



Universiteit
Leiden
The Netherlands

The implementation of international law in the national legal order : a legislative perspective

Beenakker, E.B.

Citation

Beenakker, E. B. (2018, June 5). *The implementation of international law in the national legal order : a legislative perspective*. Meijers-reeks. s.n., S.l. Retrieved from <https://hdl.handle.net/1887/63079>

Version: Not Applicable (or Unknown)

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/63079>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The following handle holds various files of this Leiden University dissertation:

<http://hdl.handle.net/1887/63079>

Author: Beenakker, E.B.

Title: The implementation of international law in the national legal order : a legislative perspective

Issue Date: 2018-06-05

6.1 IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME

6.1.1 General

In contrast to the international legal regimes discussed above, which are mostly of European origin, the United Nations Convention against Transnational Organised Crime (CTOC) has truly global aspirations. It has been negotiated in response to growing concerns about the effects of transnational organised crime, which urged the UNGA to adopt a resolution which in 1998 called for the establishment of an intergovernmental *ad hoc* committee for the purpose of elaborating a comprehensive international convention in order to combat transnational organised crime.⁵³⁸ Over the course of almost two years, the *ad hoc* committee had drafted a Convention against Transnational Organised Crime and two supplementary Protocols, which were adopted by the UNGA in late 2000.⁵³⁹ The protocols included the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air.⁵⁴⁰ The instruments were opened for signature in December 2000.⁵⁴¹ Today 189 states are party to the CTOC, which entered into force on 29 September 2003.⁵⁴² It has been complemented with another protocol: the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.⁵⁴³

538 UNGA res 53/111 (9 December 1998) UN Doc A/RES/53/111, par. 10.

539 UNGA res 55/25 (15 November 2000) UN Doc A/RES/55/25, par 2.

540 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319; Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 207.

541 UNGA res 55/25 (n 539) par 2.

542 In accordance with article 38 of the Convention, which prescribes the entry into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, approval or accession. The protocols entered into force on 25 December 2003 and 28 January 2004, respectively.

543 The protocol was adopted by the General Assembly in 2001 and entered into force in 2005. UNGA res 55/25 (n 539) par. 2.

6.1.2 Content of the Convention

The purpose of the CTOC is 'to promote cooperation to prevent and combat transnational organized crime more effectively'.⁵⁴⁴ It is applicable to certain specified crimes, if they have been committed by an organised criminal group and if they are 'transnational' in nature, i.e. which affect more than one state.⁵⁴⁵ They include conduct that constitutes an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty, the participation in an organised criminal group, the laundering of the proceeds of crime, corruption and the obstruction of justice.⁵⁴⁶ One of the central obligations of the CTOC is to adopt such legislative and other measures as may be necessary to establish these and related acts as criminal offences, when committed intentionally.⁵⁴⁷ Furthermore, states must establish jurisdiction over these crimes, and perpetrators must be liable to proportionate sanctions.⁵⁴⁸ Also, article 12 CTOC imposes the duty to adopt measures as may be necessary to enable confiscation of proceeds of crime derived from offences covered by the CTOC and of property, equipment or other instrumentalities used in or destined for use in those offences.⁵⁴⁹ Other provisions relate to, among other subjects, international cooperation, including extradition and the transfer of sentenced persons or of criminal proceedings, to the protection of witnesses and to the prevention of transnational organised crime.⁵⁵⁰

In addition to these obligations, which are broad in nature as they apply to several crimes enumerated in the CTOC, state parties have the duty to take certain measures in response to certain specified crimes in particular. One of them is money laundering. The applicable duties encompass the obligation to 'institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions [...] in order to deter and detect all forms of money-laundering, which regime shall emphasise requirements for customer identification, record-keeping and the reporting of suspicious transactions' and the obligation to ensure that 'administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering [...] have the ability to cooperate and exchange information at the national and international levels [...]'.⁵⁵¹ As a means to fight corruption, states that are bound by the CTOC shall 'to the

⁵⁴⁴ Art 1.

⁵⁴⁵ Art 3. Pursuant to the second paragraph, the 'transnational' character of the crimes can refer to the place where the crime is committed, prepared, planned, directed or controlled, the place where its effects materialise and the place where the involved organised criminal group is active.

⁵⁴⁶ Artt 2, sub b, 5, 6, 8 and 23.

⁵⁴⁷ Artt 2, sub b, 5, 6, 8 and 23.

⁵⁴⁸ Artt 15 and 11, first paragraph.

⁵⁴⁹ Art 12, first paragraph.

⁵⁵⁰ Artt 16, 17, 21, 24 and 31.

⁵⁵¹ Art 7, first paragraph, sub a and b.

extent appropriate and consistent with [their] legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials' and to 'take measures to ensure effective action by [their] authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions'.⁵⁵²

Finally, the CTOC contains what may be considered the core obligation, laid down in article 34, first paragraph, to take 'the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention'.⁵⁵³

This brief overview of the content of the CTOC makes clear that the adoption of national measures, including legislation, is indispensable for states that wish to comply with its provisions. In order to attain the objectives of Part II of the present study, it is necessary to examine the legislative standards that should be taken into account by the states party to the CTOC. Two types of sources may provide insight into these standards: the CTOC itself and the *Legislative Guide*, which was compiled by experts, international institutions and government representatives in order to assist states seeking to ratify or implement the CTOC.⁵⁵⁴ These standards will be discussed in the following section.

6.1.3 Legislative standards

6.1.3.1 Implementation, effectiveness and harmonisation

It is evident from the convention's provisions that states have a duty to adopt all domestic measures, including legislation, that are required for the implementation of the CTOC. This follows from the 'core obligation' entrenched in article 34, first paragraph, cited above. Compliance with this obligation must be understood as a necessary precondition for the attainment of the CTOC's aim: to promote cooperation to prevent and combat transnational organised crime more effectively.⁵⁵⁵ Thus, the duty to ensure the implementation of the CTOC is closely related to the treaty's effectiveness. Whereas article 34, first paragraph, applies to the CTOC as a whole, various other CTOC norms impose a similar obligation to adopt domestic measures in relation to the attainment of a *specified* policy aim. Examples of the policy aims include the detection and deterrence of all forms of money-laundering, the prevention,

552 Art 9, first and second paragraph.

553 Art 34, first paragraph.

554 UN Office on Drugs and Crime, *Legislative Guide for the implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto* (United Nations, New York 2004).

555 Art 1.

detection and punishment of the corruption of public officials, the maximisation of the effectiveness of law enforcement measures, and the identification, tracing, freezing or seizure of proceeds of crime.⁵⁵⁶ From this it may be derived that the effectiveness of domestic implementing measures is a prerequisite for state compliance with the treaty.⁵⁵⁷

A notion which is closely related to the CTOC's implementation and effectiveness is the objective of harmonisation, which is considered an 'indispensable component of a concerted, global strategy against serious crime'.⁵⁵⁸ The central role attributed to this concept comes to the surface in several parts of the CTOC. Pursuant to article 34, third paragraph, CTOC, '[e]ach State Party may adopt more strict or severe measures than those provided for by this Convention [...]'. It thus imposes minimum standards of implementation, which ensure the harmonisation of domestic measures along the lines laid down in the CTOC. In addition to the imperative obligations included in the CTOC, it encourages harmonisation of domestic policies through the inclusion of optional measures. An example can be found in article 17, which stipulates that:

'States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention, in order that they may complete their sentences there'.

Even where the CTOC prescribes compulsory minimum standards for the prevention and combating of transnational organised crime, it is noted that domestic authorities may be responsible for the formulation of the particulars of the envisaged measures. Article 7, first paragraph, sub a, for instance, provides that states are required to establish a domestic regulatory and supervisory regime within their competence in order to deter and detect money-laundering activities. In the *Legislative Guide* it is submitted that:

'[t]his regime must be comprehensive, but the precise nature and particular elements of the regime are left to States, provided that they require at a minimum banks and non-bank financial institutions to ensure: (a) Effective customer identification; (b) Accurate record-keeping; (c) A mechanism for the reporting of suspicious transactions.'⁵⁵⁹

Another feature of the notion of harmonisation applies to the language used in domestic implementing measures. There is some ambivalence in

556 Artt 7, first paragraph, sub a, 9, first paragraph, 11, second paragraph, and 12, second paragraph.

557 In the *Legislative Guide* (p. 9) it is noted that '[t]hese general provisions and requirements must be clearly understood by legislative drafters and policy makers and care must be taken to incorporate them when preparing legislation to implement the specific articles concerned. Otherwise, the implementing measure could be out of compliance with the requirements of the Convention'.

558 UNODC, *Legislative Guides* (n 554) 130.

559 Ibid, 51.

the approach taken by the CTOC's drafters in this regard. On the one hand, it is noted that 'close conformity [to the CTOC's terminology] is desirable, for example to simplify extradition proceedings'.⁵⁶⁰ On the other hand, it is

[...] recommended that drafters check for consistency with other offences, definitions and legislative uses before relying on formulations or terminology contained in the Convention. The Convention was drafted for general purposes and is addressed to national Governments. Thus, the level of abstraction is higher than that necessary for domestic legislation. Drafters should therefore be careful not to incorporate parts of the text verbatim, but are encouraged to adopt the spirit and meaning of the various articles.⁵⁶¹

In other words, state parties to the CTOC are expressly invited to ensure that their domestic implementing legislation corresponds to their domestic legal tradition, even if this tradition deviates from the language used in the CTOC. 'This', it is argued, 'avoids the risk of conflicts and uncertainty about the interpretation of the new provisions by courts and judges'.⁵⁶²

In sum, the implementation and effectiveness of the CTOC, and the harmonisation which it pursues, are closely related. The harmonisation of domestic implementing measures leads to a certain complementarity between the CTOC on the one hand, and domestic legislation enacted by state parties on the other hand, in several respects. First, the CTOC contains minimum standards which encompass both imperative and optional provisions, as a result of which states may go beyond the CTOC requirements in their efforts to prevent and combat transnational organised crime. Second, domestic (legislative) authorities may be responsible for the elaboration on the domestic level of CTOC obligations which are formulated in broad terms. Third, the CTOC relies to a significant extent on legal terms and concepts that are in use in the jurisdictions of the state parties; it does not require the verbatim transposition of the terms and concepts used in the CTOC.

6.1.3.2 *Observance of applicable international and national law*

Furthermore, states must ensure that the national measures, including legislation, which they undertake to implement the CTOC, do not contravene other norms to which the state authorities are bound. These norms may encompass both norms of national and of international legal origin.

560 Ibid, 10. The importance of the domestic legal context may not only be inferred from the *Legislative Guide*, but is also codified in the Convention itself. Article 11, sixth paragraph, provides: 'Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law'.

561 UNODC, *Legislative Guides* (n 554) 7.

562 Ibid, 18.

The former category comprises what has been termed ‘fundamental principles of domestic law’, which states must take into account when they adopt national implementing measures.⁵⁶³ It emphasises that the harmonisation anticipated by the CTOC has legal limits. The phrase ‘fundamental principles of domestic law’ was proposed in the early stages of the negotiation process and its incorporation has remained largely uncontroversial until the adoption of the final text.⁵⁶⁴ The justification for its inclusion in the treaty may be found in the desire to prevent domestic implementing legislation from ‘becoming a dead letter, or challenged as unconstitutional’.⁵⁶⁵

In the context of the general treaty obligation to ensure the CTOC’s effective implementation, entrenched in article 34, first paragraph, it is difficult to identify the specific domestic legal principles which the drafters had in mind. However, other articles may provide some clarification. An example may be found in article 26, third paragraph, which provides that:

‘[e]ach State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention’.

In this particular context, the reference to national legal principles was perceived necessary to accommodate the diversity in national policies applicable to the granting of immunity to alleged offenders who cooperate with national authorities. For this reason, it is noted in the *Legislative Guide* that ‘the specific steps to be taken are left to the discretion of States, which are asked, but not obliged, to adopt immunity or leniency provisions’.⁵⁶⁶

While other provisions have a more compulsory character, they may similarly refer to boundaries laid down by domestic law. Article 16, first paragraph, as an example, which provides for norms on extradition, demands that ‘the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party’. Furthermore, article 16, seventh paragraph, stipulates that ‘[e]xtradition shall be subject to the conditions provided for by the domestic law of the requested State Party [...] including, inter alia, conditions in rela-

563 Art 34, first paragraph.

564 It was included in the early draft of the Convention, although this early proposal referred to ‘fundamental provisions of [...] domestic legislative systems’. Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, ‘Draft United Nations Convention against Transnational Organised Crime’ (1st session, Vienna, 19-29 January 1999) (15 December 1998) UN Doc A/AC.254/4, 1.

565 UNODC, *Legislative Guides* (n 554) 10.

566 Ibid, 165. Similar argumentation may be applicable to, among other provisions, article 6, first paragraph, sub b, sub i, and article 10, second paragraph, which refer to the ‘basic concepts of [a state’s national] legal system’ and to the ‘legal principles of a state party’ respectively.

tion to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition'.⁵⁶⁷

Thus, it seems that the reference to fundamental principles of domestic law, as included in several provisions of the CTOC, is a double-edged sword. On the one hand, its objective is to ensure the effectiveness of the CTOC itself as it dissuades state parties from adopting national implementing legislation that, as a result of contravention of domestic laws or principles of higher rank, will remain without legal force. On the other hand, it serves to protect the sovereignty of states, since it ensures that the relevant domestic laws prevail over the applicable treaty provisions to the extent that a treaty obligation must be performed 'in accordance with fundamental principles of domestic law'.

As regards the latter category, states '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'. Moreover, the Convention provides for the protection of jurisdiction of the state vis-à-vis other states.⁵⁶⁸ Arguably, the references to the principles of non-intervention and exclusive exercise of jurisdiction are redundant, since the obligation to abide by these principles already follows from general (customary) international law.⁵⁶⁹ They emerged for the first time in a proposal made by Germany⁵⁷⁰, which was subsequently incorporated in a draft text of the treaty that was prepared by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime at its first session and seem to have been included in the final text of the treaty with only minor revisions.⁵⁷¹ Their substance and the motivation for their inclusion in the text have not been subject of debate at all, which may very well be explained by their

567 Also article 12, ninth paragraph, of the Convention.

568 Art 4, first and second paragraph.

569 Only a few references may suffice. Pursuant to article 2, first paragraph, ChUN, 'the [UN] is based on the principle of the sovereign equality of all its Members'. Furthermore, the ICJ has found that '[b]etween independent states, respect for territorial sovereignty is an essential foundation of international relations' and, on another occasion, that 'the principle of non-intervention [...] is part and parcel of customary international law'. *Corfu Channel Case (Merits)* [1949] ICJ Rep 4, p. 35, and *Case concerning Military and Paramilitary Activities in and against Nicaragua* (n 198) par. 202, respectively.

570 Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, 'Proposals and contributions received from governments' (1st session, Vienna, 19-29 January 1999) (19 December 1998) UN Doc A/AC.254/5, 10.

571 Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (n 564) 4. The revisions concerned the question whether the formulation should follow the language used in the International Convention for the Suppression of Terrorist Bombings ('Nothing in this Convention entitles a State Party to [...]') or the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ('A State Party shall not [...]'). Whereas the provisions on the principles non-intervention and exclusive exercise of jurisdiction had originally been envisaged as part of the Convention article on the scope of application, it was decided to place them in a separate article. UNODC, *Travaux préparatoires* (n 189) 27, 29 and 37.

redundancy, as noted above. This view is supported by the *Legislative Guide*.⁵⁷² Its commentary on the motivation for the inclusion of article 4 on the protection of national sovereignty is limited to the observation that 'its provisions are self-explanatory'.⁵⁷³

In addition to article 4, first and second paragraph, which applies to the CTOC as a whole, several other, specific provisions refer to other norms of international law that should be observed in the implementation of the treaty.⁵⁷⁴ These provisions indicate that the CTOC and the domestic implementing measures to which it gives rise, should be adequately embedded in the international regulatory environment. This also applies to article 7, third paragraph, CTOC. Pursuant to this provision, 'States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organisations against money-laundering'. Although this provision is not compulsory in the sense that it contains a binding obligation for state parties to use the said initiatives as guidelines, it demonstrates a preference for international harmonisation in this regard. For this reason, it is stated that

[u]ltimately, States are free to determine the best way to implement this article. However, the development of a relationship with one of the organisations working to combat money-laundering would be important for effective implementation'.⁵⁷⁵

6.1.3.3 Criminalisation and enforcement

As was noted above, the CTOC requires state to establish as criminal offences the acts that fall under its scope.⁵⁷⁶ Thus, CTOC's implementation must be performed through the enactment of criminal laws, instead of civil or administrative laws.⁵⁷⁷ The choice for implementing measures of a criminal legal nature is based on the premise that it not only enables state authorities to resort to criminal powers for the investigation, prosecution and punishment of offenders. It also facilitates international cooperation among national authorities.⁵⁷⁸

Once the conduct referred to in the CTOC has been criminalised under domestic laws, the question arises what sanctions should be imposed on offenders. Here, the CTOC prescribes that sanctions should 'take into account the gravity of the offence', which may be viewed as a proportionality

572 UNODC, *Legislative Guides* (n 554) xv.

573 Ibid, 16.

574 Artt 13, fourth paragraph, 15, sixth paragraph, and 18, sixth paragraph.

575 UNODC, *Legislative Guides* (n 554) 51.

576 Artt 2, sub b, 5, 6, 8 and 23.

577 UNODC, *Legislative Guides* (n 554) 18. There is one exception to this rule, which pertains to the liability of legal persons. This exception can be found in article 10, second paragraph, of the Convention.

578 UNODC, *Legislative Guides* (n 554) 40.

requirement.⁵⁷⁹ This proportionality of sanctions is inspired by the desire to provide for a minimum level of deterrence in order to ensure that sanctions 'clearly outweigh the benefits of the crime'.⁵⁸⁰ This, however, cannot conceal the fact that the punishment of offenders is primarily a responsibility and prerogative of the state parties, which is emphasised in article 11, sixth paragraph. Pursuant to this provision, '[n]othing contained in this Convention shall affect the principle that [...] offences shall be prosecuted and punished in accordance with [the domestic law of a state party]'.⁵⁸¹

A special regime is applicable to legal persons involved in the commission of serious crimes that fall within the scope of the CTOC. Contrary to other obligations that are part of the CTOC, which, as we have seen, require criminalisation, the liability of such legal persons may be accomplished on the basis of civil or administrative law as well. This is stated in article 10, second paragraph. Whatever the nature of the sanctions imposed on the perpetrating legal person, however, states must ensure that it is subject to 'effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions'.⁵⁸² Apparently this special regime for legal persons was contained in the CTOC as a result of the diversity in domestic laws on the subject, which include, among other sanctions, criminal and non-criminal fines, forfeiture, confiscation, restitution, the withdrawal of certain advantages and the suspension of certain rights.⁵⁸³

6.1.4 Overview

The CTOC contains a large number of obligations that will require the adoption of domestic legislation by the state parties.⁵⁸⁴ However, the legislative standards that should be respected, as stipulated by the CTOC and the *Legislative Guide*, which was compiled by experts, international institutions and government representatives in order to assist states seeking to ratify or implement the CTOC, are scarce; the CTOC seems to grant considerable space for domestic policies. This may be explained by the premise that states consider the adoption of criminal legislation as a matter reserved for the domestic, instead of the international, policy makers. The standards that have to be taken into account by the national legislature may be summarised as follows. First and foremost, states should ensure that the CTOC is effective, which requires adequate implementation on the domestic level. In addition, states should take into account applicable national and

579 Art 11, first paragraph.

580 UNODC, *Legislative Guides* (n 554) 130.

581 *Ibid.*, 20.

582 Art 10, fourth paragraph.

583 UNODC, *Legislative Guides* (n 554) 120-121.

584 'The process by which the requirements of the Convention can be fulfilled will vary from State to State. Monist systems could ratify the Convention and incorporate its provisions into domestic law by official publication, while dualist systems would require implementing legislation.' *Ibid.*, 6.

international law when they adopt implementing measures. References to national law not only serve as a protection of state sovereignty, but also as a safeguard to ensure the CTOC's effectiveness. With respect to the international legal obligations, this may not only be interpreted as a rather superfluous statement that states should act in accordance with other international legal obligations to which they are bound, but also serves as a reminder that the CTOC's policy aims will be accomplished successfully if domestic implementing measures fit in with the regulatory environment which is already in place. In relation to the norms pertaining to the punishment of offenders, the CTOC is largely limited to the requirement of proportionality, which imposes the obligation on state authorities which establish the sanctions on offenders to take into account the gravity of the offence.

6.2 IMPLEMENTATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

6.2.1 General

The origins of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) can be found in the concern about the 'worldwide escalation of acts of terrorism in all its forms and manifestations'.⁵⁸⁵ It may be traced back to the UNGA resolution 51/210 of December 1996 on 'Measures to eliminate international terrorism', which called upon states, *inter alia*, to 'take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organisations, whether such financing is direct or indirect [...]'.⁵⁸⁶ A draft convention on the financing of terrorism was prepared by France, which was, after elaboration by the *ad hoc* committee established by the aforementioned resolution,⁵⁸⁷ adopted by the UNGA's Sixth Committee.⁵⁸⁸ On 9 December 1999 the text was adopted by resolution 54/109 of the UNGA.⁵⁸⁹ The ICSFT was open for signature between 10 January 2000 and 31 December 2001. As of today, 188 states are party to the treaty, which entered into force on 10 April 2002.

585 Preamble.

586 UNGA res 51/210 (17 December 1996) UN Doc A/RES/51/210, par. 3.

587 UNGA res 53/108 (26 January 1999) UN Doc A/RES/53/108, par. 11.

588 UNGA, 'Measures to eliminate international terrorism. Report of the Working Group' (26 October 1999) UN doc A/C.6/54/L.2. Also UNGA, 'Measures to eliminate international terrorism. Report of the Sixth Committee' (10 December 1999) UN Doc A/54/615, par. 13.

589 UNGA res 54/109 (25 February 2000) UN Doc A/Res/54/109.

6.2.2 Content of the Convention

The approach taken by the ICSFT differs from previous treaties pertaining to terrorism, since it 'seeks to cripple the phenomenon as a whole' instead of addressing specific types or areas of terrorism.⁵⁹⁰ Although the body of the ICSFT does not contain an express provision on the purpose of the ICSFT, the purpose can be derived from the treaty's preamble, which recalls 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'.⁵⁹¹ The provision on the ICSFT's scope is embodied in article 2, first paragraph, which establishes as an offence under the ICSFT the financing of conduct with the intention that they should be used or in the knowledge that they are to be used for what may be loosely defined as 'terrorist acts'.⁵⁹² In order to determine what conduct constitutes an act of terrorism, the ICSFT refers to several international anti-terrorism treaties enumerated in the annex to the treaty.⁵⁹³ It also encompasses 'any other act intended to cause death or serious bodily injury to a civilian [...] when the purpose of such act, by its nature and context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act'.⁵⁹⁴ The ICSFT, with the exception of the articles pertaining to international cooperation, including on matters of extradition or mutual legal assistance, does not apply where the commission of an offence merely affects the interests of a single state.⁵⁹⁵

State parties are under the obligation to establish as criminal offences under their domestic law the offences set forth in article 2 and to make those offences 'punishable by appropriate penalties which take into account the grave nature of the offences'.⁵⁹⁶ Lavalley convincingly argues that it is difficult to imagine that the terrorist acts included in the anti-terrorism trea-

590 R. Lavalley, 'The International Convention for the Suppression of the Financing of Terrorism' 60 *Heidelberg Journal of International Law* 1 (2000) 491-510, 492. Also A.C. Culley, 'The International Convention for the Suppression of the Financing of Terrorism. A legal tour de force?' 29 *Dublin University Law Journal* (2007) 397-413, 397-398.

591 For an extensive discussion of the Convention's content, see Lavalley, 'The International Convention for the Suppression of the Financing of Terrorism' (n 590).

592 In the context of the Convention, 'financing' means the provision or collection by any means, directly or indirectly, unlawfully and wilfully, of funds.

593 Art 2, first paragraph, sub a. These treaties include *inter alia* the Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105; the International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205; and the Convention on the Physical Protection of Nuclear Material (adopted 3 March 1980, entered into force 8 February 1987) 1456 UNTS 101. The annex may be amended in accordance with the procedure laid down in article 23.

594 Art 2, first paragraph, sub b.

595 Art 3.

596 Art 4.

ties to which the ICSFT refers for its scope of application, given their grave nature, are not punishable under the existing domestic criminal laws of any state. In practice, therefore, the obligation to criminalise such conduct will often not require any additional specific legislative action.⁵⁹⁷ Furthermore, a state party has a duty to take such measures as may be necessary to establish jurisdiction over the offences if they are committed in its territory or by one of its nationals.⁵⁹⁸

In addition to the obligations to criminalise and penalise the financing of terrorism and to establish jurisdiction over offences referred to in article 2, the ICSFT imposes several duties which are closely related. They include the adoption of measures for the identification, detection, freezing or seizure, and subsequently forfeiture of any funds used for those offences, as well as the proceeds derived from such offences.⁵⁹⁹ Once a person is suspected to have a financed terrorist activities, a state which has jurisdiction may choose to either prosecute or extradite the alleged offender.⁶⁰⁰ Moreover, state parties should afford one another the 'greatest measure of assistance' in connection with criminal investigations or criminal or extradition proceedings.⁶⁰¹ Finally, in order to prevent the financing of terrorist acts, states must, *inter alia*, exchange information and adopt measures that require financial institutions to ensure that their customers can be identified and to pay special attention to unusual or suspicious transactions.⁶⁰²

6.2.3 Legislative standards

6.2.3.1 Implementation, effectiveness and harmonisation

In contrast to the CTOC, which was discussed in the previous chapter, the ICSFT does not contain one core provision of a general nature to the effect that states are required to adopt implementing legislation in order to comply with the obligations set forth in the treaty; such requirement must be derived from the various specific articles that were explored in section 6.2.2. Neither does the body of the ICSFT impose a general obligation to ensure the effectiveness of domestic implementing measures. Aside from the preambular statement, referred to above, on the 'urgent need to enhance international cooperation among States in [...] devising and adopting effective measures for the prevention of the financing of terrorism', such obligation must be looked for in the specific articles of the ICSFT. The notion of effectiveness arises only in article 5, third paragraph, which imposes the

597 Lavalle, 'The International Convention for the Suppression of the Financing of Terrorism' (n 590) 505.

598 Art 7, first paragraph.

599 Art 8, first and second paragraph.

600 Art 10, first paragraph.

601 Art 12, first paragraph.

602 Art 18, first paragraph, sub b, and third paragraph.

obligation to ensure that legal entities that commit crimes as set out in the ICSFT, are subject to 'effective' sanctions. This, of course, must not lead to the conclusion that the notion of effectiveness is not relevant to the states that are required to adopt implementing measures; effectiveness must again be considered inherent to the specific treaty obligations.⁶⁰³

With regard to the subject of harmonisation, the ICSFT contains several categories of norms, most notably of a compulsory nature. An example can be found in article 4, sub a, which provides that '[e]ach State Party shall adopt such measures as may be necessary [...] to establish as criminal offences under its domestic law the offences set forth in article 2'. Other, less numerous, provisions leave a certain measure of discretion to state parties, such as the norms entrenched in article 12, fourth paragraph, which stipulates that '[e]ach State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence [...]'.⁶⁰⁴

6.2.3.2 *Observance of applicable international and national law*

The ICSFT partly relies on domestic law. This can be derived, for example, from article 8, first paragraph, ICSFT, which reads:

'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'.

Similar references to domestic law can be found in the provisions pertaining to the forfeiture of funds that are used for the commission of terrorist offences and of the proceeds derived from such offences; the institution of criminal proceedings; extraditable offences; and the provision of mutual legal assistance in the absence of an applicable treaty between two or more state parties.⁶⁰⁴ Arguably, as was noted in the context of the CTOC, references to national law serve both as a protection of state sovereignty, and as a safeguard to ensure the effectiveness of the convention. As regards the former, such references emphasise that the ICSFT provides for a framework which is to *respect*, instead of *replace* applicable domestic law. Indeed, as was noted during the negotiations of the draft text of article 5, first paragraph, the insertion of the phrase 'in accordance with its domestic legal system' was proposed in order to 'take into consideration the diversity of national legal systems'.⁶⁰⁵ At the same time, the observance of applicable national law ensures that the ICSFT is not rendered ineffective for reasons of incompatibility with domestic law of higher rank.

603 For instance art 6.

604 Artt 8, second paragraph, 10, first paragraph, 11, third paragraph, and 12, fifth paragraph.

605 UNGA, 'Measures to eliminate international terrorism. Report of the Working Group' (n 588) par. 128. The phrase 'domestic legal system' would eventually be replaced by the term 'domestic legal principles'. Ibid, par. 175.

Several other provisions require state parties to ensure that the obligations entrenched in the ICSFT are performed in accordance with existing international legal norms. Examples can be found in article 7, sixth paragraph, which reads: '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'. During the negotiations of this particular provision it was noted 'that the exercise of national terms of reference should be applied in conformity with international law. If not, the provision could lead to actions considered unacceptable under international law'.⁶⁰⁶ And such a situation, the negotiators might have added, is to be avoided. Similarly, article 20 stipulates that states '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'.⁶⁰⁷ Pursuant to article 21, '[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the UN Charter, international humanitarian law and other relevant provisions'.⁶⁰⁸ The issue of concurrence of international humanitarian law and the ICSFT was raised during the negotiations of the text because of expected 'difficulties with the application of humanitarian law' which feared to lead to 'the situation where certain acts would be classed as terrorism when they would be acceptable under humanitarian law'.⁶⁰⁹ For this reason it was suggested that 'the draft convention makes reference to the hierarchy of norms of international law, whereby in the context of armed conflict the application of humanitarian law would take precedence over that of the draft convention'.⁶¹⁰ In short, the provisions emphasise the requirement that the ICSFT obligations, including those which necessitate the adoption of domestic legislation, must be honored in a way which is consistent with other international legal rights and obligations.

606 UNGA, 'Measures to eliminate international terrorism. Report of the Working Group' (n 588) par. 202.

607 Closely related is article 22, which provides: '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.' Also artt 7, sixth paragraph, 8, fifth paragraph, and 9, fifth paragraph.

608 Similarly, article 17 provides that '[a]ny 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'.

609 UNGA, 'Measures to eliminate international terrorism. Report of the Working Group' (n 588) par. 102.

610 *Ibid.*, par. 85.

6.2.3.3 Criminalisation and enforcement

As we have seen above, two of the most principal obligations embodied in the ICSFT concern the criminalisation of the financing of terrorism and related conduct and the penalisation of those crimes. As regards the latter, the ICSFT not only prescribes the obligation to provide for penalties on the domestic level, but also that the established penalties must be 'appropriate' and 'take into account the grave nature of the offences'.⁶¹¹ If such offence is attributed to a legal entity, as opposed to a natural person, the state parties must ensure that those entities are subject to 'effective, proportionate and dissuasive criminal, civil or administrative sanctions' which include monetary sanctions.⁶¹² In other words, the ICSFT does not express a preference regarding the legal nature of the prescribed sanctions (either criminal, civil or administrative, including monetary); they must, however, be sufficiently deterrent.

6.2.4 Overview

From the foregoing it may be concluded that the ICSFT does not provide for elaborate standards applicable to implementing legislation which must be observed by state parties. In addition, its drafters, contrary to the drafters of the *Legislative Guide* for the implementation of the CTOC, have not arranged for guidance regarding the implementation of the ICSFT provisions. As a result, legislative standards can only be derived from the ICSFT itself. The ICSFT imposes obligations to, *inter alia*, criminalise the offences covered by the convention, to provide for penalties under domestic law, and to establish jurisdiction over those crimes. The choice of sanctions, either criminal, civil or administrative, including monetary, is left to the discretion of states. The ICSFT only prescribes that the available sanctions are sufficiently deterrent. Furthermore, it requires that its obligations, including the obligations that require the adoption of domestic legislation, are performed in consistency with other norms to which the state is bound, either national or international.

611 Art 4, sub b.

612 Art 5, third paragraph.

