



UNITED NATIONS
Office on Drugs and Crime

LEGISLATIVE GUIDE TO THE UNIVERSAL LEGAL REGIME AGAINST TERRORISM

Prepared by the United Nations Office on Drugs and Crime

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

LEGISLATIVE GUIDE TO THE UNIVERSAL LEGAL REGIME AGAINST TERRORISM

Prepared by
the United Nations Office
on Drugs and Crime



UNITED NATIONS
New York, 2008

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

Material in this publication may be freely quoted or reprinted, but acknowledgement is requested, together with a copy of the publication containing the quotation or reprint.

UNITED NATIONS PUBLICATION
Sales No.: E.08.V.9
ISBN 978-92-133780-8

The designations employed and the presentation of material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area of its authorities, or concerning the delimitation of its frontiers or boundaries.

This publication has not been formally edited.

Contents

	Page
<i>Preface</i>	v
I. The universal legal regime against terrorism	1
A. Introduction	1
B. The universal conventions and protocols	1
C. Binding resolutions of the Security Council concerning terrorist acts and terrorist funds	3
D. Fundamental considerations in providing legislative advisory services	5
E. Insistence that counter-terrorism measures be based upon human rights standards	5
F. The role of the criminal justice system in preventing terrorist acts	6
G. Prohibiting incitement to terrorism as required by the ICCPR	7
H. Steps in becoming a party to and implementing the conventions and protocols	10
II. Criminalization and other legislative requirements of the terrorism related conventions and protocols	13
A. Common elements of the conventions and protocols	13
B. Agreements relating to the safety of civil aviation developed by the International Civil Aviation Organization (ICAO)	13
C. Agreements relating to maritime safety developed by the International Maritime Organization (IMO)	14
D. Convention on the Physical Protection of Nuclear Material, 1979 and its 2005 Amendment developed by the IAEA	15
E. Agreements relating to other protections for civilians developed at the initiative of the General Assembly	16
F. Other legislative requirements relating to the financing of terrorism	19
G. Issues common to all conventions and protocols	24
H. Forms of participation in an offence	29
I. Elements of knowledge and intent	30
III. Jurisdiction over offences	33
A. Jurisdiction based upon territoriality	33
B. Jurisdiction based upon registration of aircraft or maritime vessels	33

C. Jurisdiction based upon nationality of the offender 34

D. Jurisdiction based upon protection of nationals and national interests 34

E. Jurisdiction based upon the presence of a person in the national territory 35

IV. Obligation to extradite or prosecute 37

A. Nature and consequences of the obligation 37

B. Obligation to conduct an inquiry, to report findings and to advise of intent 38

V. International cooperation in criminal matters 39

A. Dependence of the legal regime against terrorism upon international cooperation 39

B. Mutual legal assistance 39

C. Extradition 40

D. Dual criminality 40

E. Protections for political activity, against discrimination and requiring fair treatment 41

F. Concluding human rights considerations 44

Annex 45

Preface

The Terrorism Prevention Branch (TPB) of the United Nations Office on Drugs and Crime (UNODC) is mandated to provide legal and related assistance to requesting countries to ratify and implement the universal legal instruments against terrorism. The Global Project on Strengthening the Legal Regime against Terrorism provides the overall framework for delivering such assistance to countries. The overall project objective is to support Member States in achieving a functional universal legal regime against terrorism in accordance with the principles of the rule of law, especially by facilitating the ratification and implementation of the universal legal instruments against terrorism and enhancing the related capacity of national criminal justice systems.

To assist in identifying and drafting the laws necessary or desirable to implement the terrorism-related instruments, UNODC/TPB furnishes reference materials and technical advice, both by video and telephone conferences, by electronic communications, and by field missions when they are cost effective. These efforts are designed to assist the work of the national officials who ultimately must draft and administer legislation incorporating international commitments into national law. Providing these legal advisory services encourages adoption of the instruments by removing some of the uncertainties and technical obstacles that accompany membership in any international convention. In delivering this assistance UNODC/TPB makes extensive use of several technical assistance tools. Please see the annex for a full listing of available tools and publications and information on how to access them.

This updated version of the *Legislative Guide* has been prepared to facilitate the task of national authorities in adopting and implementing the universal legal regime against terrorism. It replaces a publication issued in 2003, the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*. Both the 2003 and 2008 versions of the *Guide* were prepared for the information of government officials and others concerned with the international legal aspects of the prevention and suppression of terrorism. The 2003 *Guide* grouped the then existing 12 conventions and protocols according to subject matter, that is as relating to: (a) civil aviation; (b) status of the victim; (c) dangerous materials; (d) vessels and fixed platforms; and (e) the financing of terrorism. The 2008 *Guide* groups the offences according to the entities of the United Nations system responsible for their development in order to place recent developed instruments in context and to indicate sources of technical expertise.

This page intentionally left blank

I. The universal legal regime against terrorism

A. Introduction

A key element of the international community's response to terrorism has been the gradual development, since 1963, of a legal infrastructure of terrorism-related conventions and protocols, simply meaning multilateral treaties and supplemental agreements. Those legal instruments, numbering 16 including recent protocols and amendments, require the States that adopt them to criminalize most foreseeable terrorist acts. Another core part of the global legal regime to counter terrorism is a series of Security Council resolutions relating to terrorism, many of them adopted under the authority of chapter VII of the United Nations Charter, which empowers the Security Council to adopt resolutions legally binding on all Member States of the United Nations.

This legal regime against terrorism offers the legal framework to address serious crimes committed by terrorists utilizing a wide array of criminal justice mechanisms. It is based on the premise that perpetrators of terrorist crimes should be brought to trial by their national governments, or should be extradited to a country willing to bring them to trial. The well-known principle of *aut dedere aut judicare* (extradite or prosecute) is meant to make the world inhospitable to terrorists (and those who finance and support them) by denying them safe havens.

Yet it is essential to emphasize that the legal authority to enforce these measures against terrorism is exclusively within the responsibility of sovereign States. No international tribunal exists with competence to prosecute an offender for aircraft or ship hijacking, bombings of civilian targets or financing of terrorism.¹ The legal instruments developed over decades to deal with those offences can only be implemented under national legislation which criminalizes the defined offences, creates appropriate jurisdiction in domestic courts, and authorizes the cooperation mechanisms provided in the international instruments and essential to their effectiveness.

B. The universal conventions and protocols

The selection of the sixteen universal instruments² examined herein reflects the annex to General Assembly resolution 51/210 of 17 December 1996 and General Assembly resolution 61/40 of 18 December 2006. Resolution 51/210 urged Member States to become members of ten specific agreements. Those agreements included:

¹The International Criminal Court, created in 1998 by the Treaty of Rome, is granted jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Jurisdiction over acts of terrorism was rejected during the negotiations that resulted in the Court's creation.

²The term universal is used to describe those agreements open to membership to all States of the United Nations or its affiliated specialized agencies, such as the International Civil Aviation Organization, as opposed to agreements open only to members of a regional or other restricted groupings, such as the Council of Europe.

- (a) Four conventions and one protocol elaborated by the International Civil Aviation Organization (ICAO);³
- (b) Two conventions developed under the leadership of the General Assembly;⁴
- (c) One convention elaborated by the International Atomic Energy Agency (IAEA);⁵
- (d) One convention and a protocol developed by the International Maritime Organization (IMO).⁶

In addition, the 1996 resolution established an Ad Hoc Committee open to all Member States:

... to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism.

Within a year that Committee had elaborated the 1997 International Convention for the Suppression of Terrorist Bombings. It was given an additional mandate by the General Assembly to develop an agreement on terrorist financing, resulting in the International Convention for the Suppression of the Financing of Terrorism of 1999. The International Convention for the Suppression of Acts of Nuclear Terrorism was adopted in 2005 and came into force in July 2007. Negotiations on a comprehensive instrument dealing with terrorism continue as of 2008. The instruments developed by the specialized agencies are also being updated. The IMO developed two protocols in 2005 to update its 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the 1988 Protocol for the Suppression of Acts against the Safety of Fixed Platforms on the Continental Shelf. The IAEA adopted Amendments in 2005 to its 1980 Convention on the Physical Protection of Nuclear Material.⁷ The ratification status of all 16 instruments can be found at www.un.org/sc/ctc under International Law.

³Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aircraft, 1971; Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 1988.

⁴Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; International Convention against the Taking of Hostages, 1979.

⁵Physical Protection of Nuclear Material Convention, 1979.

⁶Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental shelf, 1988.

⁷The organization sponsoring negotiations for a convention typically becomes the treaty depository. All of the terrorism-related treaties developed by a General Assembly committee name the Secretary-General of the United Nations in New York as their depository. The specialized agency agreements vary. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft names the ICAO as its depository. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aircraft identify the Governments of the former Union of Soviet Socialist Republics, the United Kingdom and the United States of America as the depositaries for instruments of ratification, accession and denunciation. The 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation identifies the same three depository governments and adds the International Civil Aviation Organization in Montreal, which became the sole depository for the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection. The 1979 Physical Protection of Nuclear Material Convention and its 2005 Amendment both provide for signature either at the IAEA in Vienna or at UN Headquarters in New York, and identify the Director General of the IAEA as the depository for the original convention text. This reference to the IAEA Director General appears to be treated as an implied designation of the IAEA as the depository for subsequent treaty purposes, although no explicit reference is made in either instrument to the place of deposit of instruments of ratification, accession or denunciation. The IMO instruments all designate the Secretary General of that organization, headquartered in London, as their depository. The practical significance of these varying designations is that a ratification or accession document sent to the wrong depository may never take effect. It would be wrong to assume that the Secretary-General of the United Nations in New York is the depository for all 16 of the universal terrorism-related instruments. Moreover, advisory services on technical aspects of certain specialized instruments may be within the particular competence of the organization that developed the agreement, such as information from the IAEA in Vienna on the levels of protection required under the 2005 Amendment to the IAEA Physical Protection of Nuclear Material Convention, or from the IMO in London on ship boarding procedures under the 2005 Protocol to the Maritime Safety Convention.

On 20 September 2006, the Member States of the United Nations adopted General Assembly resolution 60/288. In a Plan of Action of 8 September 2006 annexed to this resolution, the Assembly agreed upon the United Nations Global Counter-Terrorism Strategy. In paragraph III-7 of that Plan of Action, the Member States resolved:

7. To encourage the United Nations Office on Drugs and Crime, including its Terrorism Prevention Branch, to enhance, in close consultation with the Counter-Terrorism Committee and its Executive Directorate, its provision of technical assistance to States, upon request, to facilitate the implementation of the international conventions and protocols related to the prevention and suppression of terrorism and relevant United Nations resolutions.

Resolution 61/40 of 18 December 2006 followed soon after the adoption of the Global Strategy. The General Assembly therein called upon Member States to implement that Strategy and upon all States to become parties to all of the ten conventions and protocols referenced in resolution 51/210 of 1996, as well as to the subsequent three conventions, two protocols and one amendment.⁸ In its resolution 62/71 of 8 January 2008, the General Assembly repeated the call made in the Global Strategy for the Terrorism Prevention Branch of UNODC to continue its work assisting States in becoming parties to and implementing the terrorism-related conventions and protocols, adding that this should include national capacity-building.

C. Binding resolutions of the Security Council concerning terrorist acts and terrorist funds

States become Members of the United Nations by adopting its Charter, which is an international convention with legally binding obligations. Under Articles 24, 25 and 48 of the Charter those obligations include the duty to carry out decisions taken by the Security Council when it is acting to preserve peace and security under Chapter VII of the Charter. In October 1999 the Security Council adopted resolution 1267, demanding that the Taliban in Afghanistan turn over Osama bin Laden to a country where he would be brought to justice. In order to enforce the demand the Council decided that all States should:

4(b) Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.

Non-compliance with the resolution by the Taliban led to resolution 1333 in December 2000, expanding the freezing obligation to “funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization”. Resolution 1390 of January 2002 continued the freezing of funds and provided for regular updating by the Committee, which came to be known as the Al-Qaida

⁸While tragic events have demonstrated the grave risk to United Nations personnel from terrorism, the 1994 Convention on the Safety of United Nations and Associated Personnel is not included on this list. Historically, that Convention was developed following a series of deaths of United Nations military and police personnel in conflict situations.

and Taliban Sanctions Committee, of the list of designated individuals and entities. That updated list is known as the Consolidated List because it consolidates alphabetically organized lists of Taliban associated individuals, Taliban associated entities, Al-Qaida associated individuals, Al-Qaida associated entities and delisted individuals and entities. The list is available at www.un.org/sc/committees/1267/consolist.shtml. As of 21 January, 2008 it named 142 individuals associated with the Taliban; 228 individuals and 112 entities associated with the Al-Qaida organization, and 11 individuals and 24 entities removed from the list.⁹

On 28 September 2001 the Security Council adopted resolution 1373, expanding freezing obligations to persons (and certain related persons and entities) who commit or attempt to commit terrorist acts. This freezing obligation therefore applies to a broader group than the Taliban and Al-Qaida associated individuals and entities listed under resolution 1267 (1999) and its successor resolutions. Paragraph 1 of resolution 1373 (2001) requires the freezing without delay of:

“funds and other financial assets or economic resources of persons who **commit, or attempt to commit, terrorist acts** or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities. (Emphasis added).

The resolution required the criminalization of the financing of terrorism, which led to a number of law enforcement and international cooperation measures. It also called upon Member States to become parties, as soon as possible, to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism. This appeal to become parties to relevant agreements can also be understood to include regional agreements related to terrorism. Those instruments can play a valuable role complementing bilateral treaties and universal terrorism-related conventions and protocols, so long as those arrangements are “consistent with the Purposes and Principles of the United Nations” in accordance with Article 52 of the United Nations Charter.

Unlike Security Council resolution 1267 (1999), resolution 1373 (2001) does not specify particular individuals or entities whose funds must be frozen because those persons are involved with terrorist acts, nor does it establish a listing mechanism. It also does not define “terrorist acts”. At a minimum that phrase would include crimes that a country denominated as terrorism or terrorist acts under domestic law. Most countries would consider that the offences in the universal terrorism-related conventions and protocols adopted by that country would be considered terrorist acts. In view of the many references describing terrorism and terrorist acts as victimization of civilians in resolutions of the Security Council¹⁰ and the General Assembly,¹¹ the definition in Article 2.1 (b) of the Financing of Terrorism Convention provides another practical guide for identification of acts for which the provision or collection of funds should be forbidden:

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

⁹Relevant successor resolutions dealing with procedures for listing, delisting and humanitarian exceptions include resolutions 1333 (2000), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1730 (2006) and 1735 (2006).

¹⁰See Security Council resolutions 1456 (2003), 1540 (2004) and 1566 (2004), 1624 (2005) and 1735 (2006).

¹¹See General Assembly resolutions 56/88, 57/27, 58/81 and 58/174, 60/288 and 61/40.

D. Fundamental considerations in providing legislative advisory services

The task assigned to the UNODC by the Global Counter-Terrorism Strategy is to continue the work it has done since 2002 by providing requesting States with technical assistance to facilitate the implementation of the terrorism-related conventions and protocols and of related Security Council resolutions.¹² In executing that task, the legal advisory services provided by UNODC's Terrorism Prevention Branch are conducted according to certain fundamental considerations. A dominant concern is to scrupulously avoid any interference in the internal political affairs of the States requesting legal advisory services. That value is served by providing objective advice, in response to a State's express request, on gaps that may exist between the international requirements of the universal terrorism-related agreements and the provisions of national law and on possible solutions. This technical, apolitical, approach is reinforced by TPB's consistent and limited focus upon terrorism as a set of criminal offences with precise elements defined by the relevant United Nations instruments.

This is in no way intended to undervalue the need for governments and elements of the United Nations system to address terrorist acts and groups in their political and social context and to deal with the conditions conducive to the spread of terrorism listed in Section 1 of the Global Strategy's Plan of Action, as is being done by the organizations and entities in the Secretary-General's Counter-Terrorism Implementation Task Force (CTITF). However, as is evident from the listing of those conditions, many of them cannot be influenced in any significant way by international criminal justice processes.¹³ Moreover, the mandate of the Terrorism Prevention Branch is geared towards advancing the implementation of the universal terrorism-related instruments. Ensuring that the technical assistance provided by the Branch is confined to criminal justice and related procedural aspects of countering terrorism, enables the Branch to work clearly within the limits of its mandate. It also capitalizes upon the advantages of UNODC's established expertise with penal law conventions and international cooperation mechanisms.

E. Insistence that counter-terrorism measures be based upon human rights standards

The UN's counter-terrorism efforts are built upon the uncompromising conviction that successful terrorism prevention efforts should not merely comply with, but must actually be based upon, the spirit and the language of rule of law standards, specifically including the guarantees of the International Covenant on Civil and Political Rights (ICCPR). The premise of this approach is that when communities believe that terrorist acts can be successfully prevented and punished by legal mechanisms that faithfully incorporate human rights protections, there will be less demand for harsher measures and more respect for the rule of law. Instead of a competition in which either security or liberty must be reduced for the other value to be maintained, it is possible to produce synergy so that both effective crime control and respect for human rights are increased. Moreover, the social compact in which citizens willingly support

¹²Resolution 62/71 is the latest GA resolution, regarding TPB's mandate as of January 2008.

¹³"... including but not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization, and lack of good governance, while recognizing that none of these conditions can excuse or justify acts of terrorism." Section 1 of the Global Counter-Terrorism Strategy's Plan of Action, UN doc. A/Res/60/288.

their government, obey the law and avoid vigilantism depends upon public confidence that the government will do its part to prevent terrorist attacks and deal firmly but fairly with those accused of planning or committing such attacks.

Article 6 of the International Covenant on Civil and Political Rights (ICCPR), the foundational human rights document in the criminal justice field, provides that: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.

There can be no clearer example of an arbitrary deprivation of life than the killing by terrorists of harmless civilians enjoying a holiday or shopping. To the citizen, the guarantee of the ICCPR that the right to life will be protected means preventing terrorists from murdering them and their families and friends, not merely supplying a fair and efficient system for trial and punishment after an attack has been accomplished. Protection by law thus demands legal measures to interrupt and interdict preparations by terrorists aimed at arbitrarily depriving civilians of their lives. This interruption and interdiction of terrorist planning and preparation before innocent civilians become victims is infinitely preferable to conducting autopsies and crime scene investigations after a tragedy has occurred and is essential to preserving the faith of citizens in the rule of law and in the credibility of their government.

This insistence upon treating human rights guarantees as the foundation for counter-terrorism technical assistance is simply one aspect of providing integrated legal advisory services. The Global Project on Strengthening the Legal Regime against Terrorism is carefully supervised and subject to great transparency to ensure that it remains within its mandates. Subject to that limitation, however, it would be wasteful to encourage a country to comply only with the technical elements of the Financing of Terrorism Convention and relevant Security Council resolutions on the freezing of terrorist property, without advising the Government of that country to simultaneously consider the human rights implications of its measures, together with the provisions of the Financial Action Task Force’s 40 Recommendations for the control of money laundering and its Nine Special Recommendations relating to the financing of terrorism. Similarly, UNODC technical experts must be prepared to inform States of applicable best practices for implementing international requirements, even though the universal instruments often impose general obligations without specifying the particular legislative language or international cooperation mechanism by which fulfillment of those obligations should be accomplished.

F. The role of the criminal justice system in preventing terrorist acts

Preventive measures exemplify the need to inform countries of pertinent trends and standards, as they are intimately related to the simultaneous achievement of respect for human rights and effective criminal justice practices. The existing conventions and protocols contain no conspiracy, planning, preparation or other prospective provisions. They punish only offences that have been “committed”, “attempted”, “aided or abetted”, “ordered”, “directed” or “contributed to”.¹⁴

¹⁴The only exception is the Financing Convention. That instrument achieves a prospective, preventive effect by establishing as an offence the non-violent financial preparations that precede and support violent terrorist acts. It also avoids ambiguity by specifying that the offence of providing or collecting funds for a terrorist act is not dependent upon commission of the planned violent act. Part II, Section H, explains why the offence of ordering or directing others to commit a terrorist act, established under other recent terrorism-related conventions, arguably may not apply when the act being ordered or directed is not attempted or accomplished.

As a representative example, the offence established by the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation would not have been committed until an attack at an airport were actually attempted or accomplished. That would be true even if overwhelming evidence existed that a group were planning an attack, had secured automatic weapons, ammunition and hand grenades and had printed manifestos announcing their intention to kill as many travelers in the airport as possible in order to publicize their political or ideological cause. Obviously, a regime for international cooperation is not completely satisfactory if a legal prerequisite for its use is an attempted or successful attack with the potential to inflict hundreds of deaths.

Moreover, the phenomenon of suicide attacks makes the deterrent effect of the criminal justice process seem irrelevant. The realization that the criminal justice system cannot deter attackers who are willing to die for their cause can lead to calls for a militarized response, with its obvious risks of further polarization and a weakened respect for procedural protections. To reduce that danger and to contribute to the reduction of terrorism while maintaining confidence in the rule of law, there is increased recognition that intervention against terrorist acts must be possible at the planning and preparation stage. One of the Security Council's mandatory decisions in resolution 1373 of 28 September 2001, is that all States must bring to justice not only those who perpetrate terrorist acts, but also those who "... participate in the **financing, planning, preparation** of such acts." (Emphasis added).

G. Prohibiting incitement to terrorism as required by the ICCPR

The UNODC Terrorism Prevention Branch has prepared a technical assistance working paper analyzing the crucial importance of criminal justice preventive measures in anti-terrorism efforts. This paper is entitled *Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments (2006)*. It reviews the substantive and procedural mechanisms that permit effective intervention against terrorist planning and preparation, while observing human rights guarantees. Among the substantive offences reviewed are *association de malfaiteurs* and conspiracy, material support for terrorism, preparation offences, recruitment for, training and membership in a terrorist group. Among the procedural mechanisms are undercover operations, technical surveillance, witness incentives, evidentiary rules, regulatory controls and international cooperation improvements.

The Financing of Terrorism Convention was the first global instrument to require the imposition of criminal liability for the logistical support that precedes almost every significant act of terrorist violence and is essential to the groups that form the institutional infrastructure of terrorism. Intense consideration at the global level is now being given to measures aimed at the psychological indoctrination that incites to hatred and violence and is similarly essential to motivating acts of organized terrorism. Article 20, paragraph 2 of the ICCPR requires that:

Any advocacy of national, racial or religious hatred that constitutes **incitement to discrimination, hostility or violence shall be prohibited by law.** (Emphasis added).

General Comment 11 (1983) of the independent experts making up the Human Rights Committee created pursuant to the ICCPR emphasizes that for Article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described here are contrary to public policy and providing for an appropriate sanction in case of violation.

Neither the ICCPR Article 20 nor General Comment 11 specifies that the prohibition or sanction against advocacy of discrimination, hostility or violence must be criminal in nature. Realistically, however, it is difficult to imagine non-penal sanctions being effective against dedicated clandestine terrorist groups. The rule of law as expressed in other international instruments recognizes that incitement to crime may itself be criminalized. Article 25-3 (e) of the 1998 Statute of the International Criminal Court imposes criminal responsibility for any persons who:

In respect of the crime of genocide, directly and publicly incites others to commit genocide.¹⁵

The United Nations Security Council has addressed incitement to terrorism in two of its resolutions. In paragraph 5 of resolution 1373 (2001) the Council:

Declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and knowingly financing, planning **and inciting** terrorist acts are also contrary to the purposes and principles of the United Nations. (Emphasis added).

The Council focused specifically on the incitement problem in resolution 1624 (2005), in which it:

1. Calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

(a) **Prohibit by law incitement to commit a terrorist act or acts;**

(b) Prevent such conduct;

(c) Deny safe haven to any persons with respect to whom there is credible and relevant evidence giving serious reasons for considering that they have been guilty of such conduct; (Emphasis added);

[...]

3. Calls upon all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, and to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance and to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters;

Pursuant to the Council's direction, the Counter-Terrorism Committee created by resolution 1373 (2001) prepared a report, S/2006/737 dated 15 September 2006, on the implementation of resolution 1624 (2005). Paragraphs 6 and 7 of the report indicated that most of the reporting States that prohibit incitement, do so by expressly criminalizing the making of public statements inciting the commission of a terrorist act. Other States indicated that private

¹⁵See also Article 3.1 (c) (iii) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This article requires a State Party, subject to its constitutional principles and the basic concepts of its legal system, to criminalize "publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly".

communications were included if they amounted to counseling, inducing or soliciting acts of terrorism. Most of the prohibitions imposed criminal liability without regard to whether a terrorist act was actually attempted or committed, which would help to fill the gap resulting from the reactive nature of the universal terrorism-related conventions and protocols.

The inadequacy of reactive criminal law mechanisms, that depend upon violence being attempted or accomplished, to protect society against persons willing to die for a cause is also leading to greater attention to preventive anti-terrorism mechanisms at the regional level. The Council of Europe, with 47 Member States, long ago developed a Convention on the Suppression of Terrorism (1977). In 2005, its Members negotiated a Convention on the Prevention of Terrorism, which has entered into force in June 2007. Among its preventive measures are the establishment of new offences of public provocation to commit a terrorist offence,¹⁶ recruitment for terrorism and training for terrorism. Article 5 of the Conventions thus states:

For the purposes of this Convention, “public provocation to commit a terrorist offence” means the distribution of, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

The European Convention is not limited to incitement based upon national, racial or religious hatred. However, since those are the principal grounds used for recruitment for current terrorist acts and groups, the Convention effectively implements the ICCPR requirement that advocacy of hatred that incites violence be prohibited. Of course, the offence established in the Prevention of Terrorism Convention also must comply with the requirement of ICCPR Article 19, that everyone shall have the right to hold opinions without interference, and that:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds [...]

The Convention’s incitement offence applies only to public provocation to commit criminal offences clearly defined by law, when done with the specific criminal intent to incite the commission of an offence, so mere careless conduct or unforeseen consequences will not result in criminal liability. In view of those safeguards, the provocation offence appears consistent with ICCPR paragraph 3 of Article 19, which states that:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For the respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

¹⁶A terrorist offence is defined as an offence established under any of the universal terrorism-related instruments from the Aircraft Seizure Convention of 1970 through the Financing of Terrorism Convention of 1999.

H. Steps in becoming a party to and implementing the conventions and protocols

The process of becoming party to an international treaty or convention (multilateral treaty) involves both an international and a domestic component. The international component consists of a formal procedure dictated by the terms of the agreement and governed by international law principles. The terrorism-related conventions and protocols require the deposit of a formal legal instrument with the depository identified in footnote 7 above for the particular agreement. This document must express, in the appropriate international law terminology, the country's willingness to be bound by the obligations of that instrument. Obviously, however, that formal process will not take place until a domestic component of the process has been satisfied. A political decision leading to satisfaction of the approval requirements of a country's constitutional or other legal rules will be necessary, and often legislative action as well.

An analysis of legislation required in order to meet international counter-terrorism standards is normally the first step to becoming a party to the global terrorism-related agreements. Governments and legislatures understandably want to know in advance what changes in their legal system will be required as a result of membership in an international treaty or compliance with other international standards. Some countries will not, either because of domestic law or as a matter of policy, adopt a treaty until legislation is in effect that permits the fulfillment of all of its international obligations, and do not consider a treaty binding until implemented by a domestic law.¹⁷ This is often referred to as the "dualist" position, in that international law and domestic law are considered as two separate systems, so that legislation is required to introduce an international obligation into the domestic legal order.¹⁸

In other countries, adoption of a treaty may automatically incorporate its provisions into domestic law, which would permit articles relating to mutual legal assistance and other procedural matters to serve as self-executing legal authorization for their use upon the treaty entering into force, without further executive or legislative action except for the practical step of publication of the treaty in the official Gazette or otherwise giving notice to the public. However, even countries that follow what is called a "monist" tradition of automatic treaty incorporation will require legislation to provide non-self executing elements essential to implementation.¹⁹ The clearest example of this relates to criminalization of offences. None of the terrorism-related agreements specify a penalty or even a penalty range for the offences defined therein. Typical language is found in Article 4 of the International Convention for the Suppression of the Financing of Terrorism:

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

- (a) To establish as criminal offences under its domestic law the offences set forth in article 2;
- (b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

¹⁷Unless otherwise stated, all laws and court decisions cited are available either in English or their original language in the terrorism legislative database of the UNODC, at www.unodc.org/tldb.

¹⁸See for example the South African Constitution, 1996, Section 231.

¹⁹Article 122 (1) of the Constitution of the Republic of Albania provides that: Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law. [...]

Even if a country's legal tradition were to allow the theoretical possibility of a criminal charge for committing an offence defined only in an international treaty by which that country was bound, and not in a domestic piece of legislation, that offence would remain a crime without punishment until legislation defined the penalty. A fundamental principle of the rule of law is that there can be no punishment without a law, and few persons would argue in favor of allowing punishment to be imposed by analogy to another offence. Consequently, a country that automatically incorporates an offence into its domestic law upon the adoption of a treaty, as defined therein, must take legislative action to provide a penalty for that offence and to implement any other non-self executing provisions.

This page intentionally left blank

II. Criminalization and other legislative requirements of the terrorism related conventions and protocols

A. Common elements of the conventions and protocols

Two of the sixteen terrorism-related agreements do not create any offences and therefore are not described in detail. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft establishes procedures for return of the aircraft and treatment of passengers and crew after an unlawful diversion. It also requires a Contracting State to establish its jurisdiction to punish offences committed on board aircraft registered in that State, but does not establish any offences that State Parties are obligated to punish. The Convention on the Marking of Plastic Explosives for the Purpose of Detection requires a State Party to take measures to control explosives that do not contain volatile chemicals subject to detection by scanning equipment, but those measures need not be penal in nature. It also does not contain any criminal justice cooperation mechanism, so it is not discussed here. The remaining nine conventions, four protocols and one amendment all have common elements. Each requires: (a) criminalization of the conduct defined in a particular agreement as a punishable offence; (b) establishment of specified grounds of jurisdiction over that offence, such as the registration of an aircraft or ship, or the location of an attack; and (c) the ability and obligation to refer a case against a suspected or accused offender to domestic authorities for prosecution if extradition is not granted pursuant to the applicable agreement and to furnish related forms of international cooperation.

B. Agreements relating to the safety of civil aviation developed by the International Civil Aviation Organization (ICAO)

B-1 1970 Convention for the Suppression of Unlawful Seizure of Aircraft

The earliest terrorism-related conventions were developed by the ICAO in 1963, 1970 and 1971 in response to aircraft hijackings. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft requires its Parties to take “such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State” (Art.3.2). There is no requirement to define any particular conduct endangering the safety of an aircraft or of persons on board as an offence. Moreover, the requirement to establish jurisdiction only applies to acts committed on board an aircraft in flight, defined as from the moment when power is applied for the purpose of take-off until the moment when the landing run ends. Subsequent aviation-related instruments were incremental reactions to the aircraft hijackings then prevalent. Article 1(a) of the 1970 Convention for the Suppression of Unlawful Seizures of Aircraft requires State Parties to punish by severe penalties the act of a person who “unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft”. That article refers to an aircraft “in flight”, defined in Article 3.1 as “at any time from the moment when all of its external doors are closed following embarkation until the moment when any such door is open for disembarkation”.

B-2 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

This agreement was adopted after the destruction of four civilian aircraft on the ground in the Middle East in September 1970. It requires criminalization of attacks on aircraft “in service”, defined in Article 2(b) as “from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing;” Article 1(a) and (d) also require criminalization of any act of violence against a person on board an aircraft in flight and any damage to or interference with air navigation facilities likely to endanger the safety of an aircraft.

B-3 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation

Only States that are parties to the 1971 Montreal Convention may join this Protocol. Its negotiation followed attacks on travelers in airports in Vienna, Rome and elsewhere in the 1980s. It requires criminalization of acts of violence likely to cause death or serious injury, at airports serving international civil aviation, as well as destroying or seriously damaging aircraft or facilities if such acts endanger or are likely to endanger safety at that airport. The UNODC Model Law against Terrorism, available at www.unodc.org on the Terrorism Prevention page, under technical assistance tools, contains draft laws implementing the criminal provisions of the air travel safety conventions. Legislative implementation has been achieved in some countries by enacting the jurisdictional bases and the offences required by multiple agreements in a single statute. After negotiation of the 1971 Convention, a number of countries approved legislation implementing the 1963, 1970 and 1971 Conventions in a single law.²⁰ Some consolidated laws enacted after negotiation of the 1988 Airport Protocol incorporate not only the offences defined therein, but also the unauthorized introduction of weapons and other dangerous articles into airports and on board aircraft.²¹

C. Agreements relating to maritime safety developed by the International Maritime Organization (IMO)

C-1 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Fixed Platform Protocol

This agreement is often called the SUA Convention in the maritime community. It combines many of the provisions developed in the preceding decades to deal with attacks upon aircraft. Development of the 1988 SUA Convention followed the 1985 hijacking of the cruise ship *Achille Lauro* in the Mediterranean and the murder of a passenger. The agreement requires the criminalization of a ship seizure, damage to a ship or its cargo that is likely to endanger its safe navigation; introduction of a device or substance likely to endanger the ship; endangering safe navigation by serious damage to navigation facilities and injuring or killing any person in connection with the previously listed offences. Its contemporaneous Protocol for the

²⁰Among these were the New Zealand Aviation Crimes Act 1972, the Malawi Hijacking Act of 1972, the Malaysian Aviation Offences Act 1984 and the Mauritius Civil Aviation (Hijacking and Other Offences) Act 1985. Some of the statutes were later amended by insertion of an article incorporating the 1988 Airport Protocol, as was done by Mauritius. Its 1985 Hijacking and Other Offences Act was amended in 1994 by the addition of an article 6A, which criminalized the conduct defined as an offence in the 1988 Airport Protocol to the 1971 Safety of Civil Aviation Convention, as well as any act at an airport using a device, substance or weapon likely to cause serious damage to the environment.

²¹The Australia Crimes (Aviation) Act of 1991 and the Fiji Civil Aviation (Security) Act 1994 are comprehensive post-1988 rewritings of prior air travel safety legislation and incorporate airport security measures forbidding the introduction of weapons and other dangerous articles, and in the law of Fiji, provisions on airport access, security searches and related topics.

Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf extended similar provisions to attacks upon those platforms.²² An example of legislation simultaneously implementing both the Convention and Protocol is the Australia Crimes (Ships and Fixed Platforms) Act 1992, as amended by Schedule 17 of the Law and Justice Amendment Act, No. 24, 2001.

C-2 Protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (2005)

Protocols to both the Convention and Protocol of 1988 were negotiated in 2005. These instruments provide that upon coming into force with the requisite number of adoptions they shall be combined with the earlier instruments, and designated portions will be called the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 2005. The new agreements create additional offences, including: using against or discharging from a ship explosive, radioactive, biological, chemical or nuclear materials or weapons in a manner likely to cause death, serious injury or damage; discharging other hazardous or noxious substances likely to cause death or serious injury or damage; or using a ship in a manner that causes death or serious injury or damage; or threatening to do so. Transportation on board a ship of certain materials must be criminalized if done with an intent to intimidate a population or to coerce a government or international organization, as well as any equipment, material, software or technology that significantly contributes to the design of a biological, chemical or nuclear weapon. Additional articles require the creation of offences for transporting a person knowing that the person has committed an offence defined in the 2005 Protocol or in the annexed list of terrorism-related treaties and for injuring a person in connection with the commission of the defined offences. The UNODC Model Law contains draft articles criminalizing these new offences and implementing the requirement, as indicated in the 2005 Protocol to the SUA Convention, that Parties take measures to hold liable a legal entity located in its territory or organized under its laws criminally, civilly or administratively liable when a person responsible for its management or control has, in that capacity, committed an offence set forth in the Convention as amended.

D. Convention on the Physical Protection of Nuclear Material, 1979 and its 2005 Amendment developed by the IAEA

In 1979 the IAEA developed the Convention on the Physical Protection of Nuclear Material, establishing obligations concerning the protection and transportation of defined materials. Article 7 requires the State Parties to create offences of unlawful handling of nuclear materials or a threat thereof; a theft, robbery or other unlawful acquisition of or demand for such material; or a threat of such unlawful acquisition in order to coerce a person, international organization or State. In 2005 that instrument was amended to criminalize acts directed against or interfering with a nuclear facility likely to cause serious injury or damage, as well as; unauthorized movement of such material into or out of a State without lawful authority; a demand for

²²A definition of the continental shelf is found in the United Nations Convention on the Law of the Sea. In very simplified terms it is the natural prolongation of a State's land territory to the point where the deep ocean floor begins. However, there are very technical limits and qualifications in the Convention on the Law of the Sea that need to be examined to determine whether a particular location constitutes part of the continental shelf.

nuclear material by threat or use of force; a threat to use such materials to cause death or serious injury or damage to property or to the environment or to commit an offence in order to coerce a person, international organization or State.²³ As will be explained in part II, section E-4, application of this agreement should be considered in conjunction with an instrument developed by the General Assembly's Ad Hoc Committee in 2005, the International Convention for the Suppression of Acts of Nuclear Terrorism.

E. Agreements relating to other protections for civilians developed at the initiative of the General Assembly

E-1 The Internationally Protected Persons and Hostage Taking Conventions of 1973 and 1979

The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, requires State Parties to criminalize violent attacks directed against Heads of State and foreign ministers and their family members, as well as against diplomatic agents entitled to special protection under international law. The term "diplomatic agents" and the circumstances under which such persons are entitled to special protections can be found in the Vienna Convention on Diplomatic Relations 1961.²⁴ The 1979 Hostage Taking Convention requires criminalization of any seizure or detention and threat to kill, injure or continue to detain any hostage, not merely diplomatic agents, in order to compel any State, international organization or person to do or abstain from doing any act. This Convention only addresses detentions and related threats, and not any resulting death or injury, and applies only when there is an international dimension to the event. The Cook Islands implemented the 1973 Internationally Protected Persons Convention and the 1980 Hostage Taking Convention in one statute, the Crimes (Internationally Protected Persons and Hostages) Act 1982, No. 6. While the 1973 Internationally Protected Persons Convention requires criminalization of attacks on protected persons, it is silent as to whether the necessary criminal intent must include knowledge of the victim's protected status. The Cook Islands legislation specifically provides that knowledge of the person's protected status is not an element of the offence and need not be proven by the prosecution.

E-2 1997 Terrorist Bombings Convention

As mentioned previously, General Assembly 51/210 of 1996 established an Ad Hoc Committee open to all Member States of the United Nations and charged with negotiating instruments for the suppression of various manifestations of terrorism. The first result of the Committee's work was the International Convention for the Suppression of Terrorist Bombings (1997). Although its title refers only to bombings, this instrument also deals with weapons of mass destruction. Article 1.3 defines explosive or other lethal device as:

- (a) An explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or
- (b) A weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.

²³2005 Amendment to the Convention on the Physical Protection of Nuclear Material, creating a new agreement to be called the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities.

²⁴Entered into force 24 April 1964. United Nations *Treaty Series*, vol. 500, p. 95

Article 2 requires the creation of an offence of intentionally placing or using an explosive or other lethal device with the intent to cause death, serious injury or major economic loss. Activities of armed forces during an armed conflict are not governed by this Convention, as they are subject to separate rules of international humanitarian law, primarily codified in the Geneva and Hague Conventions and Protocols on the law of armed conflicts.²⁵ The Suppression of Terrorist Bombings Act, No. 11 of 1999 of the Republic of Sri Lanka is an example of national legislation implementing the provisions of the Terrorist Bombings Convention.

E-3 1999 Financing of Terrorism Convention (Criminalization)

The second result of the Ad Hoc Committee's work was the 1999 International Convention for the Suppression of the Financing of Terrorism. Article 2.1 requires State Parties to criminalize conduct by any person who:

...by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
- (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Subparagraph 2.1(a) incorporates by reference the offences penalized in nine of the universal terrorism-related instruments that predate the Financing Convention as acts for which the provision or collection of funds are forbidden. Another means of achieving the same effect would be to quote the offence definition from each instrument in full in the domestic law. Subparagraph 2.1(b) establishes a self-contained definition of violent terrorist acts for which the provision or collection of funds is prohibited.

By Law 2001-1062 of 15 November 2001, Article 421-2-2 of the Penal Code, France defined an offence of financing of terrorism, informally translated in the following terms:

It also constitutes an act of terrorism to finance a terrorist organization by providing, collecting or managing funds, securities or property of any kind, or by giving advice for this purpose, intending that such funds, security or property be used, or knowing that they are intended to be used, in whole or in part, for the commission of any of the acts of terrorism listed in the present chapter, irrespective of whether such an act takes place.²⁶

²⁵See www.icrc.org under International humanitarian law.

²⁶Original text: Constitue également un acte de terrorisme le fait de financer une entreprise terroriste en fournissant, en réunissant ou en gérant des fonds, des valeurs ou des biens quelconques ou en donnant des conseils à cette fin, dans l'intention de voir ces fonds, valeurs ou biens utilisés ou en sachant qu'ils sont destinés à être utilisés, en tout ou partie, en vue de commettre l'un quelconque des actes de terrorisme prévus au présent chapitre, indépendamment de la survenance éventuelle d'un tel acte.

The last phrase of the French law implements Article 2-3 of the Convention, which provides that:

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

Convention Article 2-3 is part of a highly important advance in the use of anti-terrorism measures to prevent rather than merely to react to terrorist violence. Although the Financing Convention parallels the Terrorist Bombings Convention in its structure and language, it achieves a strategic breakthrough against the planning and preparation that precedes almost every terrorist attack. It accomplishes this result by two innovations. Instead of prohibiting a particular form of violence associated with terrorism, the Financing Convention criminalizes the non-violent logistical preparation and support that make significant terrorist groups and terrorist operations possible. Moreover, Article 2-3 eliminates any ambiguity by expressly providing that the prohibited provision or collection of funds need not result in a violent act specified in Article 2.1 of the Convention to be punishable. Meeting all of the international standards applicable to the financing of terrorism can be fully achieved only by legislation establishing the Convention offence and not by reliance upon theories of complicity, conspiracy, money-laundering or other offences not specific to the financing of terrorism.

E-4 2005 Nuclear Terrorism Convention

The Nuclear Terrorism Convention was also a product of the work of the Ad Hoc Committee. It defines as offences: (a) the possession or use of radioactive material or a nuclear explosive or radiation dispersal device with the intent to cause death or serious bodily injury or substantial damage to property or the environment; (b) the use of radioactive material or a device, or the use of or damage to a nuclear facility which risks the release of radioactive material with the intent to cause death or serious injury or substantial damage to property or to the environment, or with the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing any act. These offences focus more explicitly on nuclear devices specifically constructed to do harm than do those in the 1979 Convention on the Physical Protection of Nuclear Materials, but the IAEA agreements also contain prohibitions against harmful use, theft, robbery, embezzlement or other illegal means of obtaining such materials and to related threats. Both conventions define their terminology, and these definitions must be reviewed carefully by experts in the legislative drafting process. For example, a “nuclear facility” is protected by both agreements, but the term is defined differently in the two instruments. Accordingly, national drafting experts may wish to consider consultation with the legal advisors of the UNODC and the IAEA to avoid conflicts and duplication in domestic legislation implementing these two instruments. The UNODC Model Law against Terrorism provides a criminalization package incorporating the offences in both these conventions dealing with nuclear matters. Moreover, in any situation involving possible misuse of radioactive materials, one must also consider the applicability of the Terrorist Bombings Convention, 1997 that applies to:

A weapon or device that is designed, or has the capacity to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of [...] radiation or radioactive material.

E-5 Ongoing Work on a Comprehensive Convention against Terrorism

The continuing work of the Ad Hoc Committee as of 2007 is reflected in General Assembly Document A/62/37, “Report of the Ad Hoc Committee” established by General Assembly resolution 51/210 on meetings of 5, 6 and 15 February 2007. That report, on the negotiation of a comprehensive convention, reflects differing views on a number of issues. As widespread implementation of any such convention could be years in the future, the UNODC and its Terrorism Prevention Branch continue to work for adoption and implementation of the existing terrorism-related instruments.

F. Other legislative requirements relating to the financing of terrorism

F-1 Sources of international standards on the financing of terrorism

Criminalization as discussed in part II, section E-3 is only one of the measures for combating the financing of terrorism required by international standards, and the Financing of Terrorism Convention is only one of those standards. Security Council resolution 1373 (2001) independently requires, not just the 160 State Parties to the Financing Convention, but all States, to criminalize financing, defined in almost exactly the same words as the Convention. The Special Recommendations of the Financial Action Task Force (FATF), discussed below, and the work of FATF-style regional bodies also reinforce this criminalization requirement. Security Council resolutions and FATF Special Recommendations also deal with a number of non-criminal standards, including the freezing of terrorist funds. All of these standards need to be taken into account in drafting legislation to deal with any aspect of combating the financing of terrorism, as the standards and obligations are highly interrelated.

In addition to the obligation to criminalize the financing of terrorism, the Financing Convention contains significant non-criminal elements. It obligates its Parties to have legislation enabling a legal entity to be held civilly, administratively or criminally liable when a person responsible for its management or control has, in that capacity, committed a financing offence.²⁷ It also requires the Parties to have in place appropriate measures to identify, detect, freeze and seize for the purpose of forfeiture funds used or allocated for the commission of terrorist offences. Its Article 18, 1 (b) (iii) requires Parties to oblige financial institutions and other professions involved in financial transactions to identify their customers. The Parties must consider regulations on the reporting of “all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose.” Under this formulation of what constitutes a suspicious transaction, there is no need for an apparent connection to drug trafficking or terrorism. The lack of an apparent lawful purpose after consideration of all relevant circumstances is sufficient to require the institution’s management to report the transaction. A broad formulation of the reporting duty is necessary because a

²⁷It should be noted that the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation also contains a counterpart obligation to establish the legal responsibility of a legal entity when a person responsible for its management or control has, in that capacity, committed an offence established by the Convention. A general provision to that effect is found in section 5 of the Anti-Terrorism Act 2002 of Barbados:

Where an offence referred to under section 3 or 4 [meaning acts of terrorism or financing of terrorism] is committed by a person responsible for the management or control of an entity located or registered in Barbados or in any other way organized under the laws of Barbados, that entity, in circumstances where the person committed the offence while acting in that capacity, is guilty of an offence [...].

financial professional may fairly be expected to identify transactions with no apparent legitimate rationale consistent with the client's business profile, but cannot be expected to determine what kind of illegitimate activity may lie behind such transactions.

There are significant factual differences between the practices and offences of money-laundering and terrorist financing, which is one reason why money-laundering offences cannot be relied upon to adequately criminalize the financing of terrorism. Money-laundering typically involves the transfer of significant proceeds derived from illegal transactions into legitimate commerce or banking channels, often divided or disguised to avoid being conspicuous. Conversely, terrorist financing may involve aggregating sums derived from lawful activities or micro-criminality and transferring them to a person or entity that ultimately may send relatively small payments to support terrorist or terrorist activities. Such funds become legally tainted only when the originator or some person in the chain along which they pass, has the intent to use them to finance a terrorist act. Despite these differences between money laundering and terrorist financing, global efforts to fight the two phenomena both need the assistance of banks and non-bank financial institutions and professions in the detection of suspicious transactions. Both rely heavily upon intelligence collection and analysis, often through Financial Intelligence Units. Suspicious activity reporting was developed as an anti-money laundering administrative control mechanism. Its use to combat terrorist financing demonstrates how the global regimes to combat money-laundering and financing of terrorism are increasingly becoming integrated.

F-2 Freezing and confiscation of terrorist funds

The 1999 Financing of Terrorism Convention is only one aspect of a larger international effort to deter, detect and suppress the financing and support of terrorism. Article 8 of the Convention provides that each State must take measures for freezing, seizing and forfeiting proceeds and instrumentalities of the offences listed in the agreement. Following the model of the 1988 Vienna Drug Convention,²⁸ the Financing Convention treats freezing as an interim measure to prevent the disappearance or dissipation of property preliminary to a decision on whether its ownership should be permanently transferred to the State, or in some cases to a victim or rightful owner. The Convention foresees an ultimate determination of forfeitability based upon the property being an instrumentality or the proceeds of crime. Forfeiture proceedings under national laws are usually determined by a conviction of the owner or, in some systems, by the finding of a preponderance or other civil burden of proof that the property was either the proceeds or instrumentality of crime.

However, when countries implement the Financing of Terrorism Convention, it is advisable that they provide for and differentiate the regimes established by the resolutions of the Security Council. Resolution 1267 was adopted in 1999 and its successor resolutions have continuously renewed its freezing obligations. Most recently, in the preamble to resolution 1735 (2006) it was reiterated "that the measures referred to in paragraph 1 below [assets freeze, travel ban and arms embargo], are preventative in nature and are not reliant upon criminal standards set out under national law."

²⁸Article 5 of the 1988 United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances.

Thus, the resolution 1267 (1999) obligation to freeze must be continued, from time to time as determined by the Security Council, without any connection to an ultimate confiscation of the frozen funds, to prosecution of any offence, or any judicial finding. Resolution 1373 (2001) presents different issues. Its emphasis on criminal remedies and lack of explicit characterization of terrorists and what are terrorist acts, leave these matters to be determined within the national legal system, and may lead to forfeiture if grounds exist under domestic law. However, the scope of freezing must apply to all property owned or controlled by persons who commit or attempt to commit terrorist acts, whereas most existing laws only permit the freezing of property that is ultimately subject to forfeiture, which in most countries means instrumentalities and proceeds of crime. Authorities considering legislation to implement the 1999 Financing Convention thus must provide for preventative freezing under resolution 1267 (1999), possible forfeiture under resolution 1373 (2001) if appropriate evidence can be secured, and traditional freezing and forfeiture of instrumentalities and proceeds of the offences under the Financing Convention. One means of providing such legal authority is a law giving a Government the power to enforce decisions of the Security Council pursuant to Chapter VII of the United Nations Charter. A representative example is the United Nations Act Canada:

Application of Security Council decisions;

2. When, in pursuance of Article 41 of the Charter of the United Nations, set out in the schedule, the Security Council of the United Nations decides on a measure to be employed to give effect to any of its decisions and calls on Canada to apply the measure, the Governor in Council may make such orders as appear to him to be necessary or expedient for enabling the measure to be effectively applied.

Offences and punishment

3(1) Any person who contravenes an order or regulation made under this Act is guilty of an offence and liable

(a) on summary conviction, to a fine of not more than \$100,000 or to imprisonment for not more than one year, or to both, or

(b) on conviction on indictment, to imprisonment for a term of not more than 10 years.

F-3 The FATF Special Recommendations

The work of the Financial Action Task Force (FATF, or GAFI in its French acronym) and the FATF style regional bodies that apply the Forty Recommendations on Money Laundering and Nine Special Recommendations on Terrorist Financing must also be taken into account. FATF is an intergovernmental organization housed at the Organization for Economic Cooperation and Development in Paris whose work is reinforced by regional FATF-style bodies throughout the world. The Forty Recommendations on the control of money laundering were issued in 1990 and subsequently updated. Eight Special Recommendations on combating the financing of terrorism were issued in October 2001, and a ninth added in October 2004. They deal with:

(I) The adoption and implementation of the 1999 Financing of Terrorism Convention and implementation of the United Nations resolutions relating to the financing of terrorism;

(II) The criminalization of the financing of terrorism, terrorist acts and terrorist organizations and designation of such offences as money-laundering predicate offences;

- (III) The freezing and confiscating of terrorist assets;
- (IV) The reporting of suspicious transactions involving terrorist acts or organizations;
- (V) International cooperation in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organizations;
- (VI) The control of alternative remittance systems;
- (VII) The strengthening of originator information requirements for wire transfers;
- (VIII) Controls to prevent the misuse of non-profit organizations; and
- (IX) Controls over physical cross-border movement of cash.

Because the FATF recommendations are ultimately reflected in national legislation and regulations, they influence international banking practices and affect every country.

The FATF and the FATF-style regional bodies conduct evaluations of their members. The materials used for those assessments provide an excellent internal checklist for compliance not only with the provisions of the Financing Convention but also the relevant United Nations Security Council resolutions and can be accessed at the FATF web site, www.fatf-gafi.org. A Methodology developed with the International Monetary Fund and the World Bank, and used by those organizations for evaluations, is provided. It is a 92-page document with hundreds of questions designated as “essential criteria” or as “additional considerations”, organized according to the pertinent Recommendation. Moreover, an explanatory, 145 page, Handbook is provided for countries and assessors using the Methodology. The International Monetary Fund and the UNODC have also developed Model Legislation on Money Laundering and the Financing of Terrorism, December 2005, available at www.imolin.org under the heading International Norms and Standards.

Summary: financing of terrorism criminalization and freezing provisions

	<i>1999 Financing Convention</i>	<i>Security Council resolution 1373 (2001)</i>	<i>Security Council resolution 1267 (1999) and related resolutions</i>
Legal obligation	Treaty obligation for State parties. Currently 160 State parties.	Adopted under Chapter VII of the UN Charter. Legally binding for all States.	Adopted under Chapter VII of the United Nations Charter. Legally binding for all States.
Criminalization provision	Any person commits an offence when he unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [certain defined acts, including Convention offences and specific civilian-centered definition provided in the Convention. See below].	Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.	No criminalization provision, only freezing of assets, travel ban, and arms sanctions.
Freezing obligation	Take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in the Convention as well as the proceeds derived from such offences, for purposes of possible forfeiture.	Freeze the funds, and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts ; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities.	Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by Al-Qaeda, Usama bin Laden and the Taliban and other individuals and entities associated with them, or by any undertaking owned or controlled by Al-Qaeda and the Taliban, as designated by the Committee.
Confiscation/ forfeiture obligation	Take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in the Convention and the proceeds derived from such offences.	No confiscation or forfeiture requirement. Only preventative (non-criminal) freezing required.	No confiscation or forfeiture requirement. Only preventative (non-criminal) freezing required.
Other	For an act to constitute an offence set forth in the Convention, it shall not be necessary that the funds were actually used to carry out a defined terrorist purpose. Criminalization, freezing and forfeiture apply to funds of innocent origin once provided or collected with the intention or in the knowledge they will be used for one of the defined terrorist purposes	In the absence of a definitive explanation in resolution 1373 (2001) of what acts trigger its freezing obligation, countries apply their own interpretations. Many countries have definitions of terrorism or terrorist acts in criminal statutes. The resolution requires freezing all property of those who commit or support acts of terrorism, including innocent property not intended for criminal use	Consolidated list, as of 21 January 2008: - 142 individuals belonging to or associated with the Taliban; - 228 individuals belonging to or associated with the Al-Qaeda organization; - 112 entities belonging to or associated with the Al-Qaeda organization
Special Recommendations on Terrorist Financing of the Financial Action Task Force (FATF) should guide the application and implementation of the obligations above			

G. Issues common to all conventions and protocols

G-1 Defining terrorist acts and terrorism

The elements of the offences established in the various treaties are summarized in the UNODC Model Law against Terrorism provisions, available at www.unodc.org, on the Terrorism Prevention page under technical assistance tools.²⁹ There is no single formula for criminalization of these offences that is applicable to all countries, particularly as to whether the offence should be introduced as part of a special anti-terrorism law, or by amendment to a penal code. However, to the extent feasible it is desirable to repeat the terminology used in international conventions in domestic implementing legislation. This is because offence definitions that differ between countries can create problems with the dual criminality requirement of international cooperation, to be discussed in part V, section D. What will be the proper approach to criminalization will depend on the problems facing a country, its history and circumstances, and the legal tradition and jurisprudence that dictate how laws will be interpreted. Some countries have adopted comprehensive anti-terrorism laws that incorporate many or most of the offences created in the universal instruments in to one law, as alternative means of committing an offence of terrorism or terrorist violence. Another approach creates a single generic offence of terrorism in language similar to that in the UNODC Model Law and drawn from Section 2.1 (b) of the Financing of Terrorism Convention:

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

Section 261 of the Hungarian Penal Code criminalizes “Acts of terrorism” in the following words:

- (1) Any person committing a violent felony against a person, a crime posing a public threat, or a crime involving weapons as specified in subsection (9), with an intention to:
 - (a) compel a government body, another state or an international organization to commit or to refrain from or to endure any act,
 - (b) intimidate or coerce the civilian population;
 - (c) to change or interfere with the constitutional, social or economic order of another state, or to disrupt the operation of an international organization, is guilty of felony...

As explained in the Model Law, the preferred interpretation of “population” and “government” also refers to the population and government of other countries. This implements the mandatory requirement of Security Council resolution 1373 (2001), paragraph 2 (d), that States “Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens”. The Terrorism Act 2000 of the United Kingdom implements this concept in its Article 1, defining terrorism:

²⁹See also the Commonwealth Secretariat Implementation Kits for the International Counter-Terrorism Conventions, available at: <http://www.thecommonwealth.org/Internal/38061/documents/> Scroll to the bottom of the page and download in PDF form.

- (4) In this section
 - (a) “action” includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organization.

Some countries enact laws that use the explicit term “terrorism” in their title and in substantive offence descriptions.³⁰ The Anti-Terrorism Act 2002 of Barbados, Section 3.1, defines an offence of terrorism as including any offence established under any of the listed terrorism-related conventions and protocols negotiated through 1997, with the 1999 Financing of Terrorism Convention being dealt with by the creation of the separate crime of financing of terrorism in the Barbados statute. The Barbados law also addresses the concern that an anti-terrorism law may be applied to suppress political dissent or industrial actions. Under the Act, in addition to offences defined by reference to the conventions, terrorism is defined as:

- (b) any other act:
 - (i) that has the purpose by its nature or context, to intimidate the public or to compel a government or an international organization to do or to refrain from doing any act; and
 - (ii) that is intended to cause:
 - (A) death or serious bodily harm to a civilian or in a situation of armed conflict, to any other person not taking an active part in the hostilities;
 - (B) serious risk to the health or safety of the public or any segment of the public;
 - (C) substantial property damage, whether to public or private property, where the damage involves a risk of the kind mentioned in subparagraph (B) or an interference or disruption of the kind mentioned in subparagraph (D); or
 - (D) serious interference with or serious disruption of an essential service, facility or system, whether public or private, not being an interference or disruption resulting from lawful advocacy, or from protest, dissent or stoppage of work and not involving a risk of the kind mentioned in subparagraph (B).

³⁰See the Prevention of Terrorism Act 2001 of India, replaced in 2004 by the Unlawful Activities (Prevention) Act 2004. Unless otherwise stated, all laws and court decisions cited are available either in English or their original language in the terrorism legislative database of the UNODC, at www.unodc.org/tldb.

G-2 Proving motive or intent

A frequently encountered legislative drafting issue is whether to include a terrorist motivation as an element of the offence, meaning that the act must be committed with a political, ideological or religious motive. This is a separate and additional requirement of motivation, in addition to a general criminal intent to kill or injure,³¹ or to the specific criminal intent to intimidate or coerce a person, government or international organization.³² An example of a terrorism offence with a motivational element is found in Section 1 of the Terrorism Act 2000 of the United Kingdom:

- (1) In this Act “terrorism” means the use or threat of action where:
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it:
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person’s life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

Evidentiary difficulties may flow from the inclusion of an ideological motive or of a specific intent to coerce a government or to intimidate a population as an offence element. Those difficulties involve establishing a defendant’s mental state or purpose without proof of oral or written statements or a post-arrest confession revealing a terrorist purpose. Some legal cultures and some individual adjudicators may be reluctant to infer a defendant’s mental state because of the proverbial impossibility of seeing into a person’s mind or heart. An example would be a refusal to regard the fact that an attack was targeted at a house of worship on a religious feast day as sufficient, without a public claim by the responsible group, to establish an underlying religious motivation. In that situation, the investigating authorities will seek associates who may be able to testify to statements revealing a suspect’s intent and motive, or those authorities will be compelled to seek a confession from the accused. This creates pressures that may contribute to improper interrogation or investigative practices, and this danger should be anticipated and guarded against by policy makers and executive authorities. Making a confession the only feasible way to prove an element of an offence is unhealthy, as it may lead to coercion and conflicts with Article 14, 3 (g) of the ICCPR, providing that in the determination of any criminal charge, the accused is entitled “Not to be compelled to testify against himself or to confess guilt.”

³¹The offence created by Article 2.1 of the 1997 Terrorist Bombing Convention is an example of a general criminal intent crime, defined as the doing of certain acts involving specified weapons or devices “(a) With the intent to cause death or serious bodily injury; or (b) With the intent to cause extensive destruction [...] where such destruction results or is likely to result in major economic loss.”

³²This specific intent is found in the 1979 Hostage Taking Convention (Article 1), the 1988 Maritime Convention (Article 3) and its Fixed Platform Protocol (Article 2), the 1999 Financing of Terrorism Convention (Article 2), the 2005 Nuclear Terrorism Convention (Article 2), the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Article 4) and to its 1988 Fixed Platform Protocol (Article 3).

At least since the publication of Cesare Beccaria's work *On Crimes and Punishments* in 1764, criminology and criminal law have moved away from reliance upon confessions, placing more emphasis upon the reasonable inferences to be drawn from other elements of proof. This trend is demonstrated by Article 28 of the United Nations Convention against Corruption (2002).

Knowledge, intent or purpose required as an element of an offence established in accordance with the Convention may be inferred from objective factual circumstances.

Thus, in a prosecution for having committed a crime requiring an ideological element, evidence of membership in an organization endorsing political violence, possession of extremist literature attacking other religions, past expressions of hatred of the victim group, or the circumstances and target of the attack itself could substitute for a confession as evidence of the defendant's motive.

The need for a realistic approach to proof of an offence's mental element was recognized by the inclusion of a specific evidentiary rule in the Financing Convention. Article 2.1 requires not merely the criminalization of attacks on civilians, but specifies how the specific intent to intimidate or coerce may be proved:

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

To ensure compliance with the Financing Convention, which has rather complex state of mind elements, the evidentiary rule of Article 2.1 (b) may need to be introduced into a country's Code of Criminal Procedure or specifically included in special laws dealing with terrorism.

G-3 Special laws and code amendments

Rather than enacting special laws on terrorism and creating specific offences of terrorism, some countries prefer to simply amend their Penal Code or Code of Penal Procedure to fill any gaps between existing law and the requirements of particular conventions or protocols. This approach is not precluded by the terrorism-related conventions and protocols, none of which require use of the words "terrorist" or "terrorism" to define prohibited conduct. The word "terrorism" is not found in any of the pertinent conventions from 1963 through 1979, even though historically the agreements were clearly responses to terrorist incidents. The word first appears in the preamble to the 1979 International Convention against the Taking of Hostages, referring to the need for cooperation against acts of hostage taking as manifestations of international terrorism, and is repeated in the preambles of subsequent agreements.

The 1997 International Convention for the Suppression of Terrorist Bombings was the first agreement to use the word "terrorist" in its title as well as in the preamble. In Article 5 it also required the adoption of measures to ensure that offences created by the Convention, "in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature." The 1999 International Convention for the Suppression of Terrorist Financing and the 2005 International Convention

for the Suppression of Acts of Nuclear Terrorism closely resemble the Terrorist Bombing Convention by their use of the terrorism terminology in their titles, preambles and in articles specifying that no justification may be permitted for acts of terrorism. But none of these instruments use the word terrorism or terrorist in their offence definitions. Those definitions employ only traditional criminal code terminology—a description of an act constituting a social harm, such as bombing, hostage-taking or use of a ship to distribute dangerous materials, and a general or specific illegal intent, without any requirement that terrorism be mentioned or defined.³³

G-4 Relevancy of the universal instruments to all countries

Questions are often raised about how certain agreements could possibly be relevant to the circumstances of a country and why a country should adopt them. Officials of a land-locked State may question how their country could experience a violation of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. If the country has no seacoast and no registered ships or offshore platforms, it clearly cannot suffer an unlawful seizure of its vessel or platform. However, one of its nationals might commit such a crime; its citizens could be among the passengers threatened or killed; the unlawful seizure and threats to kill or destroy could be directed to force that country to release a particular prisoner or refrain from taking a certain action; or the offender could be found on its territory. These are all grounds of jurisdiction found in the SUA Maritime Convention of 1988, and there are many reasons why a country might wish to have the option to extradite or to prosecute in its own courts, or to be able to ask for extradition of an offender from another country.

Similarly, it is the need for international cooperation, not the ability to punish a domestic crime, that explains the negotiation of an agreement like the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation. No country needed the Airport Protocol to cause it to criminalize attacks with machine guns and grenades on passengers in airports on its territory, as such murderous conduct was already criminal everywhere. That Protocol did not popularize a new offence that did not previously exist in most countries, as did the 1999 International Convention for the Suppression of the Financing of Terrorism. The purpose and value of the Airport Protocol lie in the establishment of jurisdictional grounds, international cooperation mechanisms and the obligation to extradite or to prosecute. Moreover, the voluntary ideal of showing international good citizenship by membership in reciprocal cooperation agreements coincides with the concrete legal obligations set forth in mandatory paragraph 2 of resolution 1373 (2001) to:

- (c) Deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe haven;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

³³As previously mentioned, certain offences do include the intent to intimidate a population or to coerce a government or international organization, which in substance is the intent to terrorize. The important point for legislative drafters is that terminology defining the intended effect of acts on a population or a government has an objective factual meaning, whereas "intent to terrorize" could be interpreted very subjectively unless accompanied by a factual definition.

H. Forms of participation in an offence

The test of criminal responsibility has evolved under the terrorism-related conventions and protocols. The eight terrorism-related conventions and protocols negotiated between 1970 and 1988 create reactive criminal offences. They require that criminal liability be imposed, assuming the existence of the necessary guilty state of mind, in only three circumstances:

- (a) The physical commission of the conduct established in a particular convention as an offence, usually called responsibility as a principal. A principal would be the person who personally seizes an aircraft or maritime vessel, or takes hostages, attacks diplomats or passengers at an international airport, steals or unlawfully uses nuclear material, or makes threats prohibited by certain of the universal instruments;
- (b) An attempt to commit a prohibited offence, that fails for reasons beyond the offender's control, such as an armed intrusion into a diplomatic compound that is foiled by the security guards of the diplomats who were to be the victim of an intended hostage taking;
- (c) Intentional participation as an abettor or accomplice in the commission or attempted commission of an offence. Examples would include an embassy employee who leaves a gate unlocked so that assassins may enter, or someone who provides false identity documents to aid the flight of members of a group that has placed and detonated a bomb in a marketplace.

These forms of criminal responsibility developed incrementally. The 1970 convention applied only to an accomplice on board an aircraft in flight. The 1971 convention was expanded to cover any attempt, or to any accomplice, wherever located. In subsequent instruments other forms of criminal responsibility were introduced, including an act constituting participation in the principal offence (the 1979 Physical Protection of Nuclear Materials Convention) or abetting its commission (the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation). Prior to 1997 it was clear that the conventions required the punishment only of completed or attempted acts. In 1997 Article 2.3 of the Terrorist Bombing Convention established two new forms of criminal liability for one who:

- (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 [meaning either accomplishment of the principal offence or its attempted commission]; or
- (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose [...]

Article 2.3 (c) of the Bombings Convention by its terms applies only to the commission of an offence. From a purely grammatical perspective, however, it could be argued that Article 2.3 (b) imposes criminal responsibility the moment a person organizes or directs others to commit an offence, regardless of whether that act is ever attempted or accomplished. However, grammatical interpretation may not be enough to prevail over the well-established rule of law principle that any ambiguity in a criminal statute must be resolved in favour of the accused. This is particularly true in view of the fact that the Terrorist Bombings Convention does not contain the express clarification found in Article 2.3 of the Financing of Terrorism Convention, which

was apparently considered necessary to establish that the intended act of terrorism need not be committed for the crime of financing to exist.

Viewed in this context, the strategic significance of the 1999 International Convention for the Suppression of the Financing of Terrorism becomes evident. The formal structure of the Convention introduces no new form of criminal liability and simply repeats the same five forms of participation listed in the 1997 Terrorist Bombing Convention, that is as a principal, attempter, accomplice, organizer or director, or contributor to group action. However, the conduct criminalized is no longer a violent terrorist act. Instead, what is prohibited for the first time by a terrorism-related convention or protocol is the non-violent financial preparation that precedes nearly every significant terrorist act. Moreover, that preparation or contribution is explicitly made independently punishable by Article 2-3 of the Convention, regardless of whether the intended terrorist act is actually accomplished or attempted. This criminalization of preparatory conduct re-establishes the effectiveness of the criminal justice system. Unlike a highly indoctrinated suicide bomber, most of those who knowingly provide or collect funds for terrorism do not themselves wish to die, or even go to prison, for their cause, and are therefore subject to deterrence.

I. Elements of knowledge and intent

The Financing Convention applies only to unlawful and willful provision or collection of funds “with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out” specified violent acts. Some national laws have extended criminal liability to a person who “has reasonable cause to suspect” that his or her participation, support or funds may be used for the purposes of supporting terrorist groups or actions. The question may arise whether proof of reasonable cause for suspicion is a standard of negligence or at most recklessness and not of intentional or knowing wrongdoing. Accordingly, a request for international assistance involving reasonable grounds to suspect terrorist activity may be attacked as not satisfying dual criminality under the Financing Convention. The opposing argument is that proof that an offender had reasonable cause to suspect the intended illegal use of funds allows an inference that the accused made a conscious decision to remain willfully blind to the illegality and therefore acted intentionally, or at least knowingly. Which view will prevail depends upon local jurisprudence and statutory language.

The description of the mental element in the Financing Convention as intentionally providing or collecting funds with either the **intention or knowledge** that funds are to be used for unlawful acts tends to provoke two opposing reactions. Some persons question how a provider or collector can know that funds will be used to carry out a terrorist act and yet claim not to intend that result. Others question if it is fair to establish an offence that punishes a person who does not personally desire and intend that his or her funds will be used for a terrorist act. A hypothetical situation serves to answer both questions. Assume that an influential person in an expatriate community is subject to lawful electronic surveillance by the security services of his country of residence. He is overheard reporting his activities to a superior in an organization in his country of origin. This organization carries on both legitimate social programmes and bomb attacks on non-combatant civilians of an opposing group. In the conversation the target of the surveillance advises that he will be sending funds collected from fellow emigrants to the organization by courier, and that he personally hopes that they will be used for medical care for the community. The person being intercepted then acknowledges that despite his personal desires he knows the organization will make the ultimate decision on how to spend the funds and may decide to use

them for bomb attacks on civilians. By those declarations, the speaker indicates that he does not personally desire that the funds be used for terrorist attacks but knows and is willing that such attacks may be facilitated by his fund raising. The offence established to implement the Financing Convention reaches a personal desire and intent to provide or collect funds to support terrorist acts. However, that prohibition alone was not considered sufficient to accomplish the goal of reducing terrorist attacks by discouraging the knowing provision or collection of funds for their accomplishment. Consequently, the offence implementing the Convention must also punish provision or collection of funds with the knowledge and willing acceptance of the possibility that they may be used for terrorist acts.

This page intentionally left blank

III. Jurisdiction over offences

A. Jurisdiction based upon territoriality

The location of the offence is the most ancient and fundamental basis upon which a country can assert jurisdiction to punish an offence. The social harm of criminal acts inflicted falls most immediately upon victims and property located within the country's boundaries, and it is that country's public order and tranquility that are undermined by a violation of its laws. Nevertheless, this ground of jurisdiction was not recognized in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft. That agreement dealt with in-flight hijackings, many of which involved situations in which the territorial jurisdiction was either uncertain, in dispute, or not applicable, such as seizures over the high seas. However, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, protected aircraft "in service", meaning on the ground in the 24 hours before and after a flight, as well as air navigation facilities. It therefore listed territoriality as its first ground of jurisdiction in Article 5.1 (a). Every one of the terrorism conventions developed since then has included the jurisdictional basis of territoriality. The Criminal Code of the Republic of Korea establishes territorial jurisdiction in the following language:

Article 2 (domestic Crimes)

This Code shall apply both to Korean nationals and aliens who commit crimes within the territory of the Republic of Korea.

B. Jurisdiction based upon registration of aircraft or maritime vessels

The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft declares that the State of registration of an aircraft is competent and obligated to exercise jurisdiction over criminal offences committed on board aircraft registered to that State. In recognition of the prevalence of aircraft leasing, the subsequent air travel safety conventions of 1970 and 1971 added a requirement to establish jurisdiction when the offence is committed against or on board an aircraft leased without crew to a lessee whose principal place of business is in that State. Article 6.1 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation used the traditional maritime registration concept, that jurisdiction exists when an offence established by the Convention is committed:

(a) against or on board a ship flying the flag of the State at the time the offence is committed

The Korean Criminal Code establishes this form of jurisdiction in the following language:

Article 4 (Crimes by Aliens on Board a Korean vessel outside of Korea),

This Code shall apply to aliens who commit crimes on board a Korean vessel or aircraft outside the territory of the Republic of Korea.

The 1963, 1970 and 1971 aircraft conventions were all focused upon the safety of international civil aviation and specifically excluded aircraft used in military, customs or police service. The 1997 Terrorist Bombings Convention permits an optional ground of jurisdiction if an offence established by that instrument is committed on board an aircraft operated by the Government of a State, regardless of its use. That ground is carried forward in the 1999 Financing Convention and the 2005 Nuclear Terrorism Convention. The International Convention on the Physical Protection of Nuclear Material and its 2005 Amendment do not specifically exclude aircraft used in military, customs or police service, and simply require jurisdiction to be established when the offence is committed in the territory of the State or on board a vessel or aircraft registered in that State.

C. Jurisdiction based upon nationality of the offender

The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, introduced the requirement that a State Party must establish jurisdiction over an alleged offender who is a national of that State. Continuing the use of the Republic of Korea Criminal Code to illustrate how these various grounds of jurisdiction may be established, Article 3 of that Code provides:

Article 3 (Crimes by Koreans outside Korea)

This code shall apply to all Korean nationals who commit crimes outside the territory of the Republic of Korea.

All of the subsequent terrorism-related agreements that create offences require the establishment of jurisdiction over nationals, with the exception of the 1988 Airport Protocol. That instrument supplemented the 1971 International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, which did not contain the nationality provision. An element of flexibility was introduced in the 1979 Hostage Taking Convention, which recognized that a State might wish to also establish jurisdiction over stateless persons who have their habitual residence in its territory. That ground is listed with other optional grounds in the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Fixed Platform Protocol (and therefore applies to their 2005 Protocols), in the 1997 Terrorist Bombings Convention, the 1999 Financing of Terrorism Convention and the 2005 Nuclear Terrorism Convention.

D. Jurisdiction based upon protection of nationals and national interests

The assassination of the Jordanian Prime Minister in 1971 in Cairo and the murder of three foreign diplomats in Khartoum in 1973 preceded the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,

1973. This was the first of the terrorism-related conventions that established jurisdiction based upon the status or nationality of the victim. In the 1973 Convention the protected status was that of “an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.” Jurisdiction based upon the nationality of the hostage was established in the 1979 International Convention against the Taking of Hostages as an optional basis of jurisdiction. That Convention also introduced the protection of national interests principle in Article 5.1 (c) as a mandatory ground of jurisdiction, when hostage taking was committed “in order to compel that State to do or abstain from doing any act.” The 1988 Maritime Safety Convention and its Fixed Platform Protocol included jurisdiction based upon the nationality of the victim and upon an effort to compel a State to do or abstain from doing any act, but treated them as optional rather than mandatory grounds. The optional treatment of both those grounds was continued in the Terrorist Bombings Convention 1997, which also established the optional ground of an offence committed against a State facility abroad. Those three options were repeated in the Financing of Terrorism Convention, 1999 and the Nuclear Terrorism Convention, 2005.

E. Jurisdiction based upon the presence of a person in the national territory

The obligation to extradite or prosecute is discussed separately in part IV, but depends upon a jurisdictional element requiring discussion in this part. The competence of domestic courts to exercise jurisdiction over an act which took place elsewhere and has no connection with a country’s citizens or interests other than the alleged offender’s presence, is a prerequisite to obligating the referral of a case for prosecution, if extradition is refused. Many countries provide for extra-territorial jurisdiction over acts by citizens, as a corollary to constitutional or legislative mandates or jurisprudential tradition that citizens not be extradited. All of the terrorism-related conventions and protocols that create criminal offences impose the obligation to refer for prosecution. As a consequence, so-called “monist” countries, that automatically incorporate treaties in domestic law, may be able to exercise jurisdiction over an alleged offender found in the territory based simply upon the international treaty. However, not all countries provide that a non-citizen found in the territory may be prosecuted for an extra-territorial act simply based upon that person’s presence, or upon presence plus a decision not to extradite. If that is not the case, legislation like Article 64 of the Anti-Terrorism Act, 2002 of The Gambia may be necessary:

- (1) A Gambian Court shall have jurisdiction to try an offence and inflict the penalties specified in this Act where the act constituting the offence under sections 3, 4, 5, 6, 7, 11, 15, 18 or 19 had been done or completed outside The Gambia and –

[...]

- (c) the alleged offender is in The Gambia, and The Gambia does not extradite him or her.

This page intentionally left blank

IV. Obligation to extradite or prosecute

A. Nature and consequences of the obligation

The most fundamental rule of international cooperation established by the terrorism-related conventions and protocols is the principle of extradite or prosecute. This obligation is found in all of the terrorism-related agreements that define criminal offences. As phrased in Article 8 of the 1997 Terrorist Bombing Convention, a State Party that does not extradite a person to a Requesting State Party shall:

[...] be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Analytically, compliance with this obligation requires both jurisdiction over the extra-territorial offence and an obligation to refer the case for prosecutive examination. As mentioned previously, extra-territorial jurisdiction based upon mere presence may be limited to cases wherein extradition is refused. It would also be dependent upon the standard condition of dual criminality. In some countries both jurisdiction over a foreign offence committed by a person found on the national territory and the obligation to extradite or prosecute flow automatically from membership in the terrorism-related agreements. In others, legislative action may be necessary to make referral for prosecution mandatory rather than discretionary. As a matter of executive administrative policy, this could easily be interpreted as a self-executing provision of a convention. However, the language that the “authorities shall take their decision in the same manner as in the case of any other offence of a grave nature.” demonstrates that an allegation that is investigated and determined to be unfounded need not be brought to trial. A State’s constitutional principles and its substantive and procedural law will determine to what extent the prosecution must be pursued “in accordance with the laws of that State.”

The phrase found in the extradite or prosecute articles of the conventions and protocols providing that the requested State Party is obliged to submit the case for the purpose of prosecution “without exception whatsoever” can be interpreted in differing ways. One possible meaning is that the words eliminate the traditional “public order” exception to international cooperation. Under that exception a State would not be required to render cooperation in a matter that would undermine its domestic tranquility by causing public disturbance or disrupt public morale. In the terrorism context that might equate to refusal of cooperation for fear that a terrorist group would retaliate against the requested State’s nationals or national interests if it granted extradition of aircraft hijackers who had been found on its territory. Another potential interpretation is that the language is an implicit rejection of the political offence exception. That possible meaning will be discussed in part V, section E, dealing with protections for political activity, against discrimination and requiring fair treatment.

Reference to part V, section E, dealing with protection against discrimination, raises the question of whether the obligation to extradite or prosecute applies even when there are substantial grounds to believe that a request for international cooperation is made for discriminatory reasons or that a person's position would be prejudiced for such reasons. In the abstract, it may seem counter-intuitive that a State should pursue the prosecution of a person who would suffer prejudice if extradited. However it must be recognized that a person believed to have committed atrocities may well provoke hatred and be the type of person most likely to suffer discrimination and unjust treatment. One can imagine a situation in which there is overwhelming evidence, perhaps including the offender's own claims of responsibility, that a person has committed terrorist acts. At the same time, there may be very substantial ground to believe that the person's position would be prejudiced if extradition were granted, because of official hatred of his or her political position or ethnic or religious affiliation. In that situation there is no obligation to extradite or even to grant mutual assistance, but there may well be an obligation to ensure that the available evidence is considered objectively by the authorities of the requested State under the "prosecute" alternative of the extradite or prosecute rule, considering that it applies "without exception whatsoever."

B. Obligation to conduct an inquiry, to report findings and to advise of intent

Because the terrorism-related conventions and protocols must deal with a wide variety of legal systems, they normally do not include the level of procedural detail found in bilateral treaties, such as the number of days allowed for certain actions or the precise form or channel of communications. However, the agreements do contain articles concerning the need for orderly procedures governing the custody and extradition or prosecution of a suspect.³⁴ When a requested State is satisfied that grounds exist to take an alleged offender into custody, that custody should ensure the person's presence for the purposes of prosecution or extradition. A preliminary inquiry into the facts must be made. All of these procedural steps are to be governed by national law. The State of nationality and other interested states must be notified immediately of the custody and informed promptly of the results of the inquiry, and of whether the custodial State intends to exercise jurisdiction.

³⁴Representative language is found in Article 10 of the International Convention for the Suppression of Nuclear Terrorism, 2005.

V. International cooperation in criminal matters

A. Dependence of the legal regime against terrorism upon international cooperation

There being no international tribunal with competence for acts of terrorism, those acts can only be dealt with by domestic courts. The international community has come to recognize how handicapped domestic authorities are when they confront criminals and terrorists who conduct their illegal activities so that national borders serve as insulation from investigation and prosecution. The terrorism-related conventions and protocols provide essential tools of extradition and mutual legal assistance so that national authorities can effectively conduct cross-border investigations and ensure that there are no safe havens from prosecution and extradition. Some salient points in connection with the use of those tools are mentioned below. The complexities of those mechanisms are analyzed in greater detail in the Manual for International Cooperation in Criminal Matters against Terrorism, available through the UNODC website.

B. Mutual legal assistance

The requirement that Parties afford assistance in criminal proceedings appeared first in Article 10.1 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft:

Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence and other acts mentioned in article 4. The law of the State requested shall apply in all cases.

A mutual assistance article appears in all of the subsequent conventions that create criminal offences (except the 1991 Convention on the Marking of Plastic Explosives for the Purposes of Detection). In the 1979 Hostages Convention and subsequent instruments, that assistance is specified as including the obtaining of evidence at a party's disposal. Beginning with the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Conventions obligate parties to take measures to prevent offences against other parties. This obligation was broadened in the 1973 Convention on Internationally Protected Persons, including Diplomatic Agents, to a duty to exchange information and coordinate administrative and other preventive measures. Prior to the 1997 Terrorist Bombings Convention the mutual assistance articles all referred to "assistance in connection with criminal proceedings." In 1997 the language was expanded, or at least clarified. The words "criminal proceedings" clearly apply to the evidence-gathering phase in civil law systems, where inquiries are conducted under the authority of a magistrate who opens a formal proceeding. It arguably may not apply to the evidence-gathering phase in systems where investigations are opened and conducted by the police without participation by a prosecutor or judge until a formal charge is filed. Whether an investigation by police authorities prior to the filing of a charge would be regarded as a criminal

proceeding depends on the law and discretion of the Requested State. Despite this ambiguity, the “criminal proceeding” language was used in all of the conventions and protocols until the Terrorist Bombings Convention introduced the language “investigations or criminal or extradition proceedings,” which has been used in the subsequent conventions developed by the General Assembly’s Ad Hoc Committee.

C. Extradition

All of the terrorism-related agreements that create criminal offences contain a provision that the offences established therein shall be deemed to be extraditable offences in any existing treaty between State Parties. This provision gives treaty partners the opportunity to use a bilateral treaty that is likely to contain more procedural details than the universal instruments, which are written to apply to a variety of legal systems. If the law of a Requested State requires a treaty as a legal basis for extradition, the State may at its option choose to regard the Convention as such a basis. If no treaty is required, the offence shall be treated as extraditable. For purposes of extradition, offences shall be treated as if they had been committed not only in the place where they occurred, but also in the territory of the States that have established jurisdiction under that convention or protocol (or in a place within the jurisdiction of the party requesting extradition, a formulation used only in the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its 2005 Protocol). Countries that maintain the death penalty should be aware that many countries will refuse to extradite unless assurances are received that a death sentence will not be imposed, or if imposed, will not be carried out. Similar assurances are sometimes required, with regard to other penalties that are considered to violate the public policy of a requested country, such as a sentence of life imprisonment without possibility of parole.

D. Dual criminality

Although the tests for its application are progressively becoming more flexible, an important limitation upon international cooperation is the necessity for dual or double criminality. In simple terms this policy means that a Requested State will normally not assist a Requesting State in investigating or punishing an activity that the Requested State does not consider as meriting criminal punishment. An example might be blasphemy or adultery, which are criminal offences in some legal systems, but only considered socially undesirable, not criminal, in others. As a consequence, a request for extradition of an adulterous spouse would not be granted by a country that did not criminalize adultery. At one time this doctrine was applied in a legalistic fashion that focused on form rather than substance, that is on whether the offence was similarly denominated in both systems, or whether the offence elements were identical. Modern treaties and domestic jurisprudence tend to focus more on whether the conduct would be punishable by the laws of both countries, regardless of the name of the offence or its elements.

An unresolved question in the terrorism context is the effect of dual criminality of an offence that must be committed with a particular motive. Inclusion of an ideological motive as an element of terrorism-related offences, in addition to a specific intent to coerce a government or to intimidate a population and a general criminal intent to commit the prohibited act, permits a very precise definition of offences and thus reduces the risk of the overly broad application of severe sentences or special procedural measures. However, inclusion of such a motivation requirement may have consequences for international cooperation. None of the terrorism-

related instruments require that the prohibited conduct be committed for a racial, religious, political or other ideological motive, and so many countries require only that the defined offences be committed with the state of mind specified in the respective convention or protocol. That specified state of mind may be a general criminal intent (to do the prohibited act “intentionally”, or in some instruments “willfully”) or a specific intent in other cases (in order to intimidate a population or to coerce a government or international organization to do or to refrain from doing any act). If a country that defines an offence as only requiring a general or specific intent were to request international cooperation from a country that also requires an ideological motivation as an element of the offence, the question arises whether dual criminality exists.

E. Protections for political activity, against discrimination and requiring fair treatment

The evolution of protective articles in the conventions and protocols demonstrates a progression toward ensuring the rule of law in international criminal justice cooperation while reducing tolerance for terrorist violence. For over a century prior to adoption of the first terrorism-related convention in 1963, the political offence exception had constituted a ground for refusal of international cooperation in many countries. That exception to the obligation to grant extradition was based on the choice by certain countries not to assist in punishing political activity directed against the government of another country, such as treason, sedition, or attempts to force a ruling group to change or adopt certain policies. In addition to prohibited, but non-violent, political activity, such as unauthorized public demonstrations or publications, the exception often covered violent offences connected with a political offence, such as injuries or damage inflicted during a political protest or in the course of resisting an arrest for a political offence. Proponents of the exception argued that it should cover even an attack upon civilians to draw attention to a cause because the inspiration for the offence was political in nature. Obviously, application of the exception to shield political violence from extradition or international evidence gathering would frustrate an anti-terrorism convention, as terrorist incidents involving violence against airline and ship passengers, hostages and civilians, are routinely inspired by political motives and associated with efforts to change government policies.

By the time of the adoption of the Convention on Offences and Certain Other Acts on Board Aircraft in 1963, the international law community had come to recognize the difficulties in applying the traditionally broad and ambiguous political offence exception to terrorism-related offences. The 1963 Convention reflects an attempt to allow a limited exception for laws of a political nature without negating the purpose of the agreement. Its Article 2 provides in pertinent part that:

“[...] except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.”

The stated exception recognizes the most limited form of political offence exception, that of offences against penal laws of a political nature, such as those prohibiting specified political speech or activity, but not the more problematic exceptions for violent offences connected to a political offence or unlawful acts inspired by political motives. This protective article also introduced a form of non-discrimination protection, making the agreement inapplicable to violations of laws based on racial or religious discrimination.

For 34 years after 1963, no express reference is found to any form of political offence exception in any of the terrorism-related conventions and protocols.³⁵ However, some interpret the obligation to extradite or prosecute “without exception whatsoever” found in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft as an implicit rejection of the political offence exception. This interpretation is based in part on the disappearance of the limited political offence exception which exists in the 1963 aircraft convention, which was negotiated under the auspices of the same organization, ICAO. In part it is also based on the 1970 Unlawful Seizure Convention reference to the obligation to decide upon prosecution in the same manner as any “ordinary” offence of a serious nature.³⁶ In legal writing the term “ordinary” crimes was often used to distinguish murders and other crimes in which the motives and consequences resembled normal criminality, because involving personal advantage or harm to innocent civilians, from offences more directly related to political expression and considered more worthy of the political offence exception. While the boundary between “ordinary” and “political” offences was never clear or coherent, use of the term “ordinary” offence normally conveyed a contrast with a “political” offence.

An important factor facilitating the rejection of the political offence exception in the 1997 Terrorist Bombing Convention and in subsequent universal terrorism-related instruments is the expansion of superior safeguards for alleged offenders. The 1963 Convention required minimal protection for a suspected hijacker. Custody of a suspect could be continued only “for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.” Article 13.3 granted a person in custody the right to be assisted in communicating immediately with the nearest appropriate representative of the State of nationality. Article 15.2 also required a State to accord a suspect disembarked in its territory treatment no less favorable for his protection and security than that accorded to its own nationals.

Protections for suspected offenders have grown steadily during the decades since 1963, as demonstrated by the relevant articles in the 1997 Terrorist Bombings Convention. Article 7.3 ensures that any suspect regarding whom restrictive measures have been taken against shall be entitled to:

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

³⁵Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), Convention for the Suppression of Unlawful Seizure of Aircraft (1970), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), International Convention Against the Taking of Hostages (1979), Convention on the Physical Protection of Nuclear Material (1979), Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988), Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991), International Convention for the Suppression of Terrorist Bombings (1997), International Convention for the Suppression of the Financing of Terrorism (1999), International Convention for the Suppression of Acts of Nuclear Terrorism (2005), Amendment to the Convention on the Physical Protection of Nuclear Material (2005), Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005).

³⁶Article 7. Convention for the Suppression of Unlawful Seizure of Aircraft, 1970:

The Contracting State in the territory which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

- (b) Be visited by a representative of that State;
- (c) Be informed of that person's rights under subparagraphs (a) and (b).

Article 14 is a so-called "fair treatment" article, elaborating the concept found in Article 15.2 of the 1963 Convention, but with more precision regarding the international law component of human rights guarantees:

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.³⁷

Article 12 establishes the important principle of non-discrimination in the following language:

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

The above non-discrimination article is found immediately following an article abolishing the political offence exception not only in the 2005 Nuclear Bombings Convention, but in the 1997 Terrorist Bombings Convention, the 1999 Financing of Terrorism Convention and the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. These articles expressly declare that the offences established in those agreements:

... shall not be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.³⁸

The political offence exception was always a difficult tool for legal analysis except in its simplest application to non-violent expressions of political speech or activity. This was particularly true of offences connected with a political offence, most typically consisting of violence utilized to implement a political goal and of offences inspired by a political motive, which could involve the most extreme forms of demonstrative violence. Various tests were developed to judge whether the offence was a prohibited expression of an attempt to force change upon a government or more analogous to an ordinary crime, but consistently satisfactory rules of appli-

³⁷At a minimum, this body of law would include obligations assumed under the ICCPR, the Convention against Torture, the International Convention on the Status of Refugees and those guarantees recognized as part of *jus gentium*, the customary law of nations existing independently of treaty law. Further information in this regard can be found in an Introduction to International Law Aspects of Counter-Terrorism, available at www.unodc.org, on the Terrorism Prevention page under technical assistance tools.

³⁸All of these articles are similarly worded, except the 2005 Maritime Protocol, which adds gender to the list of impermissible considerations.

cation were never achieved. Excusing attacks against innocent civilians inspired by political motives increasingly came to be viewed as a protection for terrorists. These difficulties are avoided by the rejection of the political offence exception for the offences defined by the 1997 Terrorist Bombings conventions and subsequent agreements. At the same time, the legitimate interests of the accused offenders are protected by incorporation of a robust anti-discrimination article that protects against any prejudice a person might suffer for political or other impermissible reasons. If a person was being prosecuted or punished because of her political opinion or if her position would suffer prejudice for that reason, the non-discrimination articles allow an extradition or mutual assistance request to be refused, leaving the Requested State free to deal with the person as dictated by its own national law and the available evidence.

F. Concluding human rights considerations

In a Legislative Guide intended as a concise introduction to the universal legal regime against terrorism, it is not possible to analyze each of the human rights protections that may become relevant in a particular investigation, prosecution or international cooperation situation. Readers are therefore encouraged to supplement their reading of this *Guide* with the detailed examination of protections found in a companion UNODC publication. That work, an *Introduction to International Law Aspects Related to Counter-Terrorism*, contains valuable explanations of human rights considerations that could only be touched upon in this *Guide*. Specific issues include the application of humanitarian law principles and the Geneva Conventions to terrorism, asylum law and the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, the structure and functions of the United Nations human rights bodies, and the extent and conditions of permissible derogation from the guarantees of the International Covenant on Civil and Political Rights. The interaction of these topics and the terrorism-related conventions and protocols and Security Council resolutions are examined in the context of the overall principles of international human rights and humanitarian law. Accordingly, readers should be aware that this guide is only a partial introduction to the legal regime against terrorism and should be supplemented by consulting other resources available at the UNODC website, particularly the above-described *Introduction* and the *Manual for International Cooperation in Criminal Matters against Terrorism*.

Annex

The Terrorism Prevention Branch has developed the following technical assistance tools to assist countries in their work to combat terrorism:

- Legislative guide to universal anti-terrorism conventions and protocols
- Guide for the legislative incorporation of the provisions of the universal legal instruments against terrorism
- Preventing terrorist acts: a criminal justice strategy integrating rule of law standards in the implementation of United Nations anti-terrorism instruments
- Model legislative provisions against terrorism
- Model law on extradition (prepared jointly with the Treaty and Legal Assistance Branch)
- Mutual legal assistance request writer tool (prepared by the Treaty and Legal Assistance Branch)
- Electronic legal resources on international terrorism
- Comparative study on anti-terrorism legislative developments in seven Asian and Pacific countries

These tools and publications are accessible on TPB's website in all six official languages of the United Nations (<http://www.unodc.org/unodc/en/terrorism/index.html>); print copies are available upon request from TPB. Further technical assistance tools and publications are currently under preparation.