND THE ORGANIZATION OF AFRICAN UNITY CONVENTION FOR THE PREVENTION AND COMBATING OF TERRORISM: YOUR S45/1/2/1 (16) OVER 45/9/2 (79) DATED 27 JUNE 2002

1. The South African Police Service ["the SAPS"] informs us that –
 - (a) after the terrorist attacks on the United States on 11 September 2001, member states of the United Nations, through various UN Resolutions, were urged to ratify or accede to the 12 counter-terrorism Conventions as soon as possible;
 - (b) the Republic of South Africa must still ratify eight of the said Conventions;
 - (c) during the Cabinet Committee meeting on International Relations, Peace and Security on 16 May 2002, the Committee recommended that Cabinet approves the ratification of the said Conventions;

- (d) the Committee also recommended that the South African Law Commission finalize anti-terrorist legislation as a matter of priority;
- (e) the South African Law Commission is in the final phase of drafting the Anti-Terrorism Bill; and

requests our opinion on the questions whether –

- (1) the said Conventions can be ratified before the legislation is finalized; and
- (2) the Republic will be able to fulfil its international obligations with regard to extraterritorial jurisdiction for extradition as contemplated in Article 8 of the OAU Convention on the Prevention and Combating of Terrorism, Article 7(1)(c) of the International Convention for the Suppression of the Financing of Terrorism and Article 6(1)(c) of the International Convention for the Suppression of Terrorist Bombings.

2.1 Ad question (1)

We have considered the viewpoints of the SAPS and the State Law Adviser (International Law) and are in agreement therewith insofar as we are also not aware of any legal obstacle to the ratifying of the said Conventions in the absence of a legislative framework facilitating the implementation of those Conventions. However, such a course of action is not advisable since the Republic, by ratifying the Conventions, will implicitly demonstrate that it is willing and able to implement the Conventions, which, of course, it is unable to do.

2.2 Ad question (2)

2.2.1 We have considered the draft Anti-Terrorism Bill, 2002 which was also submitted to us and we are satisfied that it provides the courts of the Republic with extraterritorial



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Annexure 'B'

6 November 2001

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THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS AS WELL AS THE OAU CONVENTION ON THE PREVENTION AND COMBATING OF TERRORISM

1. Your fax of 31 October 2001, which presents several questions to the Department of Foreign Affairs, refers. Our responses to these questions are as follows:

1.1 Your Department's viewpoint regarding the ratification of the Conventions:

1.1.1 The Department of Foreign Affairs supports the ratification of the abovementioned Conventions. In this regard it should be noted that South Africa has signed both the abovementioned Conventions in 1999. In international law signature of a convention, while not creating binding legal obligations, does create a *bona fide* indication of a State's intention to ratify the signed Convention, and South Africa should give effect to this intention.

1.1.2 It should furthermore be noted that Security Council Resolution 1373 of 27 September 2001 creates a binding obligation on States to ratify the international conventions against terrorism. The Terrorist Bombings Convention in particular forms part of the international conventions referred to and it is therefore a binding obligation on all States to ratify this Convention. The same Security Council Resolution 1373 also creates an obligation on States to co-operate *inter alia* on a regional level in combating terrorism. The OAU Convention forms an important part of the regional framework in combating terrorism and should therefore also be ratified expeditiously.

1.2 Whether it is foreseen that new legislative (and administrative) measures will be necessary to give effect to the Conventions and, if so, when should such legislation be tabled in Parliament and by which department?

1.2.1 The first part of the question relates to domestic law, which the State Law Advisers (International Law) are not mandated to comment on authoritatively. This is the function of the State Law Advisers at the Department of Justice in consultation with the line function Department that administers the Convention and implementing legislation. We can point out however that both Conventions are premised on the

principle of "prosecute or extradite" and rely heavily on a framework of international cooperation.

- 1.2.2 In order to comply with the obligations of the Convention, and specifically the requirements of extradition such as dual criminality it will be important that there is a specific crime in South African law which equates to the crimes enunciated in the Conventions. The crimes also have to be punished by grave penalties and it therefore may be necessary to introduce new legislation to specifically give effect to this obligation (specifically elucidating the crimes specified in the Convention) of the Conventions. Once again however we stress that the Department of Justice and the South African Police Service, administering existing similar legislation should comment on this issue comprehensively.
- 1.2.3 The prevailing view in international law is that a Convention should only be ratified once legislation is in place to give effect to the international obligations on a domestic level. This is particularly the case when a Convention has already entered into force, as is the case with the Terrorist Bombings Convention, as the international obligations will become binding on the ratifying State almost immediately. However drafting new legislation can be a lengthy process and in view of the urgency and importance in ratifying the terrorism conventions (especially in view of the binding obligations created by Resolution 1373) it has been necessary to consider whether the Terrorist Bombings and OAU Convention, as well as other international terrorism conventions should not be ratified before implementing legislation is introduced. The Department of Foreign Affairs was instructed by the Minister of Foreign Affairs to submit the issue to Cabinet for their guidance on this matter. A Cabinet Memorandum in this regard has been prepared and submitted to Cabinet.
- 1.2.4 The terrorism issue is a crosscutting issue and involves several departments, especially the South African Police Services, the Department of Justice and the Department of Foreign Affairs, on a substantive level and therefore any action in this regard should be a consultative process. In this regard it can be noted that a Counter Terrorism Working Group is in the process of being established. This Working Group will operate on an inter-departmental level and will include all departments involved in or affected by the terrorism issue. It would therefore be the ideal forum for consultations relating to the ratification of the terrorism conventions.
- 1.2.5 With regard to the tabling of the Conventions in Parliament, it is our view that there must be a lead department to drive the process and our understanding is that, in accordance with Chapter 5 of the Manual on Executive Acts (paragraph 5.8), the Department responsible for processing the Convention, and implementing it on a domestic level would be that lead Department. In view of the nature of the terrorism Conventions we would assume that the South African Police Services would play the lead role in this regard. However, in the past on crosscutting issues which affect several Departments (e.g. peacekeeping issues) the relevant Department make a joint submission to Parliament for the ratification of the Conventions. In view of the international importance in ratifying the Conventions, the Department of Foreign Affairs could therefore work with the South African Police Services in preparing a joint parliamentary submission for the ratification of the Conventions.

1.3 Whether any fundamental organisational, personnel, financial, communication and constitutional implications are foreseen.

1.3.1 This is an issue for comment by the line function department that will be administering and implementing the Conventions. The Department of Foreign Affairs has only an ancillary role to play in the actual implementation of the Conventions e.g. through facilitating communications and international cooperation where requested, and to report to the United Nations Security Council on the ratification and implementation of the Conventions in accordance with Resolution 1373. We therefore do not have any comprehensive comments in this regard.

1.4 The exclusion of political offences

1.4.1 Once again this is an issue for the line function Department, in conjunction with the Department of Justice which administers extradition to decide on. However the history of the political offences exclusion in the Convention may be of interest. The introduction of an exclusion for political offences in the terrorism conventions is a fairly new concept and has been welcomed by many commentators and delegates as a revolutionary clause that gives real meaning to the terrorism conventions. The fact that the political offences clause operates within the framework of a Convention with a specifically defined offence has meant that it is possible to restrict the exclusions clause to that specific offence without doing away with the general principle of political offences completely. Thus, some States (e.g. Australia) in giving effect to the political offence exclusion in their domestic legislation include a clause in extradition legislation specifically excluding the political offence exception for the specified acts of the Convention, while still retaining the general principle.

1.4.2 It should also be noted that the political offence exclusion clause is balanced in all the Conventions by a complementary clause immediately following it which retains an element of the political offence exclusion principle by allowing a state to refuse prosecution or extradition if there are substantial grounds for believing that a person is being prosecuted on discriminatory grounds (e.g. by virtue of the person's race, religion, nationality or political opinion). This balance has enabled many States with a strong foundation in the political offences exclusion clause (especially the Latin American States) to accept the clause, and on the whole it has not been controversial in negotiations.

1.5 The extra territorial jurisdiction as it appears in the Conventions

1.5.1 This is another issue of domestic implementation which the State Law Advisers (International Law) are not mandated to comment on authoritatively. However from an international law we do wish to point out that the Conventions create two types of jurisdiction, compulsory and discretionary jurisdiction. Both types of jurisdictions create an element of extra-territoriality. In order to give effect to its international obligations however it is only compulsory for South Africa to establish jurisdiction over its nationals, wherever they may be, for the purposes of the offences articulated in these Conventions. To our knowledge there is no such legislation relating specifically to extra-territorial jurisdiction relating to the crimes provided for in these Conventions, however the implementing departments will be better placed to comment on this authoritatively. The other aspects of the extra-territorial jurisdiction

(e.g. if the Government or one of its nationals are a victim of a terrorist crime committed elsewhere) are discretionary and do not have to be implemented and whether or not they form part of the extra-territorial jurisdiction introduced in legislation will be a question of policy.

2. Please note that in responding to the questions put to us we have confined our comments so far to the International Convention for the Suppression of Terrorist Bombings and the OAU Convention on the Prevention and Combating of Terrorism, which were the subject matter of your letter. However the signature and earliest ratification of the International Convention on the Suppression of the Financing of Terrorism should be viewed as one of the highest and most urgent priorities, particularly in view of the fact that Security Council Resolution 1373 not only creates a binding obligation for States to ratify this Convention as a matter of urgency, but the Resolution also repeats, and therefore reinforces, many of the obligations contained in this resolution. Our comments above can therefore also be taken to apply to the signature and ratification of the International Convention for the Suppression of the Financing of Terrorism.
3. Please do not hesitate to contact me if you have any further queries in this regard.

Yours sincerely

J. Schneeburger
J. Schneeburger

State Law Adviser (International Law)