

DECLARATION OF JUDGE ROBINSON

1. Although I have voted in favour of the operative paragraphs of the Judgment, I wish to comment on two aspects of the decision.

State responsibility

2. The first seven sentences of paragraph 59 of the Judgment read as follows:

“The ICSFT imposes obligations on States parties with respect to offences committed by a person when “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” acts of terrorism as described in Article 2, paragraph 1 (*a*) and (*b*). As stated in the preamble, the purpose of the Convention is to adopt “effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators”. The ICSFT addresses offences committed by individuals. In particular, Article 4 requires each State party to the Convention to establish the offences set forth in Article 2 as criminal offences under its domestic law and to make those offences punishable by appropriate penalties. The financing by a State of acts of terrorism is not addressed by the ICSFT. It lies outside the scope of the Convention. This is confirmed by the preparatory work of the Convention”.

3. There is nothing in the first four sentences to support the conclusion that “the financing by a State of acts of terrorism is not addressed by the ICSFT”. The first sentence simply reiterates that the offence is committed by a person, without undertaking any analysis of the meaning of the term “person”. The second sentence simply states that the preamble identifies the purpose of the Convention as the suppression of the financing of terrorism through the prosecution and punishment of the perpetrators of the offence; notably, it does this without indicating whether the term “perpetrators” includes public officials as well as private persons. The third sentence indicates that the Convention is devoted to offences committed by individuals. Since this conclusion is drawn from the first two sentences it reflects the failure to examine the meaning of the term “any person” in Article 2, paragraph 1, of the Convention. The fourth sentence simply refers to the obligation imposed by the Convention on States parties to establish the offences as criminal offences under their domestic law. It is clear that States could establish offences committed by public officials, in which event it is at least arguable that the question of the responsibility of their States for their acts could arise.

4. Consequently there is nothing in these sentences to support the conclusion that State financing of terrorism is outside the scope of the Convention. The result is that when the Judgment goes on in the seventh sentence to cite the preparatory work of the Convention as confirming its earlier conclusion, it is in reality seeking to confirm a finding that has no basis in an analysis of the text of the Convention. Preparatory work may be used to confirm the meaning of a term that results from the application of the general rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties (hereinafter the “VCLT”). Since the relevant area of enquiry is the meaning of the term “any person” — and the Court had not at this stage of its reasoning established the meaning of that term in accordance with the general rule of interpretation in Article 31 of the VCLT — there is no basis for recourse to the preparatory work to confirm the Court’s conclusion that State financing of acts of terrorism is outside the scope of the Convention.

5. Thus in arriving at the finding that State financing of acts of terrorism is outside the scope of the Convention the Court has not grappled with the real issue in the case, that is, the meaning of the term “any person”, and the impact, if any, that the resolution of this question has on the general rule of attribution to States of responsibility for the acts of their agents. One consequence of the Court’s approach is that it renders questionable the finding in paragraph 61 of the Judgment that “the commission by a State official of an offence described in Article 2 does not in itself engage the responsibility of the State concerned under the Convention”.

6. In adopting this line of reasoning the Court appears to have put the proverbial cart before the horse, given that — at this stage of its reasoning — it had not yet considered the meaning of the term “any person” in Article 2. When the Court does in fact analyse the meaning of that term, it correctly concludes that it covers both private individuals and State agents. Here the Court has interpreted the term “any person” in accordance with its ordinary meaning in its context and in light of the object and purpose of the Convention. But by that time it had already concluded that State financing was outside the scope of the Convention. By this approach the Court foreclosed itself from considering the impact that its conclusion — that State agents are covered by the term “any person” — has on its analysis of the question whether or not States are also covered by the Convention. In other words the determination that State financing was outside the scope of the Convention should not have been made without the Court profiting from an analysis of the meaning of the term “any person”.

7. In any event the preparatory work of the Convention is far from being unequivocal in supporting the conclusion that State financing is outside the scope of the Convention. While the Judgment cites the preparatory work to support its conclusion that the Convention does not cover State financing, it is noteworthy that there are aspects of that work that support the contrary view. Thus, the Libyan Arab Jamahiriya stated that it

“welcomed the conclusion of the negotiations on the draft international convention for the suppression of the financing of terrorism, but wished to emphasize the responsibility of the States which financed terrorism and which protected terrorists and gave sanctuary to their leaders and their organizations. Those criminal acts should be condemned.” (United Nations, doc. A/C.6/54/SR.34, p. 3, para. 10.)

This statement is to be found in the same document cited in paragraph 59 of the Judgment and its existence points to the need for caution in relying on the preparatory work of a treaty, particularly when justification for recourse to such work has not been clearly established. In that regard there is a need to heed the admonition of Sir Humphrey Waldock (Special Rapporteur) in the “Third Report on the Law of Treaties”¹. He stressed that *travaux préparatoires* were only a subsidiary means of interpretation, caution was needed in using them and that “their cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty” (emphasis in original). In the circumstances of this case the conflicting statements in the preparatory work as to the application of the Convention to State financing of the acts constituting the offence under Article 2 cast doubt as to whether there was any common understanding of the Parties in relation to the question whether State financing is within the scope of the Convention. Consequently the preparatory work does not appear to shed any clear light on this question.

¹ *Yearbook of the International Law Commission*, 1964, Vol. II, p. 58.

Conclusion

8. In conclusion, the Court has had recourse to the preparatory work of the Convention in circumstances not permitted by the customary rules of interpretation reflected in Articles 31 and 32 of the VCLT. Moreover the Court has adopted a line of reasoning that does not establish that the financing by a State of acts constituting the offence under Article 2 is outside the scope of the Convention.

References to acts of terrorism in the Judgment

9. The history of multilateral efforts to combat terrorism is marked by the failure to adopt any global treaty on the question (a failure principally explained by the difficulty in reaching agreement on a definition of terrorism), the consequential piecemeal approach reflected in the many suppression of crime treaties adopted since 1970², and a spate of resolutions on the topic adopted by the United Nations General Assembly since 1972.

10. The only global treaty on terrorism to have been adopted is the League of Nations Convention on the Prevention of Terrorism (1937), which received one ratification and never entered into force.

11. In 1972 the General Assembly adopted resolution 3034 (XXVII) which was devoted not only to measures to eliminate international terrorism but also to a study of its underlying causes³. The question of the balance between measures to control terrorism on the one hand and its causes and political motivations on the other is the most significant aspect of the modern history of efforts to combat international terrorism. In the debate at the United Nations in the 1970s and 1980s there were differing views as to whether a study of the underlying causes of international terrorism should be a precondition for taking effective action against terrorism; there was also the concern of many countries that in the absence of a definition of the phenomenon of terrorism, the struggle of peoples for national liberation and independence might be characterized as terrorism.

12. In 1991 the reference to the underlying causes of international terrorism, which up to that time had appeared in the title of all the General Assembly resolutions on terrorism, was removed and not inserted in subsequent resolutions. With the change in title came a change in focus: the resolutions concentrated almost exclusively on the identification of effective measures to eliminate international terrorism.

13. The failure to adopt a multilateral treaty on international terrorism is mainly due to the difficulties that are encountered in defining that phenomenon. On the one hand there are States whose approach is to concentrate only on the heinous nature of the acts which an international convention would proscribe. On the other hand there are those countries which want to ensure that the underlying causes of terrorism would not be ignored in the adoption of any international

² 1970 is the date that the first convention mentioned in the Annex of the ICSFT was adopted. However the Convention on Offences and Certain Other Acts Committed on Board Aircraft was adopted in 1963.

³ United Nations, General Assembly, resolution 3034 (XXVII), 18 Dec. 1972, entitled “Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes”.

During the debate at the General Assembly on this item a number of States, including Jamaica and Syria, emphasized the importance of identifying the underlying causes of international terrorism.

instrument. In the view of these countries a definition of terrorism should exclude from its ambit measures adopted by peoples in the struggle for national liberation, self-determination and independence. In the preparatory work of the ICSFT there are very revealing statements by the delegates of Bahrain and Libya. They both emphasized the need to distinguish between the legitimate struggle of peoples for self-determination and terrorism. (United Nations, doc. A/C.6/54/SR.33, p. 10, para. 58 and doc. A/C.6/54/SR.34, p. 2, para. 7.)

14. In light of the failure to adopt a multilateral treaty that defines international terrorism States have concluded a large number of treaties at the global level⁴, which take the simpler and less problematic approach of creating offences by identifying certain acts which are characterized as offences. All of these treaties carefully avoid using the term “terrorism” in defining the acts constituting the offences they create. An examination of the nine treaties in the Annex referred to in Article 2 (1) (a) of the Convention shows that none of them describes the acts constituting the offence under the relevant treaty as terrorism⁵. Rather, they, like the ICSFT, only prohibit specific acts. Significantly even though the preamble of two of these conventions contains references to terrorism, there is absent from their articles, including the article creating the offence, any reference to terrorism⁶. In that respect the ICSFT is similar to those conventions in that there is a reference to terrorism in the preamble but no such reference in the article creating the offence or in any other article. All the treaties in the Annex were concluded in the shadow cast by the failure of the international community to agree on a definition of international terrorism. As such, they isolate acts to be criminalized as offences. However in view of the failure to reach agreement on the definition of international terrorism, they avoid characterizing these acts as terrorism. For example, the Convention for the Suppression of Unlawful Seizure of Aircraft (1970) criminalizes the act of seizing an aircraft (commonly called hijacking) but does not characterize the unlawful seizure as terrorism, even though in ordinary parlance it would be so described. In the same vein the (1979) Convention against the Taking of Hostages only criminalizes the act of taking hostages and does not characterize that act as terrorism, although in colloquial parlance it would be so described.

15. Moreover in the suppression of crime treaties⁷ adopted after the ICSFT a similar approach has been employed: the prohibited act is not described as terrorism; the conventions describe an offence that takes place when certain acts are carried out. Significantly, although the International Convention for the Suppression of Acts of Nuclear Terrorism (2005) has, like the ICSFT, a reference to terrorism in its title and in its preamble, there is no such reference in the article creating the offence.

⁴ In addition to the nine treaties listed in the Annex, the following suppression of crime treaties have been adopted: Convention on Offences and Certain Other Acts committed on Board Aircraft, 1963; International Convention for the Suppression of Acts of Nuclear Terrorism, 2005; and Convention on the Suppression of Unlawful Acts relating to International Civil Aviation, 2010.

⁵ The nine treaties that are in the Annex are: the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; International Convention against the Taking of Hostages, 1979; Convention on the Physical Protection of Nuclear Material, 1980; 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, 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 1988; and International Convention for the Suppression of Terrorist Bombings, 1997.

⁶ In the International Convention Against the Taking of Hostages, 1979 and the International Convention for the Suppression of Terrorist Bombings, 1997, terrorism is referred to in the preamble but not in the articles creating the offence.

⁷ International Convention for the Suppression of Acts of Nuclear Terrorism, 2005; and Convention on the Suppression of Unlawful Acts relating to International Civil Aviation, 2010.

16. What this legal history shows is that it is no mere happenstance that the ICSFT does not describe the offence in Article 2 as terrorism, even though its title and preamble refer to the phenomenon of terrorism. If during the negotiations Article 2 had been formulated to read “any person commits the offence of terrorism within the meaning of this Convention”, rather than “[a]ny person commits an offence within the meaning of this Convention”, the draft Convention would more than likely have met with serious objections from several countries which would have wanted to carve out an exception in respect of peoples struggling for liberation, self-determination and independence. It is for this reason that the Court’s finding in paragraph 63 of the Judgment is problematic. In that paragraph the Court finds that “[a]n element of an offence under Article 2, paragraph 1, of the ICSFT is that the person concerned has provided funds ‘with the intention that they should be used or in the knowledge that they are to be used’ to commit an act of terrorism”. It is problematic because nowhere in any of the articles of the ICSFT — and in particular, nowhere in Article 2 which creates the offence — is there any reference to “an act of terrorism”. Of course it would be unobjectionable if the Judgment did not use terrorism as a term of art referring to the offence under Article 2. But here the reference to an “element of the offence” — that is, “the intention” (the *mens rea*) that is required by Article 2, paragraph 1, to establish the offence — makes it abundantly clear that by “an act of terrorism” what is meant is the offence established by the Convention. The Court should have followed the approach it took in the same paragraph when it referred to “an act fall[ing] within the meaning of Article 2, paragraph 1 (a) or (b)”. This comment applies to other parts of the Judgment where “terrorism” is used as a term of art referring to the offence under Article 2. In any event if the phrase “act of terrorism” were to be retained in paragraph 63, the more appropriate formulation would be an act of financing terrorism.

17. The Court’s reference to acts of terrorism in describing the offence under Article 2 may lead some States to question how the acts in Article 2 could be said to constitute terrorism without any exception being carved out when those acts are committed by peoples struggling for liberation, self-determination and independence. Notably, on acceding to the ICSFT, Kuwait made a declaration that distinguished between terrorism and the “legitimate national struggle against occupation”.

(Signed) Patrick L. ROBINSON.
