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***DEFINING TERRORISM: A RISKY BUSINESS?***

A thesis submitted to the Dublin Institute of Technology in part fulfilment of the requirements for award of Masters in Criminology

by

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September 2012

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*Declaration*

I hereby certify that the material which is submitted in this thesis towards the award of the **Masters in Criminology** is entirely my own work and has not been submitted for any academic assessment other than part-fulfilment of the award named above.

*Signature of candidate:* .....

*Date:* .....

## **ABSTRACT**

The Criminal Justice (Terrorist Offences) Act 2005 introduced definitions of terrorist activity, terrorist group and terrorist offences for the first time. These definitions, enacted subsequent to the Good Friday Agreement (1998), were examined to ascertain whether perspectives of crime control or risk influenced their formulation. Evidence of control perspectives were elicited within the definitions but themes of risk or actuarial justice were not found. The policy analysis established that the definitions which emerged through process of coerced policy convergence emanating from the Council of the European Union with Irish legislators having limited influence.

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## **GLOSSARY OF ABBREVIATIONS**

<b>A.G.</b>	Attorney General
<b>C.A.T.S.</b>	Comite d'Article Trente Six/ Article 36 Committee
<b>C.O.R.E.P.E.R</b>	Committee of the Permanent Representatives
<b>D.P.P.</b>	Director of Public Prosecutions
<b>EUROPOL</b>	European Union Law Enforcement Agency
<b>F.A.T.F.</b>	Financial Action Task Force
<b>I.C.C.L.</b>	Irish Council of Civil Liberties
<b>I.H.R.C.</b>	Irish Human Rights Commission
<b>I.I.C.D</b>	Independent International Commission on Decommissioning
<b>I.M.C.</b>	Independent Monitoring Commission
<b>I.N.L.A.</b>	Irish National Liberation Army
<b>I.R.A.</b>	Irish Republican Army
<b>U.K.</b>	United Kingdom
<b>U.S.A.</b>	United States of America

## CHAPTER 1

### 1. INTRODUCTION

#### 1.1 Research Rationale and Aims

The Criminal Justice (Terrorist Offences) Act 2005 introduced legal definitions for a terrorist group, terrorist offences and terrorist activity for the first time in our turbulent history. The Act implemented Ireland's obligations under the Framework Decision on Combating Terrorism (2002) and three terrorist related conventions. Part 2 of the Act gives effect to the Framework Decision obliging Member States to incorporate agreed definitions and create specific offences within their criminal law.

To facilitate such a study, a policy review was conducted to understand the influences and processes which culminated in this Act. To facilitate such a study tools of policy analysis and policy convergence were chosen. The policy analysis was informed by Irish and European Union legislative documents, Oireachtas debates, the Department of Justice and Equality, specialist committees and commissions as well as advocacy groups. The documentary analysis reviewed the content relevance before thematic trends were elicited.

The literature review examined whether theoretical perspectives on crime control and/or risk are reflected in the definitions formulated. The thesis assessed whether these terrorist definitions reflect aspects of a crime control model described by Packer (1968) or the Garland's crime complex (2001). Paradigms of risk and actuarial justice were considered to assess their potential influence upon the decision to introduce terrorist definitions.

#### 1.2 Findings

The problem of terrorism was identified by the European Parliament before September 11, 2001. After that date, policy making moved rapidly in the Council of the European Union to the virtual exclusion of the Oireachtas and public debate. The principle definitions in Part 2, agreed by the framework decision, were politically binding on Ireland. The global nature of terrorism contributed to such political dynamism. Terrorist definitions do reveal crime control objectives whereby the prosecutorial path is eased by evidential presumptions and all encapsulating definitions but do not extend to the evolution of a crime complex. Risk strategies seeking to control dangerous groups were not evident in the definitions but policies aimed at containing funding and support for terrorist groups did reveal such purpose. The

thesis did not reveal any support for the proposition that actuarial justice policies underlie the terrorist definitions created.

### **1.3 Thesis Layout**

This thesis will begin by exploring the theoretical foundations to perspectives on crime control, risk and policy making within the literature chapter before describing the methodology adopted. The findings chapter will summarise evidence elicited from the data sources which is the subject of analysis in the chapter entitled discussion of findings. Finally, the conclusion chapter summarises the lessons to be drawn from the research.

## CHAPTER 2

### 2. LITERATURE REVIEW

The Criminal Justice (Terrorist Offences) Act 2005 for the first time in our turbulent history defined a terrorist group and terrorist offence. The definitions introduced in Part 2 of the Act were examined to assess whether their formulation signifies a movement towards a crime control perspective and/or represents the emergence of risk technologies in criminal justice policy making. The study also considered whether the definitions demonstrate a movement on the pendulum of risk towards the actuarial end of that scale. Before evidence of crime control traits can be identified within the relevant definitions, an understanding is required of the theoretical perspectives on crime control. The literature review examined the crime control model first described by Packer (1968) and Garland's writings about the emergence of a 'crime complex' (2001). In addition, the theories underpinning the promotion of risk techniques in criminal Justice, known as the new penology (Simon and Feeley: 1992) and actuarial justice, were considered.

To understand the derivation of these definitions, a policy review will examine the processes, persons and institutions that refined definitions within the Criminal Justice (Terrorist Offences) Act 2005 so as to inform the theoretical conclusions. As global terrorism operates without borders, terrorism has demanded the attention of European Union policy makers and facilitated recent definitional changes in Ireland. Consequently, theories and frameworks which assist in the analysis of policy making processes, policy transfer and convergence are reviewed as part of the literature review to enable the policy analysis to capture the impact of those processes upon the development of our anti-terrorist policy. An evaluation of whether ideological shifts have occurred necessitates examination of pre-existing terrorist legislation as well as the cultural and political impact of terrorism in our history. However, to appreciate why anti-terrorism policies might exhibit control and risk management traits necessitates an understanding of the impact of terrorism upon criminal justice systems.

#### 2.1 Terrorism Undermines Criminal Justice Systems

Anti-terrorism policies position due process rights and crime control objectives in direct conflict. Michael Levi (2007) identifies the 'tasks' required to sustain terrorism as being to:

*'Neutralise law enforcement by technical skill, by corruption, and/or by legal arbitrage, using legal obstacles to enforcement operations and prosecutions which vary between states'*

Therefore, terrorism presents a stiff challenge to criminal justice policy makers who historically have been unsuccessful in suppressing terrorist groups. Duggan et al (2005) examined policies employed in Northern Ireland to control terrorism. She later concluded that *'four of the other five interventions suggest more of a deviant effect, leading to an escalation of terrorism activity'* and advised against reliance on deterrent strategies against terrorism (Dugan: 2009). Equally, Cronin (2006) found in his study that only two deterrence based strategies, amongst eight contributing factors, led to the demise of a terrorist group. Consequently, deterrent strategies alone appear unsuccessful in curbing terrorism which prompts an examination of whether Ireland has moved away from those unsuccessful deterrent based strategies to curb terrorist threats. Deterrent policies are founded upon the assumption of the rational being who can be deterred. However, actuarial justice involves strategies that assume the offender not to be rational. Therefore, to enable an assessment of whether the definitions in Part 2 of the Act are speaking to a rational actor requires firstly an understanding of perspectives on risk and crime control.

## **2.2 Theories of Control**

Packer (1968) described two basic models of criminal process; the 'due process' and the 'crime control' models. The 'crime control' model emphasises crime containment resembling *'an assembly line conveyor belt down which moves an endless stream of cases'* (Packer 1968:158). Packer described the 'crime control' model as favouring the screening of potential offenders, resembling a risk-reduction approach to criminal justice. This contrasts with the 'due process' model protecting individual rights from the excesses of State power. King (1981) surmised that the 'crime control' model proceeds on a presumption of guilt. Practical representations include the prioritising of the victim over the accused and the removal of evidential and system controls within the criminal justice process to ease the path to a successful prosecution. The use of inference provisions and evidential presumptions overcomes system barriers to establishing guilt (Campbell: 2007). Packer's theory mainly addresses the trial process but Campbell (2007) argues it has equal application to sentencing, in particular mandatory sentencing.

Garland (2001) expanded upon this control terminology in a more contemporary context. He believed there had been movement towards a crime control model precipitated by the State declining to accept responsibility for rehabilitation of the individual offender, otherwise known as ‘penal welfarism’. Garland (2001) believed cultural changes within society were responsible for this change which he collectively called the ‘crime complex’. They included the public acknowledgment that governments cannot control crime, an acceptance of high crime rates and a cultural fear of crime. Emerging from these cultural changes are reactive policies designed to demonstrate persisting control, a phenomenon which some commentators have called ‘*governing through crime*’ (Simon: 2007). This politicisation requires regular symbolic signals of control. The status of the victims is elevated within the collective consciousness and incapacitation emerges as the primary sentencing objective, especially for repetitive and dangerous criminals (Garland: 2001). Garland cautioned that a criminology of the ‘dangerous other’ was emerging from this crime complex (2001:167). Theoretical enquiries into strategies employed to manage risks posed by ‘others’, marginalised within society, began with Simon and Feeley (1992). Their theory, known as the ‘new penology’, was based upon policies believed to be directed at a perceived social underclass in the United States. Their theory may however have relevance to terrorist groups who present as ungovernable.

### **2.3 Paradigms of Risk**

The concept of the ‘dangerous other’ was recently explored by De Londras who observed that Al Qaeda terrorists were perceived as a more dangerous threat thus posing a greater challenge to anti-terrorism policy makers (2011: 14). As discussed above, Feeley and Simon (1992) called this trend of managing risky groups as the ‘new penology’. This approach isolates and separates the dangerous from ‘normal’ citizens using alternative criminal justice policies to control such groups (Feeley and Simon 1992). These policies have been described as having ‘*managerial, not transformative*’ purpose concerned only with ‘*surveillance, confinement and control*’ (Gordon 1991). Individuals categorised into such groups are selectively chosen for these different control strategies based on risk profiles (Feeley and Simon 1992). The emergence of this risk management approach to criminal justice was described by Cohen (1985) as the new ‘master plan’. O’Malley noted that these policies are less concerned with causation (1996) whilst Zedner (2007) describes this new era as the ‘pre-crime’ society. In this new epoch, traditional objectives of prosecuting, punishing or

rehabilitating offenders are absent. Therefore, measurement of success involves the ‘*decoupling of performance evaluation from external social objectives*’ (Heydebrand and Seron 1990). O’Malley warned that the trajectory of such policies:

*‘signalled not merely a redirection of particular policies but rather a shift away from the disciplinary technology of power itself’ (1996).*

Interestingly, O’Malley (2004) further deconstructed Simon and Feeley’s theories by emphasising the distinction to be drawn between risk-based technologies and actuarial justice. O’Malley describes actuarial justice as an offshoot of risk technologies that emphasises ‘system focused efficiencies’ which:

*‘reduce the interventions of justice to merely incapacitating techniques that merely displace punitive, reintegrative, correctional and deterrent strategies’ (2004:31)*

Whereas risk-based situational crime prevention methods seek to deter, actuarial justice seeks to incapacitate. Deterrence strategies fail to achieve engagement of the marginalised ‘others’ who remain permanently isolated from ‘normal’ society. O’Malley believes that whereas ‘risk technologies’ assume a rational actor, ‘actuarial justice’ is the more appropriate term where the offender is perceived as ‘*irredeemable, irremediable and dangerous ‘other’*’(2004). Examples of actuarial policies include formula based sentencing provisions replacing individualised sentences, curfews, civil detention orders and post-release reporting obligations (O’Malley: 2004). O’Malley (2009:32) believes the creation of ‘others’, who exists outside normal society, is a political construct. Therefore, the potential transposition of actuarial justice policies should be examined within the political, social and cultural environment into which it is alleged they have been transposed.

Complementing these approaches to risk, Beck (1992, 1997), a critical criminologist, described the emergence of a ‘risk society’ within industrialised countries who operate globalised economies. These societies are resultantly exposed to incalculable risks with limited ability to manage risks locally. He argued that this has led to increased ‘social and political dynamism’ (1992:12) transcending traditional forms of risk management. Beck (1992) cautioned that although risks are dominant and divisive features in society they should not dominate government policy as they are not statistically predictable. De Londras (2011) applied Becks ‘risk society’ to terrorism, acknowledging its awkward fit, but believing such a framework was useful within which to assess terrorist policies (2011:17). In particular, she

identified the impact of globalisation upon open societies as being particularly relevant to terrorism. Terrorism operates without borders, does not respond to international law and cannot be contained by conventional diplomatic means, requiring the political dynamism referred to by Beck (1997). De Londras (2011) argues that these factors contribute to the categorisation of terrorists as ‘others’ (2011:17). Echoing Garland (2001), De Londras asserts that this construct of ‘otherness’ is a response to the rise of victimhood within society bringing as it does the ‘risk’ of victimhood (2011).

However, both Garland (2001) and Simon and Feeley (1996) developed their theories upon the observation of cultural and political developments in the USA. Beck spoke generally about the creation of risks in a globalised world whilst O’Malley (2004) cautioned that the persuasiveness of risk theories depended upon the cultural and political environment into which they were transposed. Therefore, analysis of the relevance of these theoretical perspectives within an Irish context is necessary.

#### **2.4 Irish Perspectives on Crime Control and Risk**

The ‘troubles’ dominated policy making within the Department of Justice from 1972 (Walsh 1998). The violence threatened not just lives but the political fabric of the Irish State. This was highlighted by Farrell (1986:149) who said *‘it is impossible to calculate the destabilising effects [on the political system] of an issue....which has absorbed so much government time and energy’*. The violence continued for many decades such that Downes and Morgan (2004) observed that *‘comparatively speaking, the death toll in Northern Ireland alone made the UK absolutely the most violent liberal democracy’*. In evaluating contemporary anti-terrorist policies this history cannot be ignored. Hood (1987:530) cautioned that criminal justice policy:

*‘can....only be fully understood in this wider context-and with due respect to an historical understanding of the relationship between perceptions of crime and the various strategies that have been employed in the attempts to control it’.*

In that context, Kilcommins et al (2004) applied the six indices of Garlands’ crime complex to Ireland and concluded that penal-welfarism *‘never existed in developed form in Ireland’*. Despite our subversive history, Kilcommins et al (2004) found that the Irish do not have a ‘cultural’ fear of crime and law making in Ireland does not constitute ‘retaliatory gestures’ as described by Garland (2001). The primacy of incapacitation did not appear evident in



Ireland. It is noteworthy that whilst Kilcommins et al (2004) acknowledged the emerging role of victims' they did not believe victims' voices directed criminal justice policy (2004:289). More recently, however, Mulcahy (2006) noted that 'signal events' may create a sense of collective victimhood. In relation to our criminal process, Kilcommins et al (2004) cautioned that the evolution of 'extraordinary' powers utilised for 'ordinary' crime was silently changing the direction of Irish criminal justice towards '*something like a crime complex*' (2004:291), a process described as '*repression by stealth*'. They arrived at this position upon consideration of the perceived erosion of procedural safeguards within the criminal process, many having been introduced during heightened terrorist activity in Ireland. Ironically, this concern about the normalisation of extraordinary powers is not new. Hillyard (1971) commented, in the Northern Irish context, that the 'temporary' label on extraordinary powers '*belied their longevity*'.

More recently, Campbell (2006) examined the Irish criminal justice process, from investigation to sentencing, using Garland's model of control and warned of a '*growth in the culture of control*'. Similarly, Kilcommins and Vaughan (2006) revised their earlier observations as to the relevance of Garlands' crime complex indices to Ireland noting that:

*'traces of a more punitive 'logics of action'- embracing many of Garland's crime control indices – are also evident in Ireland'*

Interestingly, they observed that whenever Ireland is faced with a security crisis 'coercive laws' are designed as the solution. They argued that this process is facilitated by our terrorist past which has created a 'collective unconscious' of the 'dangerous' (2004:179). The possible penetration of risk and actuarial justice strategies into our criminal justice process was touched upon by Campbell (2006) who observed some movement towards a crime control model with aspects of 'actuarial' policies. Campbell subsequently examined organised crime legislation within the new penology framework and commented that:

*'actuarial probabilistic language of risk is joined to the moral language of blame'* (Campbell: 2007).

Thus far, there has not been an analysis of the definitional changes introduced in the Criminal Justice (Terrorist Offences) Act 2005 within control or risk constructs. Campbell's (2007) examination of legislation introduced in the Criminal Justice Act 2007 to counter organised crime threats within crime control perspective is however interesting as the definition of

'terrorist group' is similar to 'criminal organisation' under that Act (Campbell: 2007). The European Commission proposal for the framework decision on terrorism (2001:8) confirms that the proposed definition of 'terrorist group' was based upon the definition of 'criminal organisation' adopted by the Council of the European Union and later transposed into Irish legislation. Equally, Conway and Mulqueen (2009) observed that gangland crime is increasingly perceived as a *'threat to state security, such that there is an increasing overlap between crime and security, without examining the theoretical basis for this trend'*. Consequently, they suggest in the context of organised crime that the politicisation of crime is progressively influencing criminal justice policy *'away from a rights based regime'* (Conway and Mulqueen:2009).

Interestingly, Kilcommins et al (2004) believed that the absence of administrative structures necessary to move a 'crime control' agenda forward had protected Ireland from increased punishment. However, given that the terrorist related definitions found in Part 2 of the Act have their genesis in a European Union initiative, it is not clear whether those barriers preventing movement towards a crime control perspective remain. Huysmans (2000) cautioned that at European Union level social problems, such as migration, are increasingly presented with emphasis on potential threats posed to citizens such that 'social relations' are organised into 'security relations'. This was echoed by Loader (2009:600) who cautioned that *'security discourses are coming more to the forefront of European politics'*: For example, article 29 of the Treaty of the European Union (1992) states that the union aims to *'provide citizens with a high level of safety'*. Framework decisions agreed by the Council of Ministers have depoliticised the European Union legislative procedure away from the Parliament with resultant exclusion of meaningful public discussion (Balzaq: 2008). The role of national parliaments and democratic processes are bypassed (Loader: 2009). Irish analyses of control theories or risk based strategies have however failed to combine theoretical reviews with analyses of the underlying policy making processes in Ireland and Europe. Consequently, to facilitate a greater understanding of the origins of any theoretical shifts within anti-terrorist policies this study examined the policy process within which the definitions were formulated. The first task was to identify the tools of policy analysis.

## **2.5 The Policy Process**

Jones and Newburn (2002:179) observed that *'we still know very little about how penal policy comes to be the way it is'*. They attributed this deficit of knowledge to the dearth of

empirical research studies focusing on the policy making process. Similarly, Ismaeli (2006) commented that the:

*‘messiness of real-world decision-making remains largely unknown..... understanding the policy making environment in all of its complexity becomes more central to the enterprise of criminology’.*

To understand these processes requires knowledge of models of policy analysis. The policy model rarely, if ever, resembles a logical path towards a solution. Kingdon (1995) recognised that policy making should involve steps including *‘agenda setting, alternative – specification, authoritative choice and implementation’*. However, Kingdon, like Nelson (1996) agreed that policy making seldom conforms to this *‘policy cycle’*. A rigid policy cycle cannot *‘capture value difference, the role of interest groups, shifts in public moods, and institutional constraints’* within the policy making environment (Ismaeli: 2006). Neither would it incorporate the life experiences, political interests or biases of policy makers who direct policy choices (Ismaeli: 2006). Ismaeli (2006) advises policy researchers to adopt *‘the principle of contextuality’*, summarised by Laswell (1936) as *‘who gets what, when, how’*. Research within this *‘contextual framework’* must first identify the environment, secondly arrange that environment into a *‘policy making community’* and thereafter reveal networks or relationships that influence policy development. Ismaeli (2006) recommends understanding the ecological development of policy whereby knowledge of the habitat, the interdependencies and dominance of groups within the community so as to reveal the policy making processes. The criminal justice policy community can incorporate an eclectic mix of pressure groups, government agencies, media and academics (Pross:1986). After identifying this contextual environment a structure within which to examine the process is needed.

Jones and Newburn (2006) endorse Kingdon’s framework involving the analysis of three concurrent *‘process streams’* (1995). These streams include the *‘problem stream’* *‘policy stream’* and *‘political stream’* that flow independently but converge to direct policy. The *‘problem stream’* generates problems demanding policy makers’ attention. The *‘policy stream’* is devoted to formulation of policy ideas whilst the *‘political stream’* encapsulates the public mood within policy decision-making. Kingdon concludes that policies emerge when these process streams converge and *‘solutions become joined to problems and both of them are joined to favourable political forces’* (1995). Often there are *‘policy entrepreneurs’* who lobby for the introduction of policies as the solution to a problem. These *‘entrepreneurs’* react quickly to emerging *‘policy windows’* opened by political winds that favour the

promotion of their particular policy solution. Kingdon cautions that proposals can be stymied if powerful interests are not accommodated. It is for this reason that Stolz recommends that researchers also examine the 'non decision making' to understand why some policies are championed whilst others wither (2002:211).

The political process is particularly important to understand. Solomon (1981) cautioned that political institutions influence proposal formation, clear proposal pathways and moderate policy implementation. Therefore, Bernstein and Cashore (2000) advise researchers to focus upon formal policy decisions such as legislation, regulation and statements which generally capture '*the actual choices of government*'. Paul Sabatier believes however that confining examination to those documents would only reveal a picture of one level or institution within government and a limited view of the policy process pathway (1991:148). Sub-government committee members, whilst sources of 'knowledge' and 'methodology' for policy makers, are often selectively chosen to facilitate consensus policy making which ensures safe passage through policy making currents (Rock 1995). Policy survival is increased if consensus policy making, favoured by politicians, is possible (Rock 1995).

The approval by institutional interests of the proposed policy is vital for its success. Rock (1995) describes these institutional interests as being '*independent but interdependent*'. Institutional interests often overpower human rights advocacy groups. This may have relevance to Ireland as Kilommins et al (2004) noted that '*expertise has lost its hold as policy has succumbed to populism and incessant fear of crime*'. Rock noted that policy communities are acutely attuned to the 'attentive public'. The 'attentive public' includes victims support organisations or special interest groups who capture government attention when formulating policy. Roe (1994:34) commented upon the increasing necessity for '*policy narratives*' that there is a need to explain arguments supporting policies, especially prevalent when the evidence based foundations underlying policies are weak. Increased politicisation within a consensus policy making structure is a feature of European politics.

## **2.6 The Policy Processes in the European Union**

There is evidence of increased politicisation in the operation of the pillar structures of the European Union. In 2005, common interest subjects were divided into three subject areas known as 'pillars', the third of which related to justice and home affairs. Despite this structural division, Bazacq (2008) observed that '*the fight against terrorism creates a field*

*within which legal mechanisms of the pillars are overridden by the political 'necessity' of the time'* so matters often proceed at intergovernmental level rather than within the European Commission or Parliament. Consequently, framework decisions bypass the European Union legislative procedure of decision making thereby lessening public debate and diminishing the Commission and European Court of Justice (Balzaq: 2008). This is perhaps unsurprising given that terrorism is a globalised political threat which national criminal justice systems are ineffective at taming alone.

Framework decisions required unanimity in 2001. Therefore, decisions by Justice and Home Affairs Ministers are made subsequent to successful negotiations at diplomatic level within the 'Committee of the Permanent Representatives' (C.O.R.E.P.E.R.), at technocratic level with the 'Comite d'Article Trente Six' (C.A.T.S.) and within ten working groups. (Walker 2000a, den Boer and Wallace 2001:514-15). Therefore, it is clear that such supranational institutions are significant players in policy transfer Kardstedt (2002). The significance of their role in policy transfer has lead Loader (2002) to question the democratic legitimacy of this process of transfer given that these administrative bodies are not elected. Therefore, we require tools to enable the examination of whether and to what extent policy transfer has impacted upon the definitions of terrorism adopted in the Act.

## **2.7 Policy Transfer and Convergence**

The question of whether and how policy transfers is controversial within the field of policy analysis. Dolowitz and Marsh define policy transfer as:

*'the process by which knowledge of policies, administrative arrangements, institutions, and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions, and ideas in another political system (2000:5)'*

In addition, Jones and Newburn (2007) recommend reviewing the role of 'human agency' driving policy transfer as well as examining the cultural and political environment into which policies are transposed. International developments may urge the enactment of legislation but the form of implementation involves domestic policy choices within Irish policy-making processes. Theorists have distinguished between policy transfer and policy convergence.

Jones and Newburn (2007) describe 'policy transfer' as involving an acknowledged political commitment to espouse a policy whereas Kerr (1983:3) describes policy convergence as *'the*

*tendency of societies to grow more alike, to develop similarities in structure, processes and performance*'. Similarly, Bennett (1991:219) describes policy convergence as a '*process*' rather than a state of being whereby policies '*become*' more alike. The more contemporary view of Jones and Newburn (2007) is that policy convergence evolves because of '*structural and cultural shifts influenced by the effects of globalisation (2007:22)*'. The four separate methods by which policy convergence evolves were described by Bennett (1991) as emulation, elite networking, harmonisation and penetration. Emulation involves the deliberate imitation of policies from another country. By contrast 'elite networking' relates to professional groupings that interact regularly at a super-national basis, outside domestic politics, who determine to promote a particular policy. More pertinent to this study are 'harmonisation' and 'penetration'. Crawford (2009: 21) observed that harmonisation was relevant to the third pillar dealing with crime and security, promoting as it does increased co-operation. He also cautioned that whilst European Union directives often commence life by harmonisation, they had penetrative effect at domestic level (Crawford 2009: 22).

Convergence does not always result in homogeneity of effect. Policy convergence can occur at a number of levels so as to accommodate domestic political and cultural influences. Bennett (1991: 218) pointed to five different layers of convergence which should be examined before determining whether there has been complete convergence. These include the policy goals, policy content, policy instruments, policy outcomes and policy style. Jones and Newburn (2007) acknowledge the usefulness of Bennett models on policy convergence with one proviso that it failed to account for the impact of unexpected events upon the 'structural and cultural' landscape. Ireland had not suffered a terrorist attack or other such unexpected event immediately before the drafting of this Bill. Therefore, it is unexplained why these terrorist definitions were introduced following the Good Friday Agreement (1998). This raises the question:

*'the dearth of rigorous evaluations of counter terrorism efforts raises an obvious question; on what are policy makers basing their strategies to counter terrorism'* (Dugan: 2009)

The policy analysis sought to evaluate from where, whom and how the definitions surrounding terrorism emerged and whether the theoretical perspectives of control or risk are evident in their formulation.

## CHAPTER 3

### 3. METHODOLOGY

The policy analysis undertaken involved a qualitative documentary analysis of mainly publicly available information. Travis (1983:46) recommends qualitative methodology '*especially in the area of criminal justice policy analysis*'. Documentary analysis has been described as '*a process of evaluating documents in such a way that empirical knowledge is produced and an understanding is developed*' (Bowen 2009:29). It is recommended that documents be assessed for relevancy before being examined for thematic patterns (Bowen: 2009). In this study, the documentary analysis partially involved the review of documentation prepared for an alternative purpose. Therefore, it was necessary to be cognisant that such data, not specifically produced for this research, could deceive the researcher into incorrectly ascribing latent meanings which the authors did not intend. Robson (2002) calls this confusing the 'witting' and 'unwitting' evidence. Equally, documents do not always reveal biases or institutional interests of the creator. The validity of documentary analysis research will always be dependent upon appropriate assessment of the reliability and accuracy of the data source (Scott: 1990). Consequently, only reliable sources of data have been chosen. Finally, once reliable data was retrieved, the data was examined for relevancy and thematic patterns whilst a deductive approach was adopted to elicit any evidence of crime control or risk perspectives within the data retrieved.

#### 3.1 The Documentary Analysis

Data collected included documentation from whom Davis, Francis and Jupp (2011: 282) identify as 'sponsors of research' such as government departments. Departments also act as '*gatekeepers*' to such relevant information. Equally, organisations such as advocacy bodies, government review committees and institutions within the criminal justice system support research. Therefore, identification of and permission from gatekeepers was vital to completing a successful policy analysis. In addition, Bernstein and Cashore (2000) advise researchers to focus upon formal policy decisions such as legislation, regulation and statements as these documents generally capture '*the actual choices of government*'. Equally, Stolz (2002: 211) recommends that studies also examine documentation relating to 'non decision making' that explain why some policy choices were championed whilst others withered. Therefore, government data included the Irish and European legislation, Oireachtas

debates and an interview with a policy official within the Department of Justice. In addition, publications by committees established by the Irish and British Governments as part of the Good Friday Agreement (1998) were examined as were publications by advocacy bodies such as the Irish Council for Civil Liberties and the Irish Human Rights Commission.

## **3.2 Documents Examined**

### *3.2.1 Legislation*

The Criminal Justice (Terrorist Offences) Bill 2002 and the subsequent Act were the main focus as these documents first introduced the definitions. As this Act was incorporated within the existing framework of the Offences against the State Acts 1939 and its amendments, those Acts were also considered. These Acts and Bill were accessed on [www.oireachtas.ie](http://www.oireachtas.ie) having searched using the terms ‘Acts and Bills’.

### *3.2.2 Oireachtas Debates*

The Dáil and Seanad debates relating to the Criminal Justice (Terrorist Offences) Bill 2002 are available on the Oireachtas website [www.oireachtas.ie](http://www.oireachtas.ie). This website includes a section entitled ‘Bills & Legislation’. The website details the progression of the Bill through the legislative process from its initial presentation on the 16 December 2002 before being finally being passed by the Oireachtas on the 23 February 2005. These relevant dates are linked to debates in the Dáil, Seanad and the Select Committee on Justice, Equality, Defence and Women’s Rights. Discussions within the Select Committee provided most detail as more time was allowed to debate and explore the definitions, proposed amendments and discuss the contextual framework around the Bill. Dáil debates are published almost contemporaneously whilst the Seanad and Committee debates are available within days. Oireachtas debates, contemporaneous in nature, illuminate the concerns of politicians, both local and international, within a capsule of time and provide direct insight into policies. The debates identified policy actors and networks that negotiated the policy stream up until the enactment of the Bill. Most revealing, the debates identified important policy actors both beyond Irish borders.



### *3.2.3 European Framework Decision*

On the 19 September 2001, the European Commission presented to the Council of the European Union a ‘Proposal for a Framework Decision on Combatting Terrorism’ (2001). A ‘Framework Decision on Combatting Terrorism’ was agreed by the Council of Justice and Home Affairs Ministers on the 13 June 2002. This decision was implemented by Ireland in the Criminal Justice (Terrorist Offences) Act 2005. A copy of the Framework Decision and Commission Proposal are available on <http://eur-lex.europa.eu>. In 2004, the European Commission published a review of the implementation process amongst Member States which is available on [www.europa.eu](http://www.europa.eu). To understand the European policy making processes, the Council of the European Union website ([www.european-council.europa.eu](http://www.european-council.europa.eu)) was accessed and valuable information gleaned as to Councils’ competency and structures. Those structures changed following the Lisbon Treaty (2009). Also, these sources revealed that Ireland held the Presidency of the Council of the European Union on the 11 March 2004 when Madrid suffered a terrorist bombing. A press release entitled ‘European Council to focus on Fight against Terrorism’ was released by An Taoiseach Bertie Ahern, then Council President (2004).

### *3.2.4 Department of Justice and Equality*

Ismaeli (2006) highlighted the sub-government level as being a key policy actor within the policy process. Also, Jones and Newburn (2007) stressed the importance of gaining access to key individuals working within this policy level. Davies (2011) advised that access to those persons often involved a ‘gatekeeper’. The researcher, through her employment in the Office of the Director of Public Prosecutions, knew an official within the Department of Justice. A request was made via this intermediary to conduct a semi structured interview with a relevant person within the policy group with responsibility for overseeing the implementation of the Act. The request was successful and a member of the policy group was interviewed in the Department of Justice and Equality on the 20 August 2012. A draft of the literature review, a timeline of dates relevant to the enactment of the Act, a list of information examined and proposed open questions were provided in advance of the semi structured interview. Pepper and Wildy (2009) recommend the preparation of such an ‘interview guide’ so as to cover all the principle avenues of questioning. The Department was assured that the researcher would respect any concerns expressed about legal privilege or security. Confidentiality was assured and the interview was recorded. It was agreed that the interviewee could review the thesis

prior to submission so as to correct inaccuracies relating to the interview and that the transcript of interview would be destroyed.

The interview focused upon factors underlying the decision to implement the Framework Decision (2002) by maintaining and incorporating these obligations into the Offences against the State Act 1939/1998 framework. The role played by domestic and external policy actors and the influence of signal events such as the Madrid bombings on policy outcomes were discussed. The interviewee provided invaluable information about the European institutional networks; in particular about the relationship between the Permanent Representatives Committee (C.O.R.E.P.E.R.), the now redundant C.A.T.S./Article 36 Committee and the Council of Justice and Home Affairs Ministers. The oversight exercised by the European Commission on implementation of decisions was also explored. At a national level, the pressures that delayed the enactment of the Bill were discussed as were the mechanics by which amendments are formulated between the Department of Justice, Equality and the Committee on Justice, Equality, Defence and Women's' Rights.

### *3.2.5 Report of the Committee to Review the Offences against the State Act 1939/98*

The Irish Government agreed under the Good Friday Agreement (1998) to establish a committee to *'initiate a wide-ranging review of the Offences against the State Acts 1939-1985'*. The Committee was chaired by Mr Justice Anthony Hederman and included representatives from the Judiciary, the Office of the Attorney General, the Office of the Director of Public Prosecutions, Department of Justice Equality and Law Reform, Department of Defence, Department of Foreign Affairs, Department of An Taoiseach, An Garda Síochána, the Irish Bar and criminal law academics. The Committee sought submissions from interested people and organisations. The Omagh bombing, on the 15 August 1998, led to the enactment of Offences against the State Act 1998 and the Committee's terms of reference were extended to accommodate that Act. The terms of reference also required the Committee to consider both national and international threats posed by terrorism and organised crime. Despite those terms, however, the Committee decided that although the bombings on the September 11, 2001 occurred during the establishment of the Committee they would not reopen the report to consider the *'undoubtedly serious and far-reaching implications of those attacks on public safety and national security'* (1999: 18). Their report, published in May 2002, discusses persisting

domestic threats to the Irish State and the proportionality of extant legal responses around the time the Criminal Justice (Terrorist Offences) Bill 2002 was drafted.

### *3.2.6 Independent International Commission on Decommissioning (I.I.C.D)*

The reports of the Independent International Commission on Decommissioning (I.I.C.D.) also provide contemporaneous information on domestic terrorist threats around the period when the Bill was drafted. These reports are available on the Department of Justice and Equality website ([www.justice.ie](http://www.justice.ie)) using internet searches terms ‘*offences against the state act*’ and ‘*unlawful organisation*’. The I.I.C.D. was established pursuant to the Good Friday Agreement (1998) to update the Irish and British Governments on decommissioning by paramilitary groups. It exceeded its initial mandate and continued working until February 2010. Press releases from the I.I.C.D. as well as reports dated 26 September 2005, 19 January 2006 and 28 March 2011 were examined. Helpfully, these reports alerted the researcher to reports from the Independent Monitoring Commission.

### *3.2.7 Independent Monitoring Commission (I.M.C.)*

The Independent Monitoring Commission (I.M.C) was established in the United Kingdom under the Northern Ireland (Monitoring Commission) Act 2003. The Commission reported every six months on paramilitary activity in Northern Ireland and provided statistics of paramilitary murders, shooting and assaults since March 2003. Their twenty fifth report, dated the 4 November 2010, is available on [www.official-documents.gov.uk](http://www.official-documents.gov.uk). Again, these reports provided contextual background to domestic terrorist threats

### *3.2.8 Irish Human Rights Commission*

The Irish Human Rights Commission (2004) published a ‘*Commentary on the Criminal Justice (Terrorist Offences) Bill 2002*’ which is available on their website ([www.ihrc.ie](http://www.ihrc.ie)). The Commission, established pursuant to the Human Rights Act 2000, promote human rights in Ireland. Their report raised concerns about the necessity for such legislation and of the absence of renewal provisions. The Commission made specific observations as to the proposed definitions in the bill which were subsequently discussed in Oireachtas.

### *3.2.9 Irish Council for Civil Liberties (I.C.C.L)*

The Irish Council of Civil Liberties (I.C.C.L) is an independent human rights organisation who defines its role as reviewing the observance of human rights within Irish society. It exercises an independent supervisory role over legislation, often canvassing for change or cautioning against any diminution of human rights standards in Irish life. In April 2003 the I.C.C.L. published a briefing document on the Criminal Justice (Terrorist Offences) Bill 2002. This publication influenced discussions within the Select Committee on Justice, Equality, Law Reform and Women's rights in 2003 and 2004.

### *3.2.10 Limitations*

Information sources on the policy making processes within the Council of Ministers and its supporting committees was limited to secondary sources. Therefore, the policy review does not provide a comprehensive picture of the policy making landscape, community, interdependences and networks of relationships that influence policy making within the Council. The policy analysis did not examine street level policy implementation which limits any findings on the extent of policy convergence. The thesis does not review terrorist legislation predating the Act within control and risk perspectives. However, the extending of evidential, procedural and definitional provisions found in the Offences against the State Act 1939/1998 to the new Act does influence the theoretical conclusions.

### *3.2.11 Ethical Considerations*

Qualitative research can more problematic in terms of ensuring confidentiality and anonymity (Gregory 2003:53). Therefore, given the topic, it was decided a policy analysis involving public documentation was most appropriate. However, to ensure research integrity an interview was conducted with a policy official in the Department of Justice. The interviewee was made aware of the context of the study so as to facilitate informed consent. The interview was recorded and a transcript prepared. The interviewee was afforded the opportunity to review details of the interview as recorded in the thesis so as to 'correct the record' if necessary. This was facilitated and a copy of the thesis was furnished. Consent was obtained prior to submission. An undertaking was given to destroy the transcript of the interview and any paper copies. The interviewee was also assured of anonymity given the evident security concerns surrounding any research on terrorism. The researcher, a solicitor in the prosecution service, was cognisant of potential professional biases during the research

process and the necessity to advise readers of her employment so as to inform any interpretation of any findings and conclusions. Nicholson (2005) commented that whilst ethical guidelines are useful, they do not provide the answer to every ethical difficulty that may arise.

## CHAPTER 4

### 4. FINDINGS

This chapter will review the policy sources identified and elicit their contribution to policy formation. They are arranged chronologically to capture the progression of the definitional changes to terrorist legislation in Ireland, commencing with the ‘Hederman Committee’ (2002). Ireland’s anti-terrorist legislation, a remnant of our troubled political history, was examined within the peace making process. The Committee produced both majority and minority reports (2002).

#### 4.1 Report of the Committee to review the Offences against the State Acts 1939/98

The Good Friday Agreement (1998) was passed by referendum on the 22 May 1998. The Irish Government undertook to ‘*initiate a wide-ranging review of the Offences against the State Act 1939 with a view to both reform and dispensing with those elements no longer required as circumstances permit*’. A Committee was established in May 1999 under the chairmanship of Judge Anthony Hederman and the Committee became known as the ‘Hederman Committee’. Legislation was dissected to assess its compliance with constitutional and international obligations in the expectation of reduced security requirements in Northern Ireland. The Committee acknowledged emerging threats from international terrorism. The Committee also held oral sessions during which they heard from Eamonn Barnes, former D.P.P. and Patrick Byrne, Former Garda Commissioner. In addition, the chairperson attended EUROPOL, the European Court of Human Rights, the Council of Europe and the Office of the UN High Commissioner for Human Rights.

##### 4.1.1 Defining Terrorism

The Hederman Committee acknowledged that the right to life also imposes obligations on States to protect citizens against terrorism. In light of September 11, 2001 they observed that (2002:37):

*‘Following the events of 11 September 2001, there has been an increased recognition, both within the European Union and the International Community of the severe threat which international terrorism poses to the enjoyment of human rights’*(2002:26)

The Hederman Committee acknowledged that balancing the wish to preserve the security of democratic States and observe human, civil and political rights of citizens, makes the task of defining terrorism extremely difficult and that is especially problematic in relation the international context (2002:10 /13).

#### *4.1.2 International and Domestic Terrorist Threats*

The Committee considered the Offences against the State Act 1939/1998 inadequate to address international terrorist threats then emerging. They recommended that new legislation be built upon the Offences against the State Act 1939/98 to accommodate that lacuna (2002:34). The majority of the Committee felt that sufficient domestic terrorist threat remained, necessitating the retention of the Special Criminal Court. The majority observed that:

*‘the security risk is sufficiently high to justify the retention of the Court on this ground alone....that as long as there is in existence a paramilitary threat to public peace, the need for the special criminal court will remain’* (2002:224).

Curiously, they also commented that Irish society differed from comparable common law countries because our population is ‘small and dispersed’ which increases the risk of jury intimidation.

#### *4.1.3 International Conventions on Terrorism*

Their report listed thirteen international conventions on terrorism, identifying eight that were signed or ratified by Ireland (2002:49). The Committee observed that non-implementation of conventions did not imply our legislation was ineffective to address the threats identified in those conventions. Subsequently, four unimplemented conventions were incorporated in the Criminal Justice (Terrorist Offences) Act 2005. The Committee noted that the United Nations Security Council resolution 1373 on international terrorism, adopted on the 12 September 2001, requested that conventions be implemented and terrorist financing suppressed. The Hederman report (2002) predated the ‘Framework Decision on Combatting Terrorism’ agreed on the 13 June 2002. However, the Committee acknowledged that developments within in the area of Justice and Home Affairs, originating with the Maastricht Treaty (1992), allowed the European Council to adopt framework decisions, similar to directives, but without direct effect (2003:38).

#### *4.1.4 Evidential Provisions*

The majority report determined that section 3(2) of the Offences against the State (Amendment) Act 1972, admitting into evidence the belief of a chief superintendent as to membership of an unlawful organisation, should remain in force as corroborative evidence. This recommendation was vehemently rejected by Professor Bryan McMahon a Human Rights Commissioner and Professor Dermot Walsh, both of whom published minority reports.

#### *4.1.5 Offences of Assisting and Financing Terrorism*

The majority report recommended the replacement of section 22 of the Offences against the State Act 1939 and section 2 Offences against the State (Amendment) Act 1985 with provisions akin to the Proceeds of Crime Act 1996 to enable the seizure of terrorist property. In addition, they recommended a supplemental offence of rendering assistance to an unlawful organisation be created. Similarly, they advised that section 8 of the Offences against the State (Amendment) Act 1998, an offence of directing an unlawful organisation, be restated to criminalise other supportive acts that assist unlawful organisations. Another suggestion was that section 19 be amended to provide for the suppression of international terrorist groups. Additional recommendations included the restatement of documentary offences prohibited by sections 10, 11, 13 and 14 of the principal Act. The Hederman Committee recommendations were partially implemented in sections 5, 6, 7, 50, 51, 52, 53 and 54 of the Criminal Justice (Terrorist Offences) Act 2005, but many remain outstanding.

## **4.2 The Independent International Commission on Decommissioning**

The Independent International Commission on Decommissioning (I.I.C.D) reports reveals that the IRA and INLA were continuing to decommission weapons until February 2012. Their final report (2012) reveals that the IRA only partially engaged with decommissioning in 2002 when the bill was drafted. Following pressure from Sinn Fein leadership in April 2005, decommissioning was declared complete the following September but factions within the IRA and the INLA continued to decommission until February 2012.

## **4.3 The Independent Monitoring Commission**

The final report of the Independent Monitoring Commission (I.M.C.) (2010) provides statistics on paramilitary shootings, assaults and murders, since March 2003. Between 2003



and 2005 paramilitary violence escalated within loyalist communities with some reduction in republican communities. However, the I.M.C. cautioned that during this period republican paramilitaries continued to engage in unlawful activity. In 2003 the peace process was not a settled reality.

#### **4.4 The Framework Decision on Combatting Terrorism**

##### *4.4.1 Approximation and Harmonisation*

The European Council was authorised, pursuant to article 34 of the Treaty of the European Union (Amsterdam Treaty:1997), to take unanimous decisions so as to ‘*promote cooperation, ... contributing to the pursuit of the objectives of the Union*’. These decisions aim to achieve ‘*approximation of the laws and regulations of the Member States... but shall leave to the national authorities the choice of form and methods*’. Ireland retains a parliamentary reservation such that the Oireachtas must be consulted prior to deciding to engage in negotiations to adopt a framework decision.

##### *4.4.2 The European Commission*

The draft proposal for a Council framework decision originated from the European Commission (2001). This was presented to the Council on the 19 September 2001, some days after September 11, 2001. Coincidentally, the European Parliament had adopted a resolution on the 5 September 2001 relating to the role of the European Union in combating terrorism. The Oireachtas debates reveal that European discussions took place between C.O.R.E.P.E.R, C.A.T.S. and the Council of Ministers before a draft declaration was agreed in December 2001, which formed the basis for the Framework Decision on Combatting Terrorism. The function of these European committees will be further explained in paragraph 4.5. The proposal (2001) noted that bombings in the U.S.A. ‘*highlight the inadequacy of traditional forms of judicial and police co-operation in combatting it*’ (2001:3) necessitating the ‘*approximation*’ of terrorist legislation between Member States to limit advantages seized by terrorists arising from differing legal systems. Security and justice issues do not normally concern the Commission but they observed that because terrorist offences ‘*affect different legal rights*’ it demanded attention. The Commission observed that only six Member States had laws covering terrorism (2001:7). The Framework decision on Combatting Terrorism agreed on the 13 June 2002

#### 4.4.3 *Definition of Terrorist Offences*

The key term upon which agreement was sought was ‘terrorist offence’ in order to distinguish it from an ordinary offence. Article 1 specified categories of wrongdoing that, if carried out with the necessary intent, would become ‘terrorist offences’, most of which are already synonymous with terrorism. The mens rea or intent necessary to commit such a terrorist offence was defined in article 1 of the Framework Decision. This intent provision was specified in the European Commission Proposal (2001). It required an accused to have intended to intimidate a population or compel a government or international organisation to do or refrain from doing an act, or have the intent of ‘*seriously destabilising or destroying the fundamental political, constitutional, economic, or social structures of a country or international organisation*’. In addition, the Framework Decision sought to limit resources available to terrorist groups by penalising persons who direct or participate in terrorist activity or who supply funds or information to such groups. Similarly, articles 3 and 4 required that offences be proscribed prohibiting the assisting or ‘*inciting or aiding or abetting*’ of terrorist offences. These definitions again originated from the European Commission.

#### 4.4.4 *Definition of Terrorist Groups*

The definition proposed by the Commission for ‘terrorist group’ was subsequently adopted in the Framework Decision. The Commission indicated that this definition emanated from the definition of ‘criminal organisations’ contained in a joint action proposal dealing with organised crime (2001:8). A terrorist group is defined as ‘*a structured group of more than two persons established over a period of time and acting in concert to commit terrorist offences*’.

#### 4.4.5 *Penalties and Victims*

The Commission had sought to fix sentencing parameters obliging Member States to impose higher ‘*effective proportionate and dissuasive*’ penalties for terrorist offences, which can be reduced when offenders recant or assist authorities in combatting terrorism. The Framework Decision partially adopted that proposal but linked increased penalties to aggravating circumstances and lesser penalties to apply when mitigating circumstances exist such as when an accused person provides assistance to authorities or denounces terrorism. The European Commission proposal had placed particular emphasis on the assistance to be given to victims.

The Framework Decision adopted that provision requiring that Member States give assistance to victims and ensure that terrorist prosecutions can proceed without a complaint.

#### *4.4.6 Jurisdiction to Prosecute*

The Framework Decision sought to further international co-operation initiatives. Member States were obliged to extend their jurisdictional limits over nationally registered aircraft, ships and residents. Countries were obliged to co-operate to facilitate the prosecution of terrorism. The European Commission had proposed that ‘legal persons’, such as limited liability companies, also attract liability to enable the extension of the prosecutorial arm of Member States to rogue companies. This proposal was largely translated into the Framework Decision

#### *4.4.7 European Commission Reports on Implementation*

Member States were obliged to notify the European Commission of their implementation proposals before the 31 December 2002. The Commission would then assess the adequacy of those proposals by the 31 December 2003. The first implementation report of the Commission noted that:

*‘Although structurally similar to other instruments aimed at harmonisation of a particular field of criminal law, this framework decision thus differs from those that do not require the incorporation of specific offences as long as the conduct to be criminalised is already covered by a generic incrimination’(2004:5).*

By this time, the Criminal Justice (Terrorist Offences) Bill 2002 was drafted and the Commission had noted it would substantially comply with the Framework Decision. They expressed some reservation about the proposed penalty provisions. Most Member States created new offences for terrorist crimes but the Commission observed that Ireland was ‘amending’ legislation. Their next report (2007) noted that Ireland was the only country to have incorporated the definition of ‘terrorist offence’ into law (2007:7). In addition, whilst observing that Ireland had complied with most of the Framework Decisions they believe Ireland had only partially given effect to articles 9 and 10, those provisions relating to assisting victims, defining of jurisdictional limits and the introducing of co-operative measures facilitating jurisdictional decision making between States as to the prosecution of terrorist offences.

## **4.5 Department of Justice and Equality**

### *4.5.1 Genesis of the Act*

The purpose of the meeting with a member of the policy unit responsible for the development of the Act was to elicit the domestic and international drivers of the legislation. The perspective presented by the Department will reflect official policy but such information is important when placed within the contextual background described by other sources. The starting point identified by the policy official were the UN Resolutions 1373 and 1368 that requested countries to implement anti-terrorism conventions. Subsequently, the European Union developed a road map tracing the implementation by each member states of those conventions. At this time the Financial Action Task Force (F.A.T.F.), an anti-money laundering body, made additional recommendations and European Union Members States were urged to implement forty six recommendations. Finally, the Framework Decision on Combatting Terrorism was agreed on the 13 June 2002. Member States had thirty six months within which to implement. In summary, Ireland had obligations to implement outstanding United Nations conventions on terrorism, forty six recommendations from the F.A.F.T. and the Framework Decision. These commitments culminated in the drafting of the Criminal Justice (Terrorist Offences) Bill 2002. The Department established a special international terrorist unit whose objective was to facilitate the implementation of these international obligations within the short time frame.

### *4.5.2 European Policymaking Explained*

The policy process by which the Framework Decision or co-operative measures are agreed was explained. The Department is represented at the Council of the European Union by an assistant secretary from the International Policy Division within the Department who attends C.A.T.S. C.A.T.S. was established under article 36 in the Treaty of the European Union (Amsterdam Treaty:1997). This Committee co-ordinates smaller working groups which examine issues relevant to justice and home affairs. C.A.T.S. reports to the C.O.R.E.P.E.R. who prepare work schedules for the Council of Ministers and report upon progress in areas of common interest. The Irish Ambassador represents Ireland at C.O.R.E.P.E.R. The Council of Justice Ministers meet regularly to discuss police and judicial co-operation issues. The Presidency of the Council of the European Union rotates and Ireland held the Presidency when Madrid was bombed in March 2004.

#### *4.5.3 C.A.T.S. and Working Groups*

The working groups reporting to C.A.T.S. include civil servants from Member States who examine issues surrounding police and judicial co-operation in criminal matters. The Department official conceded that framework decisions can present definitional difficulties during negotiations within working groups and upon implementation nationally given the different cultural and operational practices between civil and common law jurisdictions. These working groups, comprising of civil servants from Member States perform work carried out domestically by Members of Parliament, that is negotiating definitions. Definitions agreed in these working groups can ultimately adopted by the Council of Ministers in a framework decision but it was not indicated whether this was the position with this Framework.

#### *4.5.4 Irish Policy Making*

The Department official advised that the Hederman Committee report did not direct the drafting of the Bill as that report was only published in May 2002 expressing divergent views which the Government needed to debate before accepting or rejecting recommendations. In the interim there were deadlines within which international agreements had to be implemented. The Framework Decision (2001) required Member States to submit proposals to the Commission by December 31, 2002 and the European Union created a roadmap on implementation of conventions by Member States which was updated every six months. Whilst the Hederman report exerted limited influence on the Bill, the decision to incorporate the Framework definition of ‘terrorist groups’ within the Offences Against the State Act 1939/1998 structure did conform with a Hederman Committee recommendation. The policy official advised that another reason for that decision was that dissident republicans remained ideologically tied to the IRA, who continued to be active and subject to a suppression order, such that international terrorism had to be accommodated within that framework.

The Department policy unit liaised with the Attorney General’s office about the Bill. The legislative process may involve the Department providing explanations to the Select Committee for Justice and Equality, but not advising. The official believed that this did not happen with this Bill and this was corroborated upon reading the Oireachtas debates. The Department official confirmed that, as part of the process, the Minister would be aware of opinions from the Human Rights Commission. The Bill, whilst presented to the Oireachtas in

December 2002, was delayed due to the need to incorporate additional international obligations relating to the European arrest warrants and a European directive on the 'Processing of Personal Data and Protection of Privacy in the Electronic Communications Sector' (2002/58EC).

#### **4.6 The Human Rights Commission**

The Human Rights Commission (2004) published a 'Commentary on the Criminal Justice (Terrorist Offences) Bill 2002' which excludes parts 6 and 7 of the Bill as those amendments were only included at report stage. Importantly, they questioned the necessity for such 'emergency' legislation, without a renewal clause and in the absence of any assessment of International terrorist threats targeting Ireland.

##### *4.6.1 The Committee to Review the Offences against the State Act 1939/98*

The Commissioners criticised the failure to systematically review the Offences against the State Act 1939-1998 in line with recommendations of the Hederman Committee (2002). Professor William Binchy, a Human Rights Commissioner, was also a member of the Hederman Committee who had delivered a dissenting opinion to that report (2002). Criticism was directed at the reactivation of sections 2 and 8 of the Offences against the State Act 1985, emergency legislation that had lapsed without renewal, as permanent provisions. The Commission expressed surprise that the Irish Government faithfully complied with the Framework Decision by inserting agreed definitions agreed yet failed to review section 47 of the Offences against the State Act 1939, allowing the D.P.P. to direct trial in the Special Criminal Court, despite criticism from the United Nations Human Rights Committee.

##### *4.6.2 Process of Harmonisation*

In addition, the Commissioners, whilst acknowledging the authority of the Council of Ministers to agree a framework decision pursuant to article 34 of the Amsterdam Treaty (1997), questioned whether the process of harmonisation extended to obligating Member States to transpose precise definitions and penalty provisions into domestic legislation. They observed that the penalty for membership of an unlawful organisation was only increased because of the Framework Decision. The Human Rights Commission issued the following caution about the framework decision making process:

*‘...in this harmonisation process insufficient emphasis has been placed on the need to ensure that the protection of fundamental rights is preserved when both the state and supra-national state actions is in operation’ (2004:5)*

#### 4.6.3 *Proposed Definitions*

When expressing concerns about transposition of exact definitions the Commission identified ‘terrorist activity’ as being the key term. The Commissioners argued that the breadth of the definition potentially labelled campaigning protesters, who present no risk to life, as terrorists. An amendment to the Bill was proposed but ultimately a less comprehensively worded amendment was inserted into the Act. The Commissioners questioned the capability of the Gardai to identify ‘terrorist groups’ with accuracy. Any such difficulty was compounded by the failure to provide that ‘terrorist offences’ can only be committed when directed at ‘democratic and accountable governments’ (2004:7). The correlation of the definition of ‘terrorist group’ with ‘unlawful organisation’ within the meaning of the Offences against the State Act 1939 was criticised because of evidential and prosecutorial powers that flow which the Commission described as ‘exceptional’.

#### 4.6.4 *Evidential implications*

The absence of definitional safeguards alarmed the Commissioners. In particular they noted that corroborative evidence from a Chief Superintendent as to membership is admissible in trials pursuant to under section 3(2) of the Offences against the State Act 1972. In addition, the Bill included an evidential presumption of intent in section 6(5) which the Commission suggested should be amended requiring a court be satisfied ‘*beyond reasonable doubt*’ that the offences were committed with necessary intent. The Commission stated that rebuttable presumptions are extremely difficult to rebut in practice but are more dangerous when the information supporting the presumption emanates from an untested source outside Ireland where cultural nuances and police or investigative practices substantially differ.

### **4.7 The Irish Council for Civil Liberties (I.C.C.L.)**

The Irish Council of Civil Liberties (I.C.C.L.) expressed some similar reservations in their report examining the Bill’s compatibility with human rights (2003). They observed that previous enactments directed at terrorism were introduced as ‘emergency’ powers, involving temporary suspension of rights, whereas the new provisions would be permanently affect

rights. Their commentary was discussed by opposition politicians during Oireachtas debates but reservations expressed by the I.C.C.L. did alter the text of the Bill.

#### *4.7.1 Defining Terrorism*

Ireland, despite our political history, had not defined the term ‘terrorism’ within our legislation so the I.C.C.L. questioned the need to do so at that time. Emphasising this point they noted that Commissioner Patrick Byrne assured the Joint Oireachtas Committee on Justice, Equality, Defence and Women’s Rights that Gardai had sufficient powers to address terrorist threats (January 2003). They cautioned that the wide category of acts that potentially constitute terrorism could potentially criminalise strikers or protesters which, if the proposed penalties provisions were adopted to the letter, could lead to disenfranchisement. Equally, they argued that the extra territorial provisions could criminalise legitimate international democratic movements.

#### *4.7.2 Evidential Implications*

Similar to the Irish Human Rights Commission, the I.C.C.L. criticised the rebuttable presumption as to intent submitting that it constituted both a shift of the legal and evidential burden of proof onto the accused. They were equally critical of the decision to adopt the recommendation of the majority report of the Hederman Committee (2002) that persons charged with terrorist offences continue to be tried before the Special Criminal Court.

#### *4.7.3 Process of Harmonisation*

The I.C.C.L. reviewed the Framework decision making process observing that these decisions constitute ‘quasi-legislation’ as they are politically binding whilst not legally binding. They acknowledged that Ireland did exercise a parliamentary reservation so as to enable the Oireachtas to consider the decision prior to adoption but in reality no realistic opportunity was given to parliament to examine the implications of the proposal. In concluding, the I.C.C.L. quoted Statewatch who observed that framework decisions were;

*‘going ahead in an atmosphere where policing is contaminated by the ongoing war on terrorism’ (I.C.C.L.:2003).*



## 4.8 Oireachtas Debates

### 4.8.1 Minister Introduces Draft Framework Decision

The Minister for Justice, John O'Donoghue introduced the proposed Framework Decision to the Oireachtas in December 2001. The Minister noted that efforts to approximate terrorist legislation originated with article 24 of the Treaty of European Union (1992). He advised the Oireachtas that the European Commission presented the Proposal to Council on the 20 September 2001 which was subsequently refined at Council meetings on the 16 October 2001 and 16 November 2001 before political agreement was reached on the 6/7 December 2001. Minister O'Donoghue commented whilst outlining the draft Framework Decision before the Seanad that:

*'Ireland's experience in combatting terrorism means that our existing legislation in this regard is more comprehensive than the provisions in the proposal' (Dáil Debates 2001 Vol. 168 No 23).*

He further commented that the bombings on September 11, 2001 demonstrated *'the choice between good and evil'* (Dáil Debates 2001 Vol. 168 No 23). The Seanad debate took place at 12.35 a.m. upon an incomplete draft of the Framework Decision, thus limiting meaningful debate. The Dáil was equally unhappy with time afforded for parliamentary scrutiny of the draft furnished. The rush to approve the proposed draft framework denied the Oireachtas of an opportunity to properly examine and debate.

### 4.8.2 Policy Making within the Council of Ministers

Minister O'Donoghue advised that once the Proposal from the European Commission was received, negotiations took place during meetings of the European Council of Ministers, between senior officials within C.A.T.S and C.O.R.E.P.E.R. to achieve consensus. Minister Michael McDowell was appointed Minister for Justice, Equality and Law Reform in June 2002. On the 17 December 2002 he elaborated upon this decision making process within C.O.R.E.P.E.R. before the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights. He advised that C.O.R.E.P.E.R. arranges priorities into 'A' and 'B' lists, the former consisting of matters that are *'agreed or compromises reached'*. Before matters reach the 'A' list they are subject to *'detailed discussions'*. This is noteworthy when considering Minister Donoghue's comments to the Dáil when he confirmed that *'textual corrections'* in the draft Framework Decision would be *'tidied up by the Council secretariat'*

and that only ‘substantial’ changes would return to the Oireachtas (Dáil Debates 2001: Vol. 168:23).

#### 4.8.3 *The Criminal Justice (Terrorist Offences) Bill 2002*

Michael McDowell was appointed Minister for Justice, Equality and Law Reform shortly before the Bill was presented to the Dáil on the 16 December 2002. During the second stage Minister McDowell cautioned that dissident republican and loyalist groups remained active. He referred to the United Nations Security Council resolution 1368, adopted on the 12 September 2001, which required signatory States to ‘*work together urgently to prevent and suppress terrorist acts, including through increased co-operation and full implementation of the relevant conventions relating to terrorism*’(2001). Later, the UN Security Council adopted resolution 1373 (2001) which obliged States to implement international agreements. Consequently, the Bill implemented the International Convention against the Taking of Hostages (1979), the International Convention on the Suppression of Terrorism and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973). In addition, our membership of the European Union required enactment of the Framework Decision on Combating Terrorism (2002). On the 17 December 2002, a day after the Bill was presented to the Dáil, the Garda Commissioner appeared before the Oireachtas Joint Committee on Justice, Equality, Defence and Women’s Rights and advised that special units had been set up to address international terrorism but commented that ‘*I do not envisage any particular threat to this country at this time*’ (Select Committee debates: 2002).

#### 4.8.4 *Defining Terrorism*

The Oireachtas debates on the defining of terrorism proved extremely contentious. Minister for State Mary Hanafin revealed, on the 5 February 2003, that only four European Member States had defined terrorism within their own legislation before the Framework Decision. Aonghus O’Snodaigh T.D., a member of the Select Committee, noted that the UN Policy Working Group had failed to arrive at an agreed definition of terrorism other than its tendency to target civilians (Dáil Committee debates: 3/11/2004). Deputy Joe Costello questioned the necessity for such ‘stark legislation’ in a neutral country (Dáil Debates 2003: Vol. 560 No. 3). Minister McDowell, at committee stage, acknowledged that the Framework Decision defined terrorism widely and conceded that the urgency created in the ‘*aftermath of*

*a crisis*' may have been a factor. However, he emphasised that Ireland was obliged to implement the Framework Decision in accordance with both treaties and the Constitution and stated that *'the framework decision even overrides our constitution'* (Committee Stage: 3/4/2011).

#### 4.8.5 *Definitions of Terrorist Groups and Activity*

Debates on the definitions, in part 2 of the Bill, of 'terrorist activity' and 'terrorist groups' were particularly fractious. The Minister conceded that the expansive definitions for both terms were not ideal, stating *'that is how the Europeans decided it'* and observing that *'when one comes in contact with the civil law, this is what one ends up with'* (Dáil Debates 2003: Vol. 560 No 3). Minister McDowell however suggested the definition of 'terrorist group' in the Bill was structured so as to comply with the recommendation of the Hederman Committee that the Offences against the State Act 1939/98 be amended to accommodate the suppression of international terrorist groups. Article 4 of the framework decision required an additional offence for rendering assistance to an unlawful organisation which mirrored, according to Minister McDowell, a Hederman Committee recommendation. The Minister also suggested that the new offence of rendering assistance to an unlawful organisation was designed to address situations:

*'where persons are closely associated with unlawful organisations and actively further their ends but are not, or it cannot be proven to be, members of the organisation (Dáil Debates 2003: Vol. 560 No. 3)'*.

Similarly, Minister Hanafin (2003) said during the second stage that *'we must not only choke terrorist groups of funds, we must also starve them of volunteers'* (Dáil Debates 2003: Vol. 560. No.4)

#### 4.8.6 *Concern for Lawful Protests*

The Oireachtas at all levels expressed concern that anti-globalisation protests or political protests of any kind may become subject to this terrorist legislation. The Minister said that the definition of a 'terrorist group' as 'a structured group of two or more than two people, established over a period of time' was drafted to protect rioters being prosecuted as terrorists. In response, one Dáil member noted that a terrorist group established at *a particular time* would escape penalty under this legislation, to which the Minister responded *'the definition of terrorist group from the framework decision and that, therefore, we must go along with this'*

(*Dáil Debates 2003: Vol. 560 No. 3*). Ultimately, an assurance was provided in section 6(5) of the Act confirming that a protest or strike would not ‘of itself’ be a sufficient basis to bring the conduct within the terrorist umbrella. It was argued that the layering of terrorist offences upon existing criminal statutes exposed citizens to prosecution for terrorist offences where ordinary crimes were committed, that is where an ‘ordinary offence’ is committed but with the intent as defined in the Bill.

#### 4.8.7 *Definition of Intent*

The intent necessary to carry out a terrorist offence includes the destabilisation of a government and/or compelling a government to do or refrain from doing an act. The issue of what constituted a ‘government’ within that definition was controversial. An amendment inserting ‘democratic governments’ was rejected, with Minister McDowell announcing an imperfect ‘compromise’ such that the Attorney General can veto the continuation of a prosecution for terrorist offences where the governments targeted are outside the EU. The Minister believed it inappropriate for juries to determine whether a government was legitimate or despotic requiring that the provision be exercised with ‘a small ‘p’ in line with political policy. The provision introduced in the Act does not allow the D.P.P. to continue a prosecution for terrorist offence where the target government is outside the European Union without the permission of the Attorney General. A similar reservation on the prosecutorial powers of the D.P.P. is found in the Official Secrets Act 1963.

#### 4.8.8 *Presumption of Intent*

The rebuttable evidential presumption of intent inserted in part 2 of the Bill was discussed at length during the committee stage. Committee members commented that this evidential presumption was criticised by both the Irish Human Rights Commission and the Irish Council of Civil Liberties. The Minister observed that such presumptions were not unusual and the burden of proof remained on the D.P.P. and that it is ‘*merely forcing the accused person to put into play such evidence as is at his disposal in respect of this issue of intent*’(*Select Committee 3/11/2004*).

#### 4.8.9 *Penalty Provisions*

The period of the enhanced sentences for terrorist offences provided in the Bill, emanating from the framework decision, were ultimately reduced in the Act. It was conceded by

Minister McDowell that enhanced penalties, proscribed by the framework decision, had to be enacted in a manner that accommodated judicial discretion. He also noted that sentences suggested in the original draft of the original Bill would contravene our human rights obligations.

#### *4.8.10 Irish Residents*

The Minister advised that the provision conferring jurisdiction to prosecute residents, in addition to citizens, was necessary to confer prosecutorial jurisdiction over persons who choose to remain stateless to avoid the prosecutorial power of their resident state to prosecute them for actions outside that state.

#### *4.8.11 Madrid Bombings*

The select committee reviewed the Bill for a second time in November 2004. Since its previous review Madrid had suffered a devastating terrorist bombing which led to the election of a new government. Minister McDowell cautioned that the *'threat has not gone away'*, *'Madrid had reminded us we are vulnerable'* and that Ireland cannot *'opt out of the global reality'* (*Dáil Debates 2004: Vol. 595.No.2*). Throughout the debates the Minister was reminded of concerns of Human Rights Commission and the Irish Council of Civil Liberties. He acknowledged that submissions from the Human Rights Commission had led to further Government consultations, contributing to the delay in enactment. In commending the Bill to the Dáil, Minister McDowell said:

*'Important though it is and extensive its powers may be, it is directed towards ensuring Ireland is not a society within which those planning to kill other innocent people can find loopholes through which to carry out their cowardly plans'. (Dáil Debates 2003: Vol. 560 No. 3)*

### **4.9 Criminal Justice (Terrorist Offences) Act 2005**

The Criminal Justice (Terrorist Offences) Act 2005 was finally enacted on the 8 March 2005. It also incorporated additional obligations relating to European arrest warrants and the retention of data such that the Act was radically different to initial Bill presented to the Dáil. This review is confined to the terrorist related provisions in the Act.

#### 4.9.1 *Definitions*

The essential definitions are set out in part 2 of the Act. Whilst the definition of the ‘intent’ necessary to carry out these terrorist offences mirrors that provided by article 2 of the Framework Decision, many other Framework Decision definitions have been implemented in a manner that accommodates existing definitions in Irish criminal law. The terms ‘terrorist activity’ and ‘terrorist-linked activity’ are defined by corresponding existing offences, found at parts 1 and 2 of the first schedule to the Act, with offence categories identified in articles 1 and 3 of the Framework Decision, which when carried out with the necessary intent constitute ‘terrorist activity’ or ‘terrorist-linked activity’. Also, ‘terrorist group’ is defined as having ‘the same meaning as the Framework Decision’ but, pursuant to section 5, these groups also become unlawful organisations within the meaning of the Offences against the State Act 1939-1998 becoming liable for prosecution of membership under that Act.

#### 4.9.2 *Offences of Supporting Terrorism*

The Framework Decision required that additional offences be created prohibiting the inciting, aiding, abetting, attempting, directing, participating, assisting or contributing to the activities of terrorist groups. Many of these offences were already part of Irish law. Existing offences included the directing of unlawful organisations, providing training in the use of firearms, unlawfully collecting information or unlawfully printing publications. In addition, our common law tradition already provides for the prosecution of inchoate offences whilst section 7 of the Criminal Law Act 1997 prohibits assisting offenders evade detection or prosecution. Therefore, compliance with this obligation to criminalise these supportive roles which assist terrorist groups was achieved by supplementing existing legislation with the additional offence of rendering assistance (financial or otherwise) to an unlawful organisation, contrary to section 21 A of the Offences Against the State Act 1939.

#### 4.9.3 *Terrorist Financing*

The Act implements the United Nations Convention for the Suppression of Terrorism 1999. Offences of financing terrorism, or attempts thereof, are enacted in Part 4 of the Act. That part also provides extensive powers to authorities to deal with ‘funds’ ‘*used or may be intended for use in committing or facilitating the commission of an offence*’. The provision overlaps with part 6 wherein an amended section 22 of the Offences against the State Act 1939 allows for the forfeiture and disposal of ‘funds’ from unlawful organisations. This later

provision implements a recommendation of the Hederman Committee. However, the evidential burdens of establishing a link between ‘funds’ and unlawful activity is substantially eased in the Act. Part 4 allows the admission of Garda evidence of his/her belief that funds were to be used in committing or facilitating a terrorist offence in proceedings to freeze those funds. Similarly, in part 6 a ministerial document confirming a belief that the funds are the property of an unlawful organisation is admissible as evidence in an application to freeze funds.

#### *4.9.4 Evidential Implications*

It is noteworthy that part 2 of the Act creates an evidential presumption of intent to engage in terrorist activity, which was not required under the Framework Decision and provides examples of circumstances where intent can be presumed. It does not contain any reservation that acts have to be directed at ‘democratic governments’. In addition, by transposing the terrorist offences created by the Framework Decision into the Offences against the State Act 1939 structure, other evidential provisions will apply. The evidence of a chief superintendent of his belief that an accused is a member of a ‘terrorist group’ is admissible evidence pursuant to section 3(2) of the Offences against the State Act 1972. Also, inferences can be drawn from the conduct of an accused person under section 3(1) of the Offences against the State Act 1972. A person suspected of membership of a ‘terrorist group’ can be detained for questioning for 48 hours without recourse to a Judge and may be tried before the Special Criminal Court.

#### *4.9.5 Extra-territorial Jurisdiction*

The obligation to establish provisions addressing Ireland’s extra territorial jurisdiction to prosecute, required under article 9 of the Framework Decision, was implemented by defining residency for that purpose in section 3(3) and by extending Irish jurisdictional limits in section 6(2). Irish Courts can now exercise jurisdiction to prosecute acts committed by persons, within or outside Ireland, if the person has been resident for 12 months. Co-operative measures as to prosecution and extradition of terrorists were further refined in section 43(3) of the Act, which sets down the criteria when the D.P.P. has jurisdiction to prosecute terrorist offences committed abroad in Irish Courts.

#### *4.9.6 Politics with a small 'p'*

Not surprisingly, section 43(2) provides that the prosecution for terrorist related offences contrary to section 6, 9, 10 or 11 cannot be charged without direction from the D.P.P. The discretion and independence of the D.P.P. to decide to continue a prosecution is however restricted by section 6(6) of the Act. This provides that where a person is charged with a terrorist offence with intent to destabilise a government or political structure outside the European Union, the trial cannot proceed without the consent of the Attorney General. This provision enables the Irish Government to retain control over the international aspect of terrorism.

#### *4.9.7 Exemptions for Lawful Strikes or Protests*

The Framework Decision specifically acknowledged in the preamble the right to strike or protest which was not included in the Bill but finally adopted in the Act.

#### *4.9.8 Victims*

Victims do not receive special mention in the Act. Article 10 of the Framework Decision obliged Member States to 'ensure appropriate assistance' for victims and a commitment that prosecutions can be brought in the absence of a complaint. Neither article gets specific mention in the Act. Curiously, the only other articles of the Framework Decision not specifically implemented related to the requirement that 'legal persons' also attract criminal liability and that specific penalties be created for corporate bodies. Although not explained, it is possible that the legislature believed that victims were provided with sufficient support within our criminal justice system.

#### *4.9.9 International Conventions*

Part 3 of the Act implemented the International Convention for the Suppression of Terrorist Bombings (1997), the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Personnel (1973) and the Convention against the Taking of Hostages (1979). Separate crimes of hostage taking, terrorist bombing, and offences against internationally protected persons are defined in part 3 of the Act. The actions constituting the later offence are defined by reference to existing Irish offences, such that if done to an internationally protected person, become an offence against an



internationally protected person. However, the other offences created in part 3, those offences of committing a terrorist bombing and of hostage taking, adopt only convention language with little effort to reconcile those offences with existing similar offences in our criminal legislation.

## CHAPTER 5

### 5. DISCUSSION OF FINDINGS

#### 5.1 Policy Analysis

##### 5.1.1 Policy Making Environments

Kingdon (1995) advised that actors within the policymaking landscape be identified and an understanding of the relationships between those actors be developed. This policy analysis identified policy actors both from within the European and domestic policy making arenas. At a national level within Government, the principal players were the Oireachtas and the Select Committee on Justice, Equality, Defence and Women's Rights. The sub-government level included the Department of Justice, the Attorney General and the Hederman Committee. The latter is considered as sub-governmental given the composition of the members. The non-governmental sources identified were the Human Rights Commission and the I.C.C.L. who both fulfil advocacy roles. The European policy making landscape was dominated by the European Commission, the Council of the European Union, C.O.R.E.P.E.R., C.A.T.S. and its technical working groups. Framework decisions, despite necessitating unanimity, impose *political* obligations upon national governments. Therefore, those European institutions were the dominant policy makers who formulated the new terrorist definitions.

##### 5.1.2 The Problem Stream

Historically, the problem of domestic terrorism dominated policy making in the Department of Justice (Walsh: 1998). Subsequent to the Good Friday agreement, the Hederman Committee assessed whether persistent threats justified the continuation of existing anti-terrorist legislation (2002). Ironically, when the Hederman report was published (2002) the problem of domestic terrorism remained but the concern about international terrorism was increasing which informed their recommendation that existing legislation be amended to enable suppression of international terrorist groups. Insightfully, they noted the definitional difficulties it would present.

At the same time the consequences of a globalised world were emerging as a problem to be overcome when attempting to control terrorist threats. Open economies enabled terrorists to transcend national criminal justice systems. This 'problem' had been identified by the

European Parliament on the 5 September 2001. In the preamble to the Commission proposal (2001) it observes that the European Parliament had adopted a resolution asking the Council to make decisions that facilitate easier extradition arrangements and to agree '*the constituent elements and penalties in the field of terrorism*' (Commission Proposal: 2001:5). Six days later, a 'signal event', the tragic events of September 11, 2001 emphasised the urgency of reaching agreement on such proposals (Mulcahy: 2006).

### 5.1.3 *The Political Stream*

The day after September 11, 2001, the political reaction to the bombings began with the United Nations adopting resolution 1373 urging countries to enact outstanding anti-terrorist conventions. Ireland not implemented five such conventions, two of which dated from the 1970's. Kingdon (1995) identifies the 'political stream' as capturing the public mood which, in the aftermath of September 11, 2001, had heightened fears about Islamic terrorism. The Framework Decision *unusually* obliged the establishment of common definitions of terrorism (2002) and *politically* bound Member States, thus elevating the significance of the political stream in this analysis. The purpose behind Framework Decisions is to achieve political agreement, at European Level, on policies of common concern, such that by their very nature they emphasise the importance of the political stream to the policy making process.

### 5.1.4 *The Policy Stream*

Solomon (1981) observed that political institutions are very influential in policy formation. In this analysis, European administrative institutions were particularly prominent. Weiler (1999:98) observed that EU policy making is dominated by '*middle-range officials of the community and the member states in combination with a variety of private or semi-public bodies*' which Schmitter (1996:133) has called 'comitology'. This resonates in this study as whilst the European Parliament identified the 'problem' it was European administrative institutions who ultimately proposed, prepared and refined common definitions on terrorism to enable political agreement. Fairchild (1981) observed that policies are often developed by influential legislators or administrators but noted that politicians prefer consensus policy making. The Council of Ministers, comprising of Ministers for Justice and Home Affairs, are influential legislators within the European Union, a role that is considerably enabled by the political administrative structures built to facilitate consensus policy making. Limited information about this European policy making environment was available from the

Department of Justice. Some insight was gleaned from information provided by Minister McDowell to the Joint Committee on Justice (2003). The true nature of working practices, relationship networks, dependencies or interdependences within those groups and committees was not ascertainable from the information sources.

The proposal for a framework decision was presented to the Oireachtas for adoption on the evening of the 12 December 2001, with limited time for debate. The document furnished to the Oireachtas was incomplete and legislators were advised that '*textual corrections*' would be '*tidied up by the Council Secretariat*'. (Seanad Debates: 2001: Vol. 168 No. 23). The draft Framework Decision on Combatting Terrorism (2002) was prepared with those 'textual corrections' to be amended by European Administrative structures. Therefore, whilst a problem stream was identified by the Hederman Committee at national level and by the European Parliament, it was only when it became urgent within the political stream that the policy stream flourished, primarily at European level. The policy window opened by the terrorist bombings in the U.S.A enabled policy agreement at international political level. Common definitions were agreed in substance before the Irish Oireachtas entered the process. Therefore, the policy stream within which the Oireachtas subsequently became involved was limited to mediating the degree to which policy convergence, brought about by coercion, would penetrate in Ireland.

#### *5.1.5 Policy Convergence*

Irish policy makers may not have initiated the policy but did influence the local implementation. Bennett (1991) described how harmonisation of policies can be achieved by international governmental structures promoting particular policies such that countries move towards an agreed policy. Whilst the third pillar adopted the language of 'harmonisation' this policy took the form of coercion. The European Commission acknowledged this unusual compulsion which was further enforced by the subsequent monitoring of implementation by the European Commission. Bennett (1991), however, cautions researchers to look below the surface when determining whether convergence has actually occurred. He advises assessing the policy goals, policy content, policy instruments, policy outcomes and policy style before determining the extent of convergence. The 'policy goal' of limiting opportunities for terrorists to transcend borders and evade justice is translated in the legislation. The Act is the policy instrument through which 'policy content' is to be assessed and it mirrors those definitions as to terrorist groups and the 'mens rea' provision. Thereafter definitions are

accommodated within the legislative environment into which they have been transposed. Therefore, there is divergence in the ‘policy content’ as the sentencing model adopted by Ireland only minimally increases existing penalty provisions and does not impose non criminal fines or additional sanctions proposed in the Framework Decision. Neither did Ireland provide for special assistance to be given to victims of terrorism.

As this study is limited in scope, it does not allow for the assessment of ‘policy outcomes’ as advised by Bennett (1991). The role to be played by the Judiciary in interpreting the statute and thereby mediating its implementation has yet to be seen (Jones & Newburn 2006). It is noteworthy that there has not been a prosecution for a terrorist offence contrary to section 6 of the Act in 2007, 2008 or 2009 (Annual Report of the Office of the D.P.P:2010). Despite being unable to reach a conclusion about the extent of policy convergence in Ireland, the analysis did assist in understanding whether theoretical perspectives of control or risk underpin these new terrorist definitions.

## **5.2 Crime Control and Crime Complex Perspectives**

### *5.2.1 Crime Control Model*

The crime control model of justice devised by Packer (1968) promoted the elimination of barriers to a successful prosecution. As outlined in the literature review, characteristics include evidential presumptions and inferences which assist in easing the evidential burden. Terrorist offences cannot be committed without the necessary intent but that intent can be presumed from circumstances described in the Act, thus easing the prosecutorial path through any political arguments that acts were committed to further a political cause.

In addition, these ‘terrorist groups’ are now members of unlawful organisations such that evidential provisions which apply to prosecutions contrary to section 21 of the Offences Against the State Act 1939 will apply. The evidence of a chief superintendent as to his/her belief that an accused is a member of a terrorist group will be admissible which assists the prosecution given the nebulous definition of a terrorist group. The lack of specificity in the definition can be overcome when such garda evidence is admitted. The loose definition of terrorist groups, defined as ‘*a structured group of more than two persons established over a period of time and acting in concert to commit terrorist offence*’, facilitates the prosecution of groupings where only suspicion exists as to their motives. The prosecution of such nebulous groupings is unhindered by a necessity to suppress a named organisation with identifiable

goals. The concern expressed by Kilcommins et al (2004) about the normalisation of extraordinary powers is pertinent given the ministerial comments made when the initial Proposal for a Framework Decision was introduced to the Dáil. Minister O'Donoghue (2001:4) mused that our existing legislation was *'more comprehensive than the provisions in the proposal'*. Therefore, crime control trends are evident in the terrorist definitions within the Act.

### 5.2.2 *Crime Complex*

Garland (2001) linked the politicisation of crime to increased crime rates and limited ability of governments to control crime. The politics of this phenomenon requires regular political signals of control. The terrorist attacks on September 11, 2001 sent shock waves through international politics. The chameleon nature of international terrorism limits the capacity of national governments to control its threat. The Framework Decision could be interpreted as a signal of control by European Member States, especially in an Irish context where it was observed by our Minister that *'our existing legislation in this regard is more comprehensive than the proposal'* (2001:4). The wide definitions of 'terrorist offence', which allows for the prosecution of offences committed outside the European Union, presented a dilemma to politicians as prosecutions could be brought by the D.P.P. which conflict with Ireland's international diplomatic relations. Therefore, a power is reserved to the Attorney General to prevent the further prosecution of an accused person charged with a terrorist offence committed outside the European Union. Minister McDowell confirmed that this imperfect compromise represented political policy *'with a small 'p'* (Select Committee: 3/11/2004). Framework decisions by their nature are politically binding but not legally binding. However, this Framework Decision differed by politically imposing precise legal definitions upon Ireland. The debates reveal that the political nature of this agreement surpasses any domestic challenges to those definitions, with the Minister acknowledging the definitional deficits but saying we have to insert those definitions as *'that is how the Europeans decided it'*. Equally, as noted by Minister O'Donoghue, Ireland has a terrorist history such that our statute book already accommodates offences for possession of firearms, possession of explosives, false imprisonment, making menacing demands, and offences of treason. The Framework Decision determined that these statutory provisions were insufficient. However, implementation in this Act involved simply the renaming of existing Irish offences as

terrorist offences or ‘terrorist–linked offences’ but with increased penalties. These factors, it is submitted, suggest a trend towards the politicisation of crime in the area of terrorism.

Garland (2001) believed that incapacitation emerges from a crime complex as the principal aim of sentencing. Part 2 of the Act increases only minimally penalties for existing offences which if committed with the requisite intent become terrorist offences. The changes made to the penalty provisions between presentation of the Bill and passing of the Act are significant. The Minister acknowledges that he took note of advice from the Human Rights Commission that the penalties were disproportionate, given that Ireland operates a sentencing policy whereby sentences are proportionate to both the circumstances of the offence and the accused. Equally relevant was the need to allow for judicial discretion, long a feature of Irish sentencing policy. Another feature of the crime complex was the prominence given to victims in criminal justice policy making. The Framework Decision was agreed in the wake of ‘a signal event’ (Mulcahy: 2006), events which De Londras notes can increase concerns about the risk of victimhood (2011). Security decisions made by the Council of Ministers have been described as ‘event led, disjointed incrementalism’ (De Boer and Wallace (2001:514). The Irish Government did not however implement specific victim provisions as contained in the Framework Decision. The reasons why they did not do so are not explained within the documentation retrieved. Consequently the proposition by Kilcommins et al (2004) that victims do not direct criminal justice policies in Ireland has some support. Therefore, it cannot be said that penalty provisions reflect a policy of incapacitation or that victims dictate the direction of policies. Therefore, some essential features of the crime complex are noticeably absent. There is however evidence of increasing politicisation of crime at a supra-national level, as governments announce their policies for containing the risks inherent in the global nature of terrorism.

### **5.3 Risk and Actuarial Justice Perspectives**

#### *5.3.1 Risk Strategies*

The question of whether anti-terrorist policies, announced in this legislation, represent an attempt to employ risk strategies upon terrorists’ falls to be considered. The literature review described the elements of such strategies as involving the surveillance, management and control of risks posed by terrorism. These policies proceed on the assumption that everyone may offend but can be deterred when the risk of detection is too high. However, definitions

within the Act are too imprecisely worded to target an identifiable group with any deliberate policy of containment. Whilst, evidence of risk strategies are not found in terrorist related definitions, they are reflected in initiatives introduced to suppress the funding of terrorism and by the creation of an offence of rendering assistance to unlawful organisations. The Minister said that this offence was necessary to limit the activities of persons closely associated with unlawful organisation but against whom '*it cannot be proven*' that they are members of an unlawful organisation (Dáil debates:2003 Vol. 560. No. 3). Equally Minister Hanafin said that Act was needed to '*not only to choke terrorist groups of funds, we must also starve them of volunteers*' (Dáil Debates: Vol.560 No.4). Therefore, whilst the central definitions are not dominated by risk some policies aimed at curtailing the necessary support to maintain terrorism do resemble risk strategies.

### 5.3.2 Actuarial Justice

The premise upon which actuarial justice proceeds is that the offender is irredeemable such that deterrent strategies will fail. Actuarial policies include the imposition of curfews, control orders or post release reporting obligations. It cannot be argued that actuarial policies have influenced the formulation of these new terrorist definitions as the definitions and penalty provisions in the Act still encompass the aim to deter. Beyond the political rhetoric, there is no evidence of the creation of 'others'. The structural definition of 'terrorist groups' corresponds with organised criminal gangs. This nebulous definition lacking any specificity, departing from the practice of identifying named groups to be suppressed by Parliament, may appear to depart from deterrent principles. Equally, political comments by Minister O'Donoghue (2001) who described September 11, 2001 as demonstrating the '*choice between good and evil*' (Dail Debates: Vol.168 No. 23) might bolster such a proposition. Unlike other jurisdictions, however, this legislation still proposes to utilise the criminal justice system to prosecute accused persons with the existing safeguards including the right to bail, limited detention and the prosecution bearing the legal burden of proof remaining unaltered. The Act does not introduce civil procedures of containment of individuals based upon shaky platforms of evidence. The maximum penalties provided do not suggest that incapacitation is the main objective. Proportionate sentences will still be imposed by the Judiciary in accordance with established just desserts objectives. Therefore, upon closer examination any perceived policy of exclusion and control of 'others' in society does not penetrate below the political rhetoric. Consequently, perspectives on risk do not dominate



the definitions of terrorism set out in part 2 of the Act so that it cannot be argued that this has led to the creation of ‘others’ within society. However, there are still aspects of Beck’s risk society that merit examination.

### *5.3.3 Political Dynamism in the Risk Society*

It is evident from the reports from the I.I.D.C. and the I.M.C. that paramilitary activity persisted at the start of the last decade. At this time the Hederman Report (2002) concluded that domestic terrorist threats remained with emergent terrorist threats abroad and they recommended that Irish legislation be ‘amended’ to enable the suppression of international terrorist groups. Despite the concerns about international terrorism expressed by the Hederman Committee, the Garda Commissioner conceded that he did not believe that Ireland faced any immediate threat from International terrorism (Select Committee:17/12/2002). Despite commissioning the Hederman Committee report, the Oireachtas was not afforded an opportunity to create terrorist definitions appropriate to our own unique cultural, legal and political landscape. The intervention of what Beck has called supra-national political dynamism (Beck:1997) usurped national governments by imposing definitions. The European Commission noted that this Framework Decision differed from others that did not impose specific defined offences upon Member States. Therefore, the process of approximation commenced under Article 34 of the Amsterdam Treaty (1997) was perceived as an inadequate vehicle to entrust with the formulation of a common anti-terrorist policy. The extra- territorial provisions provide a further example of the impact of globalisation. The illusive global terrorist is often unhindered by the burden of citizenship, a factor that increases his/her chances of proceeding unchallenged. This risk had to be curtailed so the Framework Decision required Member States to extend their criminal jurisdiction to criminalise acts committed in another country by their residents. Terrorism does expose the European Union to incalculable risks, more difficult to identify or isolate, which had led to political dynamism emanating from the need to contain and manage those risks. Minister McDowell’s comment that Ireland cannot ‘*opt out of the global reality*’ is particularly apt (Dáil Debates 2004: Vol. 595 No 2).

## CHAPTER 6

### 6. CONCLUSIONS AND RECOMMENDATIONS

The problem of terrorism was already first identified by the European Parliament as a problem which facilitated the promotion of the proposal for a framework decision. The political pressure wrought upon globalised economies, perceived weak by terrorism, required political action, if only rhetoric. The policy convergence achieved by the Framework Decision was coerced but the level of the policy impact is beyond the examination of this study. Therefore, it remains to be assessed whether there has been complete policy convergence in Ireland. No prosecution for a terrorist offence in the Act has been taken (D.P.P:2010). Whilst the Act was conceived from the political necessity to appear in control of terrorist threats in the wake of September 11, 2001, it cannot be said that the Act is symptomatic of a crime complex as other elements indicative of a crime complex remain absent.

The continuation of extant domestic terrorist legislation was endorsed by the Hederman Committee given the persistent paramilitary activity. Theoretically, the extraordinary, now normalised powers, applicable in the prosecution of domestic terrorism have been extended to ‘terrorist groups’ of an unorganised kind, origins unknown. Consequently, such investigative and evidential provisions facilitate the successful prosecution of offenders and are indicative of a trend towards a crime control model of justice. However, the anti-terrorism policy does not appear dominated by risk strategies. There remains a commitment to deterrent based strategies when prosecuting terrorist offences. Beyond the prosecutorial path, risk based strategies are evident in the attempt to control the funds available to terrorist organisation. Risk strategies have not developed to the extent that incapacitation has primacy or has led to the creation of ‘others’ excluded from normal society. However, the existence of globalised risks, synonymous with the risk society, has led to increased political dynamism. The failure of actuarial policies to penetrate is perhaps influenced by our unique cultural, judicial and political history.

Further study on the policy outcome would be beneficial as it would reveal the degree to which policy convergence penetrates nationally. The research revealed the powerful influence of unelected supra national bodies on our criminal legislation and this will increase given that the Lisbon Treaty (2009) allows for majority decision making. To prevent the

emerging crime control model venturing towards a crime complex, non-governmental organisations should organise on a supra national basis to moderate those excesses.

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## APPENDIX 1

### Part 2 of Criminal Justice (Terrorist Offences) Act 2005

#### PART 2

##### Suppression of Terrorist Groups and Terrorist Offences

Definitions for *Part 2*.

4.—In this Part—

“Framework Decision” means the Framework Decision on Combating Terrorism adopted by the Council of the European Union at Luxembourg on 13 June 2002, the text of which is set out for convenience of reference in—

- (a) *Part 1 of Schedule 1*, in the case of the Irish language text, and
- (b) *Part 2 of Schedule 1*, in the case of the English language text

“terrorist activity” means an act that is committed in or outside the State and that

- (a) if committed in the State, would constitute an offence specified in [Part 1](#) of [Schedule 2](#), and
- (b) is committed with the intention of—
  - (i) seriously intimidating a population,
  - (ii) unduly compelling a government or an international organisation to perform or abstain from performing an act, or
  - (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a state or an international organisation;

“terrorist group” has the same meaning as in the Framework Decision;

“terrorist-linked activity” means an act—

- (a) that is committed in or outside the State and that—
  - (i) if committed in the State, would constitute an offence specified in [Part 2](#) of [Schedule 2](#), and
  - (ii) is committed with a view to engaging in a terrorist activity,

or

(b) that is committed in or outside the State and that—

(i) if committed in the State, would constitute an offence specified in [Part 3 of Schedule 2](#), and

(ii) is committed with a view to engaging in a terrorist activity or with a view to committing an act that, if committed in the State, would constitute an offence under section 21 or 21A of the Act of 1939

Terrorist groups.

5.—(1) A terrorist group that engages in, promotes, encourages or advocates the commission, in or outside the State, of a terrorist activity is an unlawful organisation within the meaning and for the purposes of the Offences against the State Acts 1939 to 1998 and [section 3](#) of the [Criminal Law Act 1976](#)

(2) For the purposes of this Act, the Offences against the State Acts 1939 to 1998 and [section 3](#) of the [Criminal Law Act 1976](#) apply with any necessary modifications and have effect in relation to a terrorist group referred to in *subsection (1)* as if that group were an organisation referred to in section 18 of the Act of 1939.

(3) *Subsections (1) and (2)* are not to be taken to be limited by any other provision of this Act that refers to provisions of the Offences against the State Acts 1939 to 1998 or that makes provisions of those Acts applicable in relation to offences under this Act.

(4) *Subsections (1) and (2)* apply whether the terrorist group is based in or outside the State.

Terrorist offences.

6.—(1) Subject to *subsections (2) to (4)*, a person is guilty of an offence if the person—

(a) in or outside the State—

(i) engages in a terrorist activity or a terrorist-linked activity,

(ii) attempts to engage in a terrorist activity or a terrorist-linked activity, or

(iii) makes a threat to engage in a terrorist activity,

Or

(b) commits outside the State an act that, if committed in the State, would constitute—

- (i) an offence under section 21 or 21A of the Act of 1939, or
- (ii) an offence under section 6 of the Act of 1998.

(2) *Subsection (1)* applies to an act committed outside the State if the act—

- (a) is committed on board an Irish ship,
- (b) is committed on an aircraft registered in the State,
- (c) is committed by a person who is a citizen of Ireland or is resident in the State,
- (d) is committed for the benefit of a legal person established in the State,
- (e) is directed against the State or an Irish citizen, or
- (f) is directed against—
  - (i) an institution of the European Union that is based in the State, or
  - (ii) a body that is based in the State and is set up in accordance with the Treaty establishing the European Community or the Treaty on European Union.

(3) *Subsection (1)* applies also to an act committed outside the State in circumstances other than those referred to in *subsection (2)*, but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings referred to in [section 43 \(2\)](#) for an offence in respect of that act except as authorised by [section 43 \(3\)](#).

(4) *Subsection (1)* does not apply in respect of—

- (a) the activities of armed forces during an armed conflict insofar as those activities are governed by international humanitarian law, or
- (b) the activities of the armed forces of a state in the exercise of their official duties insofar as those activities are governed by other rules of international law.

(5) To avoid doubt, the fact that a person engages in any protest, advocacy or dissent, or engages in any strike, lockout or other industrial action, is not of itself a sufficient basis for inferring that the person is carrying out an act with the intention specified in *paragraph (b)* of the definition of “terrorist activity” in [section 4](#).

(6) Where a person is charged with an offence under *subsection (1)*, which in the opinion of the Attorney General was committed in or outside the State with the intention of—

(a) unduly compelling the government of a state (other than a member state of the European Union) to perform or abstain from performing an act, or

(b) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of such a state,

then, notwithstanding anything in this Act, no further proceedings in the matter (other than any remand in custody or on bail) may be taken except with the consent of the Attorney General.

(7) Where in proceedings for the offence of engaging in or attempting to engage in a terrorist activity—

(a) it is proved that the accused person committed or attempted to commit an act—

(i) that constitutes an offence specified in [Part 1 of Schedule 2](#), or

(ii) that, if committed in the State, would constitute an offence referred to in *subparagraph (i)*,

And

(b) the court is satisfied, having regard to all the circumstances including those specified in *subsection (8)*, that it is reasonable to assume that the act was committed, or the attempt was made, with the intention of—

(i) seriously intimidating a population,

(ii) unduly compelling a government or an international organisation to perform or abstain from performing an act, or

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a state or an international organisation,

the accused person shall be presumed, unless the court is satisfied to the contrary, to have committed or attempted to commit the act with that intention.

(8) The circumstances referred to in *subsection (7)*, include—

- (a) whether the act or attempt referred to in *subsection (7)(a)*—
- (i) created or was likely to create a collective danger to the lives or physical integrity of persons,
  - (ii) caused or was likely to cause serious damage to a state or international organisation, or
  - (iii) caused or was likely to result in major economic loss,

And

- (b) any other matters that the court considers relevant.

(9) Where the Director of Public Prosecutions considers that another Member State of the European Communities has jurisdiction to try a person for any act constituting an offence under this section, the Director—

- (a) shall co-operate with the appropriate authority in that other Member State, and
- (b) may have recourse to any body or mechanism established within the European Communities in order to facilitate co-operation between judicial authorities, with a view to centralising the prosecution of the person in a single Member State where possible.

Penalties for terrorist offences.

7.—(1) A person guilty of an offence under [section 6 \(1\)\(a\)](#) is liable on conviction to be punished according to the gravity of the offence as follows:

- (a) to the sentence of imprisonment fixed by law, if the corresponding offence specified in [Schedule 2](#) is one for which the sentence is fixed by law;
- (b) to imprisonment for life, if the corresponding offence specified in [Schedule 2](#) is one for which the maximum sentence is imprisonment for life;
- (c) to imprisonment for a term not exceeding 2 years more than the maximum term of imprisonment for the corresponding offence specified in [Schedule 2](#) , if that corresponding offence is one for which a person of full capacity and not previously convicted may be sentenced to a maximum term of 10 or more years of imprisonment;
- (d) to imprisonment for a term not exceeding 1 year more than the maximum term of imprisonment for the corresponding offence specified in [Schedule 2](#) , if that corresponding offence is one for which a person of full capacity and not

previously convicted may be sentenced to a maximum term of less than 10 years of imprisonment.

(2) A person guilty of an offence under [section 6](#) (1)(b) is liable on conviction to the penalty to which he or she would have been liable had the act that constitutes the offence been done in the State.

(3) In this section, “corresponding offence”, in relation to a person convicted of an offence under [section 6](#) (1)(a), means the offence for which the person would have been liable to be convicted had the act constituting the offence under that section been committed in the State in the absence of the intent referred to in *paragraph (b)* of the definition in [section 4](#) of “terrorist activity”.

## APPENDIX 11

22.6.2002

EN

Official Journal of the European Communities

L 164/3

*(Acts adopted pursuant to Title VI of the Treaty on European Union)*

### COUNCIL FRAMEWORK DECISION

**of 13 June 2002**

**on combating terrorism**

*Official Journal L 164 , 22/06/2002 P. 0003 - 0007*

(2002/475/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Union, and in particular Article 29, Article 31(e) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission<sup>(1)</sup>,

Having regard to the opinion of the European Parliament<sup>(2)</sup>,

Whereas:

- (1) The European Union is founded on the universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms. It is based on the principle of democracy and the principle of the rule of law, principles which are common to the Member States.
- (2) Terrorism constitutes one of the most serious violations of those principles. The La Gomera Declaration adopted at the informal Council meeting on 14 October 1995 affirmed that terrorism constitutes a threat to democracy, to the free exercise of human rights and to economic and social development.

(3) All or some Member States are party to a number of conventions relating to terrorism. The Council of Europe Convention of 27 January 1977 on the Suppression of Terrorism does not regard terrorist offences as political offences or as offences connected with political offences or as offences inspired by political motives. The United Nations has adopted the Convention for the suppression of terrorist bombings of 15 December 1997 and the Convention for the suppression of financing terrorism of 9 December 1999. A draft global Convention against terrorism is currently being negotiated within the United Nations.

(4) At European Union level, on 3 December 1998 the Council adopted the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice<sup>(3)</sup>. Account should also be taken of the Council Conclusions of 20 September 2001 and of the Extraordinary European Council plan of action to combat terrorism of 21 September 2001. Terrorism was referred to in the conclusions of the Tampere European Council of 15 and 16 October 1999, and of the Santa Maria da Feira European Council of 19 and 20 June

<sup>1</sup> OJ C 332 E, 27.11.2001, P. 300.

<sup>2</sup> Opinion delivered on 6 February 2002 (not yet published in the Official Journal).

<sup>3</sup> OJ C 19, 23.1.1999, p. 1.



2000. It was also mentioned in the Commission communication to the Council and the European Parliament on the biannual update of the scoreboard to review progress on the creation of an area of "freedom, security and justice" in the European Union (second half of 2000). Furthermore, on 5 September 2001 the European Parliament adopted a recommendation on the role of the European Union in combating terrorism. It should, moreover, be recalled that on 30 July 1996 twenty-five measures to fight against terrorism were advocated by the leading industrialised countries (G7) and Russia meeting in Paris.

- (5) The European Union has adopted numerous specific measures having an impact on terrorism and organised crime, such as the Council Decision of 3 December 1998 instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property<sup>(4)</sup>; Council Joint Action 96/610/JHA of 15 October 1996 concerning the creation and maintenance of a Directory of specialised counter-terrorist competences, skills and expertise to facilitate counter-terrorism cooperation between the Member States of the European Union<sup>(5)</sup>; Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network<sup>(6)</sup>, with responsibilities in terrorist offences, in particular Article 2; Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union<sup>(7)</sup>; and the Council Recommendation of 9 December 1999 on cooperation in combating the financing of terrorist groups<sup>(8)</sup>.
- (6) The definition of terrorist offences should be approximated in all Member States, including those offences relating to terrorist groups. Furthermore, penalties and sanctions should be provided for natural and legal persons having committed or being liable for such

offences, which reflect the seriousness of such offences.

- (7) Jurisdictional rules should be established to ensure that the terrorist offence may be effectively prosecuted.
- (8) Victims of terrorist offences are vulnerable, and therefore specific measures are necessary with regard to them.
- (9) Given that the objectives of the proposed action cannot be sufficiently achieved by the Member States unilaterally, and can therefore, because of the need for reciprocity, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity. In accordance with the principle of proportionality, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.
- (10) This Framework Decision respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they emerge from the constitutional traditions common to the Member States as principles of Community law. The Union observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate.
- (11) Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision,

HAS ADOPTED THIS FRAMEWORK DECISION:

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<sup>4</sup> OJ C 26, 30.1.1999, p. 22.  
<sup>5</sup> OJ L 273, 25.10.1996, p. 1.  
<sup>6</sup> OJ L 191, 7.7.1998, p.4.  
<sup>7</sup> OJ L 351, 29.12.1998, p. 1.  
<sup>8</sup> OJ C 373, 23.12.1999, p. 1.

*Article 1*

**Terrorist offences and fundamental rights and principles**

1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

- seriously intimidating a population, or
- unduly compelling a Government or international organisation to perform or abstain from performing any act, or
- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

shall be deemed to be terrorist offences:

- (a) attacks upon a person's life which may cause death;
- (b) attacks upon the physical integrity of a person;
- (c) kidnapping or hostage taking;
- (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
- (e) seizure of aircraft, ships or other means of public or goods transport;
- (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
- (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
- (h) interfering with or disrupting the supply of water, power or any other

fundamental natural resource the effect of which is to endanger human life;

- (i) threatening to commit any of the acts listed in (a) to (h).

2. This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

*Article 2*

**Offences relating to a terrorist group**

1. For the purposes of this Framework Decision, "terrorist group" shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

2. Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:

- (a) directing a terrorist group;
- (b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.

*Article 3*

**Offences linked to terrorist activities**

Each Member State shall take the necessary measures to ensure that terrorist-linked offences include the following acts:

- (a) aggravated theft with a view to committing one of the acts listed in Article 1(1);
- (b) extortion with a view to the perpetration of one of the acts listed in Article 1(1);

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

#### *Article 4*

##### **Inciting, aiding or abetting, and attempting**

1. Each Member State shall take the necessary measures to ensure that inciting or aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable.
2. Each Member State shall take the necessary measures to ensure that attempting to commit an offence referred to in Article 1(1) and Article 3, with the exception of possession as provided for in Article 1(1)(f) and the offence referred to in Article 1(1)(i), is made punishable.

#### *Article 5*

##### **Penalties**

1. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 1 to 4 are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition.
2. Each Member State shall take the necessary measures to ensure that the terrorist offences referred to in Article 1(1) and offences referred to in Article 4, inasmuch as they relate to terrorist offences, are punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special intent required pursuant to Article 1(1), save where the sentences imposable are already the maximum possible sentences under national law.
3. Each Member State shall take the necessary measures to ensure that offences listed in Article 2 are punishable by custodial sentences, with a maximum sentence of not less than fifteen years for the offence referred to in Article 2(2)(a), and for the offences listed in Article 2(2)(b) a maximum sentence of not less than eight years. In so far as the offence referred to in Article 2(2)(a) refers only to the act in Article 1(1)(i), the maximum sentence shall not be less than eight years.

#### *Article 6*

##### **Particular circumstances**

Each Member State may take the necessary measures to ensure that the penalties referred to in Article 5 may be reduced if the offender:

- (a) renounces terrorist activity, and
- (b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:
  - (i) prevent or mitigate the effects of the offence;
  - (ii) identify or bring to justice the other offenders;
  - (iii) find evidence; or
  - (iv) prevent further offences referred to in Articles 1 to 4.

#### *Article 7*

##### **Liability of legal persons**

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for any of the offences referred to in Articles 1 to 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on one of the following:

- (a) a power of representation of the legal person;
- (b) an authority to take decisions on behalf of the legal person;
- (c) an authority to exercise control within the legal person.

2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of any of the offences referred to in Articles 1 to 4 for the benefit of that legal person by a person under its authority.

3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in any of the offences referred to in Articles 1 to 4.

#### *Article 8*

##### **Penalties for legal persons**

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7 is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties, such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order;
- (e) temporary or permanent closure of establishments which have been used for committing the offence.

#### *Article 9*

##### **Jurisdiction and prosecution**

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 1 to 4 where:

- (a) the offence is committed in whole or in part in its territory. Each Member State may extend its jurisdiction if the offence is committed in the territory of a Member State;
- (b) the offence is committed on board a vessel flying its flag or an aircraft registered there;
- (c) the offender is one of its nationals or residents;

- (d) the offence is committed for the benefit of a legal person established in its territory;
- (e) the offence is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that Member State.

2. When an offence falls within the jurisdiction of more than one Member State and when any of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State. To this end, the Member States may have recourse to any body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action. Sequential account shall be taken of the following factors:

- the Member State shall be that in the territory of which the acts were committed,
- the Member State shall be that of which the perpetrator is a national or resident,
- the Member State shall be the Member State of origin of the victims,
- the Member State shall be that in the territory of which the perpetrator was found.

3. Each Member State shall take the necessary measures also to establish its jurisdiction over the offences referred to in Articles 1 to 4 in cases where it refuses to hand over or extradite a person suspected or convicted of such an offence to another Member State or to a third country.

4. Each Member State shall ensure that its jurisdiction covers cases in which any of the offences referred to in Articles 2 and 4 has been committed in whole or in part within its territory, wherever the terrorist group is based or pursues its criminal activities.

5. This Article shall not exclude the exercise of jurisdiction in criminal matters as laid down by a Member State in accordance with its national legislation.

*Article 10*

**Protection of, and assistance to, victims**

1. Member States shall ensure that investigations into, or prosecution of, offences covered by this Framework Decision are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed on the territory of the Member State.

2. In addition to the measures laid down in the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings<sup>9</sup>, each Member State shall, if necessary, take all measures possible to ensure appropriate assistance for victims' families.

*Article 11*

**Implementation and reports**

1. Member States shall take the necessary measures to comply with this Framework Decision by 31 December 2002.

2. By 31 December 2002, Member States shall forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report drawn up from that information and a report from the Commission, the Council shall assess, by 31 December 2003, whether Member States have taken the necessary measures to comply with this Framework Decision.

3. The Commission report shall specify, in particular, transposition into the criminal law of the Member States of the obligation referred to in Article 5(2).

*Article 12*

**Territorial application**

This Framework Decision shall apply to Gibraltar.

*Article 13*

**Entry into force**

This Framework Decision shall enter into force on the day of its publication in the Official Journal.

Done at Luxembourg, 13 June 2002.

For the Council  
The President  
M. RAJOY BREY

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<sup>9</sup> OJ L 82, 22.3.2001, p. 1.

**APPENDIX III**

**Commission Proposal for a Framework Decision on Combatting Terrorism (2001)**



**COMMISSION OF THE EUROPEAN COMMUNITIES**

Brussels, 19.9.2001  
COM(2001) 521 final

2001/0217 (CNS)

Proposal for a

**COUNCIL FRAMEWORK DECISION**

**on combating terrorism**

(presented by the Commission)

## EXPLANATORY MEMORANDUM

### 1. INTRODUCTION

Terrorism constitutes one of the most serious threats to democracy, to the free exercise of human rights and to economic and social development. Terrorism can never be justified, whatever the target and the place where the offence is prepared or committed.

This has never been clearer than in the terrible aftermath of the unprecedented, tragic and murderous terrorist attacks against the people of the United States of America on 11 September 2001. These cowardly attacks highlight the need for an effective response to terrorism at the level of the European Union.

The European Union has set itself an objective in the Treaty on European Union to provide citizens with a high level of safety within an Area of Freedom, Security and Justice. This proposal, combined with the proposal to replace extradition within the European Union with a European Arrest Warrant, is a key element of the Commission's contribution to achieving this objective in the context of the fight against terrorism. It is vitally important that Member States of the European Union have effective criminal laws in place to tackle terrorism, and that measures are taken to enhance international co-operation against terrorism.

This proposal does not relate only to acts of terrorism directed at Member States. It also applies to conduct on the territory of the European Union which can contribute to acts of terrorism in third countries. This reflects the Commission's commitment to tackle terrorism at a global as well as European Union level. Indeed, the Commission is working closely with Member States and third countries to combat international terrorism within the framework of international organisations and existing international co-operation mechanisms, particularly the United Nations and the G8, with a view to ensuring the full implementation of all relevant international instruments.

The European Union and its Member States are founded on respect for human rights, fundamental freedoms, the guarantee of the dignity of the human being, and the protection of these rights, both as regards individuals and institutions. Furthermore, the right to life, the right to physical integrity, the right to liberty and security and the right to freedom of thought, of expression and information are included in Articles 2, 3, 6, 10 and 11 of the Charter of Fundamental Rights of the European Union<sup>1</sup> (Nice, 7 December 2000).

Terrorism threatens these fundamental rights. There is hardly a country in Europe which has not been affected, either directly or indirectly, by terrorism. Terrorist actions are liable to undermine the rule of law and the fundamental principles on which the constitutional traditions and legislation of Member States' democracies are based. They are committed against one or more countries, their institutions or people with the aim of intimidating them and seriously altering or destroying the political, economic or social structures of those countries.

Terrorism takes different forms, ranging from murder, through bodily harm and threats to people's lives and kidnappings and on to destruction of property and damage to public or private facilities. Terrorism causes suffering to the victims and those around them. It

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<sup>1</sup> OJ C 364, 18.12.2000,p.1.

destroys their personal hopes and expectations and the material basis of their livelihood, injuring them, inflicting psychological torture and causing death.

Terrorism has a long history behind it, but what makes modern-day terrorism particularly dangerous is that, unlike terrorist acts in the past, the actual or potential impact of armed attacks is increasingly devastating and lethal. This can result from the growing sophistication and ruthless ambition of the terrorists themselves, as demonstrated most recently by the horrific events in the United States on 11 September. Alternatively, it can result from technological developments (and easy access to information about these developments), whether in the traditional arms and explosives areas or in the even more terrifying fields of chemical, biological and nuclear weapons. In addition, new forms of terrorism are emerging. There have been several recent occasions where tensions in international relations have led to a spate of attacks against information systems. More serious attacks could lead not only to serious damage but even, in some cases, to loss of life.

The profound changes in the nature of terrorist offences highlight the inadequacy of traditional forms of judicial and police cooperation in combating it. Increasingly, terrorism stems from the activities of networks operating at international level, which are based in several countries and exploit legal loopholes arising from the geographical limits of investigations, sometimes enjoying extensive logistical and financial support. Given that there are no borders within the European Union and that the right of free movements of people is guaranteed, new measures in the fight against terrorism must be taken.

Terrorists might otherwise take advantage of any differences in legal treatment in the different Member States. Today, more than ever, steps are needed to combat terrorism by drawing up legislative proposals aimed at punishing such acts and strengthening police and judicial cooperation.

The objective of this Communication is to reinforce criminal law measures to combat terrorism. For that purpose, a proposal for a Framework Decision is submitted. Its objective is the approximation of the laws of the Member States regarding terrorist offences in accordance with Article 34(2)(b) of the Treaty on European Union (TEU).

## 2. INTERNATIONAL AND EU LEGAL INSTRUMENTS

The first steps in the fight against terrorism were made under the auspices of the **United Nations**, which promoted the Convention on offences and certain other acts committed on board aircraft (Tokyo, 14-9-1963). After this Convention some other conventions and protocols relating to terrorist acts were promulgated. The following are worth mentioning:

- Convention for the Suppression of Unlawful Seizure of Aircraft [Hijacking Convention] (The Hague, 16-12-1970);
- Convention for the Suppression of Unlawful Acts against the Safety of Aircraft (Montreal, 23-9-1971);
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14-12-1973);
- Convention against the Taking of Hostages (New York, 17-12-1979);



- Convention on the Physical Protection of Nuclear Materials (Vienna, 3-3-1980);
- Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Aviation, complementary to the Convention for the Suppression of Unlawful Acts against the Safety of Aircraft (Montreal, 24-2-1988);
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10-3-1988);
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 10-3-1988);
- UN Convention for the Suppression of Terrorist Bombings (New York, 15-12-1997);
- UN Convention for the Suppression of Financing Terrorism (New York, 9-12-1999).

These two last Conventions are particularly important. Article 2 of the Convention for the Suppression of Terrorist Bombings provides that any person commits an offence if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injuries; or with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss. The Convention for the Suppression of Financing Terrorism states that is an offence to provide or collect funds, directly or indirectly, unlawfully and intentionally, with the intent to use them or knowing that they will be used to commit any act included within the scope of the previously mentioned Conventions (apart from the Convention on offences and certain other offences committed on board aircraft, which is not included). This means that, even though in most of those conventions the words “terrorism” or “terrorist acts” are not mentioned, they are related to terrorist offences .

However, with regard to existing international Conventions, the most significant effort in the fight against terrorism, has been the European Convention on the Suppression of Terrorism (Strasbourg, 27-1-1977) under the mandate of the **Council of Europe**.<sup>2</sup> This is the first Convention in which terrorism is treated generically, at least in the sense that it gives a list of terrorist acts. This convention does not consider this kind of offence as political offences, or as offences connected with a political offence, or as offences inspired by political motives. This is important for the purpose of the application of the conventions on extradition.

Articles 1 and 2 contain a list of offences considered to be terrorist acts. Article 1 refers to offences within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970) and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1971), which refer to certain terrorist acts. Furthermore, offences involving an attack against the life, physical integrity or liberty of internationally protected persons (including diplomatic agents), offences involving kidnapping, taking of a hostage, serious unlawful detention, use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb, if this use endangers persons appear in the same list. Article 2 extends the concept of terrorist act to other offences such as those which

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<sup>2</sup> STE n° 90.

involve an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person (paragraph 1); and against property if the act created a collective danger for persons (paragraph 2).

Most of these conventions have been signed and ratified by the majority of Member States, which means that they have to apply them. This proposal will facilitate the implementation of those conventions as far as they concern penal law since they refer to the same issue: terrorist offences.

At **European Union** level, Article 29 of the Treaty on European Union specifically refers to terrorism as one of the serious forms of crime to be prevented and combated by developing common action in three different ways: closer cooperation between police forces, customs authorities and other competent authorities, including Europol; closer cooperation between judicial and other competent authorities of the Member States; approximation, where necessary, of rules on criminal matters.

Regarding police cooperation (Article 30 of the TEU), it is worth mentioning Article 2 (1) of the Convention on the establishment of a European Police Office,<sup>3</sup> in which terrorism is included within its field of competence, and the Council Decision of 3 December 1998<sup>4</sup> instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property, which implements Article 2 (2) of that Convention. Furthermore, the Council Joint Action of 15 October 1996<sup>5</sup> decided the creation and maintenance of a Directory of specialised counter-terrorism competences, skills and expertise to facilitate counter-terrorism cooperation between the MS of the EU.

Concerning judicial cooperation Article 31 of the TUE states that common action on judicial cooperation is to include facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions (Paragraph A) and facilitating extradition between Member States (Paragraph B). In this field there are two important legal instruments: the Convention on simplified extradition procedure between the Member States of the EU<sup>6</sup> (10 March 1995) and the Convention relating to extradition between Member States of the EU<sup>7</sup> (27 September 1996), where Article 1 establishes that one of the purposes of that Convention is to facilitate the application between the Member States of the EU of the European Convention on the Suppression of Terrorism. Furthermore, the Joint Action of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the EU<sup>8</sup> refers to terrorist offences in Article 2 (2).

However, it seemed necessary to improve these legal instruments in order to fight against terrorism in a more effective and efficient way. The conclusions of the Tampere European Council<sup>9</sup> meeting of 15 and 16 October 1999 therefore established that formal extradition procedures should be abolished among the Member States as regards persons who are fleeing

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<sup>3</sup> OJ C 316, 27.11.1995, p.1.

<sup>4</sup> OJ C 26, 30.01.1999, p.22.

<sup>5</sup> OJ L 273, 25.10.1996, p.1.

<sup>6</sup> OJ C 78, 30.03.1995, p.1.

<sup>7</sup> OJ C 373, 23.10.1996, p.11.

<sup>8</sup> OJ L 351, 29.12.1998, p.1.

<sup>9</sup> <http://ue.eu.int/en/Info/eurocouncil/index.htm>

from justice after having been finally sentenced, and replaced by a simple transfer of such persons (Conclusion 35).

The European Parliament adopted (5 September 2001) a resolution concerning the role of the EU in combating terrorism, calling on the Council to adopt a framework decision to abolish formal extradition procedures, to adopt the principle of mutual recognition of decisions on criminal matters including pre-judgement decisions in criminal matters relating to terrorist offences and the implementation of the “European search and arrest warrant”, and to approximate legislative provisions establishing minimum rules at European level relating to the constituent elements and penalties in the field of terrorism.

Finally, regarding approximation of rules on criminal matters in the Member States, Article 31 (e)<sup>10</sup> of the TEU calls for the adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of terrorism, which is also mentioned in Paragraph 46 of the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice<sup>11</sup> (3 December 1998). This is the aim of this Framework Decision: implementing Article 31 (e) of the TEU by approximating Member States’ legislation concerning terrorist offences .

Additionally to Title IV of the TEU establishing the appropriate instruments for the fighting of terrorism at the Union’s level and to coordinate action on an international level, the Union’s commitment to contribute towards the emergence of a strong, sustained and global action against terrorism may require a political dialogue with or an action in relation to a nonmember State as well as co-ordination of Member States in international organisations and on international conferences. Without prejudice to the measures undertaken in the field of police and judicial cooperation, the addressing of all security aspects may call for complementary actions under, for example, the Common Foreign and Security Policy in order to enhance impact and ensure consistency of the Union’s external relations.

### **3. MEMBER STATES LEGISLATION CONCERNING TERRORISM**

In the European Union there are different situations in Member States in relation to legislation related to terrorism. Some have no specific regulations on terrorism. In these states, terrorist actions are punished as common offences. In other member States there are specific laws or legal instruments concerning terrorism where the words “terrorism” or “terrorist” are expressly mentioned and where some terrorist offences are expressly typified. This is the case in France, Germany, Italy, Portugal, Spain and the United Kingdom.

Most terrorist acts are basically ordinary offences which become terrorist offences because of the motivations of the offender. If the motivation is to alter seriously or to destroy the fundamental principles and pillars of the state, intimidating people, there is a terrorist offence.

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<sup>10</sup> In this Article organised crime and illicit drug trafficking are also mentioned and the Union is dealing with both of them. Concerning organised crime we should take into account the Joint Action 21 December 1998 on making it a criminal offences to participate in a criminal organisation in the MS of the EU. Regarding illicit drug trafficking the Commission presented a proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (COM (2001) 259 final, 23 May 2001).

<sup>11</sup> OJ C 19, 23.01.1999, p.1.

This point of view has been incorporated in Member States legislation concerning terrorism. Although the wording is different, they are essentially synonymous with each other.

The Criminal Code and the Code of Criminal Procedure in Greece have been substantially reshaped following the recent adoption of law no. 2928 of 27 June 2001. The French Criminal Code<sup>12</sup> refers to terrorist acts as those that can alter seriously public order through threat or terror. The Portuguese Criminal Code<sup>13</sup> mentions prejudice to national interests, to alter or to disturb State's institutions, to force public authorities to do or not to do something, and to threaten individuals or groups. The Spanish Criminal Code<sup>14</sup>, as in France and Portugal, alludes to the aim of subverting the constitutional order and altering seriously public peace. A similar statement, to subvert the democratic order, is also mentioned in the Italian Criminal Code.<sup>15</sup>

The UK legislation, Terrorism Act 2000,<sup>16</sup> is the largest piece of terrorist legislation in the EU Member States. Terrorism is defined as meaning the use or threat of action where “the use or threat is designed to influence the government or to intimidate the public or a section of the public” and “the use or threat is made for the purpose of advancing a political, religious or ideological cause”; and that the action includes, among others, “serious violence against a person”, “serious damage to property” or “creating a serious risk to the health or safety of the public or a section of the public”.

#### **4. A PROPOSAL FOR A FRAMEWORK DECISION**

In view of Article 31 (e) of the TEU, the legal background previously mentioned, and the fact that only six Member States have legal instruments covering terrorism, the present proposal for a Framework Decision for the approximation of the substantive laws of the Member States is clearly necessary. It concerns constituent elements and penalties in the field of terrorism, ensuring that terrorist offences will be punished by effective, proportionate and dissuasive criminal penalties. As a direct result, it will also facilitate police and judicial cooperation, since common definitions of offences should overcome the obstacles of double criminality requirement as long as it is a prerequisite for certain forms of judicial assistance. Furthermore, the existence of a common framework in the fight against terrorism in the EU will facilitate closer cooperation with third countries.

The key concept on which this proposal is based is the concept of a terrorist offence. Terrorist offences can be defined as offences intentionally committed by an individual or a group against one or more countries, their institutions or people, with the aim of intimidating

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<sup>12</sup> Art. 421-1 : « Constituent des acts de terrorism, lorsqu'elles sont intentionnellement en relation avec une entreprise individuelle ou collective ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur... ».

<sup>13</sup> Art. 300 : « ...visem prejudicar a integridade ou a independência nacionais, impedir, alterar ou subverter o funcionamento das instituições do Estado previstas na Constituição, forçar a autoridade pública a praticar um acto, a abster-se de o praticar ou a tolerar que se pratique, ou ainda intimidar certas pessoas, grupo de pessoas ou a população em geral... ».

<sup>14</sup> Art. 571 : « ...cuya finalidad sea la de subvertir el orden constitucional o alterar gravemente la paz pública... ».

<sup>15</sup> Arts. 270 bis, 280, 289 bis : « eversione dell'ordine democratico ».

<sup>16</sup> Terrorism Act 2000 : [www.uk-legislation.hmso.gov.uk/acts/acts2000/20000011.htm](http://www.uk-legislation.hmso.gov.uk/acts/acts2000/20000011.htm)

them and seriously altering or destroying the political, economic, or social structures of a country. The implication is that legal rights affected by this kind of offence are not the same as legal rights affected by common offences. The reasoning here is that the motivation of the offender is different, even though terrorist offences can usually be equated in terms of their practical effect with ordinary criminal offences and, consequently, other legal rights are also affected. In fact, terrorist acts usually damage the physical or psychological integrity of individuals or groups, their property or their freedom, in the same way that ordinary offences do, but terrorist offences go further in undermining the structures previously mentioned.<sup>17</sup> For this reason, terrorist offences and ordinary offences are different and affect different legal rights. Therefore it seems appropriate to have different and specific constituent elements and penalties for such particularly serious offences.

On the other hand, directing, creating, supporting or participating to a terrorist group must be considered independent criminal acts and must be dealt with as terrorist offences. In order to define the concept of a terrorist group we have to take into account the Joint Action of 21.12.1998 making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, where terrorism is expressly mentioned. Article 1 defines the criminal organisation as a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing certain types of offence, which are subject to the penalties specified in the mentioned article. Consequently, and following that definition, we can say that a terrorist group is a structured organisation, established over a period of time, of more than two persons acting in concert to commit terrorist acts.

This Framework Decision covers all terrorist offences prepared or committed within the borders of the European Union, whatever their target, including terrorist acts against interests of non EU Member States located in the EU.

Common definitions of offences and penalties are proposed. The proposal also contains provisions on liability and penalties for legal persons, jurisdiction, victims and exchange of information between Member States.

## **5. LEGAL BASIS**

Article 29 of the TEU establishes that the Union's objective shall be to provide citizens with a level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation, and by preventing and combating terrorism. The same Article provides for approximation, where necessary, of rules on criminal matters in the Member States, in accordance with Article 31(e). This Article states that common action on judicial cooperation in criminal matters shall include progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field, among other offences, of terrorism.

Article 34(2)(b) of the TEU refers to framework decisions as the instruments to be used for the purpose of approximation of the laws and regulations of the Member States. Framework decisions are binding on the Member States as to the result to be achieved but leave to the

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<sup>17</sup> OJ L 351, 29.12.1998, p.1: "Whereas the Council considers that the seriousness and development of certain forms of organised crime require strengthening of cooperation between the MS of the EU, particularly as regards the following offences: drug trafficking, trafficking in human beings, terrorism..."

national authorities the choice of the form and methods. This proposal will not entail financial implications for the budget of the European Community.

## **6. THE FRAMEWORK DECISION: ARTICLES**

### **Article 1 (Subject matter)**

The subject of this Framework Decision is to implement Article 31(e) TEU, which provides that common action on judicial cooperation in criminal matters shall include adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of terrorism.

This will help to achieve the Union's objective, expressed in Article 29 TEU, of providing citizens with a high level of safety within an area of freedom, security and justice.

### **Article 2 (Scope)**

Article 2 provides four criteria to limit the scope of this Framework Decision. Apart from the territoriality principle (the offence is committed or prepared in whole or in part within a Member State) and active personality principle (the offence is committed by a national of a Member State or for the benefit of a legal person established in a Member State), offences also fall under this Framework Decision when they are committed against institutions or people of a Member State.

### **Article 3 (Terrorist Offences)**

Article 3 provides a broad list of terrorist offences, indicating when they are to be regarded as terrorist offences and terrorist offences related to terrorist groups. Article 3 puts on the Member States an obligation to ensure that these offences will be punishable as terrorist offences.

Paragraph 1 contains a list of the most serious terrorist offences. Many of them will probably be regulated as common offences in the Member States' criminal codes. The Framework Decision requests that when they are intentionally committed by an individual or a group against one or more countries, their institutions or people (people refers to all persons, including minorities), with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of those countries; they must be qualified as terrorist offences. It is worth mentioning, among them, murder; bodily injuries; kidnapping; hostage taking; threats; extortion; theft; robbery; fabrication, possession, acquisition, transport or supply of weapons or explosives; unlawful seizure of or damage to state or government facilities, means of public transport, infrastructure facilities, places of public use, and property (both private and public). This could include, for instance, acts of urban violence.

Although terrorist offences committed by computer or electronic devices are apparently less violent they can be as threatening as the offences previously mentioned, endangering not only life, health or safety of people but the environment as well. Their main characteristic is that their effect is intentionally produced at a distance from the perpetrators, but their consequences may also be much more far reaching. Therefore, terrorist offences covering the

release of contaminating substances or causing fires, floods or explosions; interfering with or disrupting the supply of water, power or other fundamental resource; and interference with an information system are included under paragraphs 1 (h),(i) and (j).

For the purpose of this Framework Decision, “means of public transport” shall mean all facilities, conveyances and instrumentalities, whether publicly or privately owned, that are used in or for publicly available services for the transportation of persons or cargo. This is also the definition of public transportation system in Article 1(6) of the 1998 UN Convention for the Suppression of Terrorist Bombing. “Information system” shall mean computers and electronic communication networks, as well as computer data stored, processed, retrieved or transmitted by them for the purposes of their operation, use, protection and maintenance.

Finally, paragraphs 1(l) and (m) refer to those terrorist acts committed in relation to terrorist groups, such as directing, promoting of, supporting of and participating in a terrorist group which are considered terrorist offences.

Paragraph 2 contains the definition of “terrorist group” as a structured organisation, established over a period of time, of more than two persons, acting in concert to commit the terrorist offences referred to in paragraph 1 (a) to (k).

The wording of this Article allows Member States decide how to introduce the precise definition of the offences in order to implement this Framework Decision.

#### **Article 4 (Instigating, aiding, abetting and attempting)**

Article 4 puts an obligation on Member States to ensure that instigating, aiding, abetting and attempting to commit terrorist offences are punishable.

#### **Article 5 (Penalties and sanctions)**

Article 5 concerns penalties. Paragraph 1 indicates that the offences and conduct referred to in Articles 3 and 4 shall be punishable by effective, proportionate and dissuasive penalties.

The scope of the penalties (paragraph 2) is rather broad in view of the different terrorist offences and penalties for terrorism existing in the Member States. The highest penalty is a period of deprivation of liberty of no less than twenty years (murder) and the lowest is a period of no less than two years (extortion, theft, robbery and threatening to commit some offences). The possibility of imposing ancillary or alternative sanctions such as community service, limitation of certain civil or political rights or publication of all or part of a sentence as regards to offences and conduct referred to in Articles 3 and 4 is also made available in paragraph 3.

Paragraph 4 indicates that fines could also be imposed.

#### **Article 6 (Aggravating circumstances)**

Article 6 establishes aggravating circumstances in case the offence is committed with particular ruthlessness, affects a large number of persons or is of a particular serious and persistent nature, or is committed against Heads of State, Government Ministers, any other internationally protected person, elected members of parliamentary chambers, members of

regional or local governments, judges, magistrates, judicial or prison civil servants and police forces. Internationally protected persons shall have the same meaning as Article 1 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

#### **Article 7 (Mitigating circumstances)**

Article 7, taking into account the Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organised crime,<sup>18</sup> refers to mitigating circumstances when the offender renounces his or her criminal activity and provides administrative or judicial authorities with information, helping them to prevent the effects of the offence in time, so that crime, the planning of which he is aware, may still be prevented; to identify or to bring to justice other terrorist offenders, to find evidence concerning terrorist crimes or to prevent further terrorist offences.

#### **Article 8 (Liability of legal persons)**

In line with the approach taken in a number of legal instruments adopted at EU level to combat different types of criminality, it is necessary also to cover the situation in which legal persons are involved in terrorist offences. Article 8 therefore contains provisions for holding a legal person liable for the offences or conduct envisaged by Articles 3 and 4, committed for their benefit by any person with certain leading positions, acting either individually or as a part of the organ of the legal person. The term liability should be construed so as to include either criminal or civil liability.

In addition, according to standard practice, paragraph 2 provides that a legal person can also be held liable when the lack of supervision or control by a person in a position to exercise control, has rendered possible the commission of the offences for its benefit. Paragraph 3 indicates that legal proceedings against a legal person do not preclude parallel legal proceedings against a natural person.

#### **Article 9 (Sanctions for legal persons)**

Article 9 sets out a requirement for penalties for legal persons held liable for the offences or conduct referred to in Articles 3 and 4. It requires effective, proportionate and dissuasive penalties, where the minimum obligation is to impose criminal or non-criminal fines. Other penalties that typically could apply to legal persons are also indicated.

#### **Article 10 (Jurisdiction)**

Article 10 contains procedural provisions on jurisdiction.

Paragraph 1 establishes a series of criteria conferring jurisdiction to prosecute and investigate cases involving the offences or conduct referred to in this Framework Decision. A Member State shall establish its jurisdiction in four situations:

- a) where the offence is committed in whole or in part on its territory, irrespective of the status or the nationality of the person involved (territoriality principle),

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<sup>18</sup> OJ C 10, 11.01.1997, p.1.



- b) where the offender is a national of that Member State (active personality principle),
- c) where the offence is committed for the benefit of a legal person established in the territory of that Member State,
- d) when the offence is committed against its institutions or people.

Given that not all Member States' legal traditions recognise extraterritorial jurisdiction for all types of criminal offences, paragraph 2 allows them not to apply the rules on jurisdiction set out in paragraph 1 as regards the situations covered by paragraph 1(b), (c) and (d).

Paragraph 3 states that the Member States shall inform the Council's General Secretariat where they decide to apply Paragraph 2.

### **Article 11 (Extradition and prosecution)**

This article shall no longer be applicable as soon as the Commission's proposal for a European arrest warrant is adopted, which will replace extradition within the EU. In particular, the European arrest warrant proposal does not foresee that nationality be a ground for refusal.

Article 11 takes account of the fact that some Member States do not extradite their own nationals and seeks to ensure that persons suspected of having committed terrorist offences do not evade prosecution because extradition is refused on the grounds that they are nationals of that State.

A Member State which does not extradite its own nationals must take the necessary measures to establish its jurisdiction over and, where appropriate, prosecute the offences concerned when committed by its own nationals on the territory of another Member State or against another Member State's institutions or people. This article does not regulate relations between Member States and third countries, which could be dealt with in international instruments.

### **Article 12 (Cooperation between Member States)**

The purpose of Article 12 is to take advantage of the international instruments on judicial cooperation to which Member States are parties and which should apply to the matters covered in this Framework Decision. For instance, arrangements on mutual legal assistance and extradition are contained in a number of bilateral and multilateral agreements as well as conventions of the European Union.

Paragraph 1 requires the Member States to lend each other every possible assistance in matters of judicial and police procedure relating to offences covered by this Framework Decision. Paragraph 2 states that if several Member States have jurisdiction, they will consult one another with a view to coordinating action and, where appropriate, to bringing effective prosecutions. The paragraph also requires full use to be made of existing cooperation mechanisms, judicial or otherwise, such as Europol, the exchange of liaison magistrates, the European Judicial Network and the Provisional Judicial Cooperation Unit.

### **Article 13 (Exchange of information)**

Article 13 (1) stresses the importance of having appointed points of contact for the purpose of exchanging information between Member States. Paragraph 2 provides for the circulation of information on which points of contact have been appointed for the purpose of exchanging information pertaining to these offences.

Paragraph 3 provides for the exchange of information between Member States relating to the future commission of a terrorist offence to enable the adoption of appropriate measures to prevent the commission of the offence.

### **Article 14 (Protection and assistance to victims)**

In the European Union's approach against terrorism special importance has been attached to the protection of and assistance to the victims. A Framework Decision was adopted by the Council on 15 March 2001 on the standing of victims in criminal proceedings. In addition, the Commission is working on a Green Paper concerning compensation to crime victims.

Victims of certain kind of terrorist offences (e.g. threats, extortion) are vulnerable. Therefore, it is appropriate for each Member State to ensure that investigation or prosecution not be dependent of the report or accusation made by a person subject to the offence.

### **Article 15 (Implementation and reports)**

Article 15 concerns the implementation and follow-up of this Framework Decision.

Paragraph 1 requires the Member States to take the necessary measures to comply with this Framework Decision by 31 December 2002.

Paragraph 2 requires the Member States to transmit by that date to the General Secretariat of the Council and to the Commission the provisions transposing the obligations imposed on them under this Framework Decision into national law. On that basis the Commission has to submit a report to the European Parliament and to the Council on the operation of this Framework Decision. Finally, the Council shall assess the extent to which Member States have complied with the obligations imposed by the Framework Decision.

### **Article 16 (Entry into force)**

Article 16 provides that this Framework Decision will enter into force on the third day following that of its publication in the Official Journal of the European Communities.

Proposal for a  
**COUNCIL FRAMEWORK DECISION**  
**on combating terrorism**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Union, and in particular Article 29, Article 31(e) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission,<sup>19</sup>

Having regard to the opinion of the European Parliament,<sup>20</sup>

Whereas:

- (1) Terrorism constitutes one of the most serious violations of the principles of human dignity, liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles on which the European Union is founded and which are common to the Member States.
- (2) All or some Member States are party to a number of conventions relating to terrorism. The European Convention on the Suppression of Terrorism<sup>21</sup> of 27 January 1977 establishes that terrorist offences cannot be regarded as a political offences or as offences connected with political offences or as offences inspired by political motives. That Convention was the subject of Recommendation 1170 (1991) adopted by the Standing Committee, acting on behalf of the Parliamentary Assembly of the Council of Europe, on 25 November 1991. The United Nations has adopted the Convention for the suppression of terrorist bombings of 15 December 1997 and the Convention for the suppression of financing terrorism of 9 December 1999.
- (3) At Union level, on 3 December 1998 the Council adopted the Action Plan of the Council and the Commission on how to best implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice<sup>22</sup>. Terrorism was referred to in the conclusions of the Tampere European Council of 15 and 16 October 1999<sup>23</sup>, and of the Santa María da Feira European Council of 19 and 20 June 2000<sup>24</sup>. It was also mentioned in the Commission's Communication to the Council and the European Parliament on the biannual update of the scoreboard to review progress on the

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<sup>19</sup> OJ C , , p. .

<sup>20</sup> OJ C , , p. .

<sup>21</sup> ETS No 90.

<sup>22</sup> OJ C 19, 23.01.1999, p.1.

<sup>23</sup> <http://ue.eu.int/en/Info/eurocouncil/index.htm>

<sup>24</sup> <http://ue.eu.int/en/Info/eurocouncil/index.htm>

creation of an area of "freedom, security and justice" in the European Union (second half of 15 2000)<sup>25</sup>. The La Gomera Declaration adopted at the Informal Council Meeting of 14 October 1995 affirmed that terrorism constitutes a threat to democracy, to the free exercise of human rights and to economic and social development.

- (4) On 30 July 1996 twenty five measures to fight against terrorism were advocated by the leading industrialised countries (G7) and Russia meeting in Paris.
- (5) The Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol convention)<sup>26</sup> refers in particular in Article 2 to improving the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism.
- (6) Other measures having an impact on terrorism adopted by the European Union are as follows: the Council Decision of 3 December 1998 instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities against the life, limb, personal freedom or property<sup>27</sup>; Joint Action 96/610/JHA of 15 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the creation and maintenance of a Directory of specialised counterterrorist competences, skills and expertise to facilitate counter-terrorism-cooperation between the Member States of the European Union<sup>28</sup>; Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on the creation of a European Judicial Network<sup>29</sup>, with responsibilities in terrorist offences, in particular Article 2; Joint Action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union<sup>30</sup>; and the Council Recommendation of 9 December 1999 on cooperation in combating the financing of terrorism<sup>31</sup>.
- (7) The important work performed by international organisations, in particular the UN and the Council of Europe, must be complemented with a view to closer approximation within the European Union. The profound change in the nature of terrorism, the inadequacy of traditional forms of judicial and police cooperation in combating it and the existing legal loopholes must be combated with new measures, namely, establishing minimum rules relating to the constituent elements and penalties in the field of terrorism.
- (8) Since these objectives of the proposed action cannot be sufficiently achieved by the Member States unilaterally, and can therefore, because of the need for reciprocity, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as referred to in Article 2 of the EU

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<sup>25</sup> COM (2000) 782 final.

<sup>26</sup> OJ C 316, 27.11.1995, p.1.

<sup>27</sup> OJ C 26, 30.1.1999, p.22.

<sup>28</sup> OJ L 273, 25.10.1996.

<sup>29</sup> OJ L 191, 7.7.1998, p. 4.

<sup>30</sup> OJ L 351, 29.12.1998, p.1.

<sup>31</sup> OJ C 373, 23.12.1999, p.1.

Treaty and as set out in Article 5 of the EC Treaty. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.

- (9) Measures should be adopted applying not only to terrorist acts committed within the Member States but also to those which otherwise affect Member States. While police and judicial cooperation measures are the appropriate way to combat terrorism in the Union and on an international level, complementary actions may be adopted in order to enhance the impact in the fight against terrorist acts and ensure consistency of the Union's external relations.
- (10) It is necessary that the definition of the constituent elements of terrorism be common in all Member States, including those offences referred to terrorist groups. On the other hand, penalties and sanctions are provided for natural and legal persons having committed or being liable for such offences, which reflect the seriousness of such offences.
- (11) The circumstances should be considered aggravated where the offence is committed with particular ruthlessness, affects a large number of persons or is of a particular serious and persistent nature; or committed against persons whose representative position, including internationally protected person, as members of an executive or legislature or their work, dealing with terrorists, makes them terrorist targets.
- (12) The circumstances must be mitigating if terrorists, renouncing their terrorist activity, provide the administrative or judicial authorities with some relevant information helping them to fight against terrorism.
- (13) Jurisdictional rules must be established to ensure that the offence may be prosecuted.
- (14) The European Convention on Extradition of 13 December 1957 is taken into account in order to facilitate prosecution when the offence is committed in a Member State which does not extradite its own nationals.
- (15) In order to improve cooperation and in compliance with data protection rules, and in particular the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data<sup>32</sup>, Member States should afford each other the widest judicial mutual assistance. Operational contact points should be established for the exchange of information or adequate use should be made of existing cooperation mechanism for that purpose.
- (16) Victims of certain kind of terrorist offences, such as threats, extortion, can be rather vulnerable. Each Member State should accordingly ensure that investigation or prosecution not be dependent on the report or accusation made by a person subject to the offence.

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<sup>32</sup> ETS No 108.

- (17) This Framework Decision respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, and notably Chapter VI thereof.

HAS DECIDED AS FOLLOWS :

*Article 1- Subject matter*

The purpose of this Framework Decision is to establish minimum rules relating to the constituent elements of criminal acts and to penalties for natural and legal persons who have committed or are liable for terrorist offences which reflect the seriousness of such offences.

*Article 2 – Scope*

This Framework Decision shall apply to terrorist offences:

- (a) committed or prepared in whole or in part within a Member State; or
- (b) committed by a national of a Member State; or
- (c) committed for the benefit of a legal person established in a Member State; or
- (d) committed against the institutions or people of a Member State.

*Article 3 – Terrorist Offences*

1. Each Member State shall take the necessary measures to ensure that the following offences, defined according to its national law, which are intentionally committed by an individual or a group against one or more countries, their institutions or people with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of a country, will be punishable as terrorist offences:
  - (a) Murder;
  - (b) Bodily injuries;
  - (c) Kidnapping or hostage taking;
  - (d) Extortion;
  - (e) Theft or robbery;
  - (f) Unlawful seizure of or damage to state or government facilities, means of public transport, infrastructure facilities, places of public use, and property;
  - (g) Fabrication, possession, acquisition, transport or supply of weapons or explosives;
  - (h) Releasing contaminating substances, or causing fires, explosions or floods, endangering people, property, animals or the environment;

- (i) Interfering with or disrupting the supply of water, power, or other fundamental resource;
  - (j) Attacks through interference with an information system;
  - (k) Threatening to commit any of the offences listed above;
  - (l) Directing a terrorist group;
  - (m) Promoting of, supporting of or participating in a terrorist group.
2. For the purpose of this Framework Decision, terrorist group shall mean a structured organisation established over a period of time, of more than two persons, acting in concert to commit terrorist offences referred to in paragraph (1)(a) to (1)(k).

*Article 4 - Instigating, aiding, abetting and attempting*

Member States shall ensure that instigating, aiding, abetting or attempting to commit a terrorist offence is punishable.

*Article 5 - Penalties and sanctions*

1. Member States shall ensure that terrorist offences and conducts referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive penalties.
2. Member States shall ensure that terrorist offences referred to in Article 3 are punishable by terms of deprivation of liberty with a maximum penalty that is no less than the following:
  - (a) the offence referred to in Article 3(1)(a): Twenty years
  - (b) the offence referred to in Article 3(1)(l): Fifteen years
  - (c) the offences referred to in Article 3(1)(c), (g), (h) and (i): Ten years
  - (d) the offence referred to in Article 3(1)(m): Seven years
  - (e) the offences referred to in Article 3(1) (f)and (j): Five years
  - (f) the offence referred to in Article 3(1)(b): Four years
  - (g) the offences referred to in Article 3(1)(d), (e), and (k) : Two years.
3. Member States shall ensure that ancillary or alternative sanctions such as community service, limitation of certain civil or political rights or publication of all or part of a sentence may be imposed for terrorist offences and conduct referred to in Articles 3 and 4.

4. Member States shall ensure that fines can also be imposed for terrorist offences and conduct referred to in Articles 3 and 4.

*Article 6 - Aggravating circumstances*

Without prejudice to any other aggravating circumstances defined in their national legislation, Member States shall ensure that the penalties and sanctions referred to in Article 5 may be increased if the terrorist offence:

- (a) is committed with particular ruthlessness; or
- (b) affects a large number of persons or is of a particular serious and persistent nature; or
- (c) is committed against Heads of State, Government Ministers, any other internationally protected person, elected members of parliamentary chambers, members of regional or local governments, judges, magistrates, judicial or prison civil servants and police forces.

*Article 7 - Mitigating Circumstances*

Member States shall ensure that the penalties and sanctions referred to in Article 5 may be reduced if the offender:

- (a) renounces terrorist activity, and
- (b) provides the administrative or judicial authorities with information helping them to:
  - (i) prevent or mitigate the effects of the offence,
  - (ii) identify or bring to justice the other offenders,
  - (iii) find evidence, or
  - (iv) prevent further terrorist offences.

*Article 8 - Liability of legal persons*

1. Member States shall ensure that legal persons can be held liable for terrorist offences or conduct referred to in Articles 3 and 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
  - (a) a power of representation of the legal person, or
  - (b) an authority to take decisions on behalf of the legal person, or
  - (c) an authority to exercise control within the legal person.
2. Apart from the cases provided for in paragraph 1, Member States shall ensure that a legal person can be held liable where the lack of supervision or control by a person



referred to in paragraph 1 has made possible the commission of terrorist offences or conduct referred to in Articles 3 and 4 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who commit terrorist offences or engage in the conducts referred to in Articles 3 and 4.

#### *Article 9 – Sanctions for legal persons*

1. Member States shall ensure that a legal person held liable pursuant to Article 8(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:
  - (a) exclusion from entitlement to public benefits or aid,
  - (b) temporary or permanent disqualification from the practice of commercial activities,
  - (c) placing under judicial supervision,
  - (d) a judicial winding-up order,
  - (e) temporary or permanent closure of establishment which have been used for committing the offence.
2. Member States shall ensure that a legal person held liable pursuant to Article 8(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

#### *Article 10 - Jurisdiction*

1. Member States shall establish its jurisdiction with regard to terrorist offences or conduct referred to in Articles 3 and 4 where the offence or conduct has been committed:
  - (a) in whole or in part within its territory; or
  - (b) by one of its nationals, provided that the law of that Member State may require the conduct to be punishable also in the country where it occurred; or
  - (c) for the benefit of a legal person that has its head office in the territory of that Member State; or
  - (d) against its institutions or people.
2. A Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, a jurisdiction rule set out in paragraph 1(b), (c) or (d).
3. Member States shall inform the General Secretariat of the Council and the Commission accordingly, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

### *Article 11 - Extradition and prosecution*

1. A Member State which, under its law, does not extradite its own nationals shall establish its jurisdiction over terrorist offences or conduct referred to in Articles 3 and 4 when committed by its own nationals on the territory of another Member State or against another Member State's institutions or people.
2. A Member State shall, when one of its nationals is alleged to have committed, in another Member State, a terrorist offence or conduct referred to in Articles 3 and 4, and it does not extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate.

In order to enable prosecution to take place, the Member State in which the offence or conduct was committed shall forward to the competent authorities of the other State all the relevant files, information and exhibits in accordance with the procedures laid down in Article 6(2) of the European Convention on Extradition of 13 December 1957. The requesting Member State shall be informed of the initiation and outcome of any prosecution.

3. For the purpose of this Article, a "national" of a Member State shall be construed in accordance with any declaration made by that State under Article 6(1)(b) and (c) of the European Convention on Extradition.

### *Article 12 - Cooperation between Member States*

1. In accordance with the applicable conventions, multilateral or bilateral agreements or arrangements, Member States shall afford each other the widest measure of mutual assistance in respect of proceedings relating to terrorist offences or conduct referred to in Articles 3 and 4.
2. Where several Member States have jurisdiction in respect of such offences, they shall consult one another with a view to coordinating their action in order to prosecute effectively. They shall make full use of judicial cooperation and other mechanisms.

### *Article 13 - Exchange of information*

1. Each Member State shall designate operational contact points, which may be an existing operational structures or one newly established for this purpose, for the exchange of information and for other contacts between Member States for the purposes of applying this Framework Decision.
2. Each Member State shall inform the General Secretariat of the Council and the Commission of its operational contact point as referred to in paragraph 1. The General Secretariat shall notify that information to the other Member States.
3. Where a Member State has information relating to the future commission of a terrorist offence affecting another Member State, it shall provide that information to the other Member State. For that purpose operational contact points referred to in paragraph 1 may be used.

*Article 14 - Protection and assistance to victims*

Each Member State shall provide that investigations into or prosecution of terrorist offences over which it has jurisdiction shall not be dependent on the report or accusation made by a victim of the offence, at least in cases where Article 8(1)(a) applies.

*Article 15 - Implementation and reports*

Member States shall take the necessary measures to comply with this Framework Decision by 31 December 2002.

They shall communicate to the General Secretariat of the Council and to the Commission the text of any provisions they adopt and information on any other measures they take to comply with this Framework Decision.

On that basis the Commission shall, by 31 December 2003, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied where necessary by legislative proposals.

The Council shall assess the extent to which the Member States have complied with this Framework Decision.

*Article 16 - Entry into force*

This Framework Decision shall enter into force on the third day following that of its publication in the *Official Journal of the European Communities*.

Done at Brussels,

*For the Council  
The President*