

Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols

**Prepared by the United Nations Office on
Drugs and Crime**



United Nations

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**United Nations
New York, 2003**

Note

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United Nations publication Sales No. [E.03.XXX] ISBN [XXX]
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I. Introduction

A. Background

1. In its resolution 1373 (2001) of 28 September 2001, the Security Council declared that “acts, methods and practices of terrorism [were] contrary to the purposes and principles of the United Nations [and] that knowingly financing, planning and inciting terrorist acts [were] also contrary to the purposes and principles of the United Nations” (para. 5). In the same resolution, the Security Council decided that all Member States should “take the necessary steps to prevent the commission of terrorist acts” (para. 2 (b)). The Council also decided to establish a Committee to monitor implementation of that resolution.

2. In its resolution 1368 (2001) of 12 September 2001, the Council stated that it regarded “any act of international terrorism as a threat to international peace and security”. Under Article 25 of the Charter of the United Nations, “the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the ... Charter”. In paragraph 2 of its resolution 1373 (2001), the Council decided that all Member States should:

“ ...

“(c) Deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens;

“ ...

“(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;

“(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

“ ... ”

3. In elaborating means to accomplish these mandatory obligations, the Council called upon all Member States to (resolution 1373 (2001), para. 3):

“ ...

“(d) 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 of 9 December 1999;

“(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

“ ...”

4. The conventions (meaning multilateral treaties) and protocols (meaning agreements supplementary to a convention) referred to in paragraphs 3 (d) and (e) of Council resolution 1373 (2001) were compiled, together with other global and regional instruments on terrorism, by the Secretariat in a 2001 publication, entitled *International Instruments Related to the Prevention and Suppression of International Terrorism*.¹ In accordance with the guidance of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism (the Counter-Terrorism Committee), the present *Legislative Guide* focuses on the following 12 universal instruments² selected for inclusion in the aforementioned publication:

(a) Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963);³

(b) Convention for the Suppression of Unlawful Seizure of Aircraft (1970);⁴

(c) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971);⁵

(d) Convention on the Prevention and Punishment of Offences against Internationally Protected Persons, Including Diplomatic Agents (1973) (the “1973 Internationally Protected Persons Convention”);⁶

(e) International Convention against the Taking of Hostages (1979) (the “1979 Hostages Convention”);⁷

(f) Convention on the Physical Protection of Nuclear Material (1980) (the “1980 Nuclear Material Convention”);⁸

(g) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the

¹ *International Instruments Related to the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E.01.V.3).

² The English-language versions of these conventions and protocols, or links to them, are available at www.un.org/terrorism/. Translations of the conventions and protocols in the other official languages of the United Nations, or links to them, are available in Arabic at www.un.org/arabic/terrorism/; in Chinese at www.un.org/chinese/terrorism/; in French at www.un.org/french/terrorism/; in Spanish at www.un.org/spanish/terrorismo/tratados/terrorismo.html; and in Russian at www.un.org/russian/terrorism/.

³ United Nations, *Treaty Series*, vol. 704, p. 218. Available at <http://untreaty.un.org/English/Terrorism/Conv1.pdf>.

⁴ The Convention for the Suppression of Unlawful Seizure of Aircraft was signed at The Hague on 16 December 1970 and entered into force on 14 October 1971. Available at www.unodc.org/unodc/terrorism_convention_aircraft_seizure.html.

⁵ United Nations, *Treaty Series*, vol. 974, No. 14118. Available at <http://untreaty.un.org/English/Terrorism/Conv3.pdf>.

⁶ *Ibid.*, vol. 1035, No. 15410. Available at <http://untreaty.un.org/English/Terrorism/Conv4.pdf>.

⁷ *Ibid.*, vol. 1316, No. 21931. Available at <http://untreaty.un.org/English/Terrorism/Conv5.pdf>.

⁸ *Ibid.*, vol. 1456, No. 24631. Available at <http://untreaty.un.org/English/Terrorism/Conv6.pdf>.

Suppression of Unlawful Acts against the Safety of Civil Aviation (1988) (the “1988 Montreal Protocol”);⁹

(h) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) (the “1988 Safety of Maritime Navigation Convention”);¹⁰

(i) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988) (the “1988 Fixed Platforms Protocol”);¹¹

(j) Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991) (the “1991 Plastic Explosives Convention”);¹²

(k) International Convention for the Suppression of Terrorist Bombings (1997) (the “1997 Terrorist Bombings Convention”);¹³

(l) International Convention for the Suppression of the Financing of Terrorism (1999) (the “1999 Financing of Terrorism Convention”).¹⁴

5. In the preface to *International Instruments Related to the Prevention and Suppression of International Terrorism*,¹⁵ United Nations Secretary-General Kofi Annan described the increasing danger faced by the world community in the following terms:

“Terrorism strikes at the very heart of everything the United Nations stands for. It presents a global threat to democracy, the rule of law, human rights and stability. Globalization brings home to us the importance of a truly concerted international effort to combat terrorism in all its forms and manifestations.”

6. At a symposium entitled “Combating terrorism: the contribution of the United Nations”, the Chairman of the Counter-Terrorism Committee expressed the desire of the members of the Committee that the United Nations Office on Drugs and Crime, based in Vienna, should play an important role by providing assistance for the legislative implementation of anti-terrorism measures, as the Committee was

⁹ The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation was signed at Montreal on 24 February 1988 and entered into force on 6 August 1989. Available at <http://untreaty.un.org/English/Terrorism/Conv7.pdf>.

¹⁰ The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was adopted on 10 March 1988 and entered into force on 1 March 1992. Available at <http://untreaty.un.org/English/Terrorism/Conv8.pdf>.

¹¹ The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, was done at Rome on 10 March 1988 and entered into force on 1 March 1992. Available at www.unodc.org/unodc/terrorism_convention_platforms.html.

¹² The International Civil Aviation Organization Convention on the Marking of Plastic Explosives for the Purpose of Detection was signed at Montreal on 1 March 1991 and entered into force on 21 June 1998. Available at <http://untreaty.un.org/English/Terrorism/Conv10.pdf>.

¹³ General Assembly resolution 52/164, annex. Available at www.unodc.org/unodc/terrorism_convention_terrorist_bombing.html.

¹⁴ General Assembly resolution 54/109, annex. Available at www.un.org/law/cod/finterr.htm.

¹⁵ *International Instruments Related to the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E.01.V.3).

responsible for analysing the anti-terrorism needs of Member States, but did not itself provide technical assistance. Such a role had been envisaged for the Centre for International Crime Prevention of the Office for Drug Control and Crime Prevention of the Secretariat¹⁶ by its guiding body, the Commission on Crime Prevention and Criminal Justice and reaffirmed by the Economic and Social Council in its resolution 2002/19 of 24 July 2002, as well as by the General Assembly in its resolutions 57/173 of 18 December 2002 and 57/292 of 20 December 2002. The Centre has initiated a preparatory assistance project on strengthening the legal regime against terrorism, which will be executed with the assistance of extrabudgetary funding.

B. Strengthening the legal regime against terrorism

7. Full implementation of the anti-terrorism conventions, as called for by the Security Council in resolution 1373 (2001), will mean far more than ratifying the relevant international conventions and putting in place the supporting legislative framework. It has many aspects, including national security doctrine, budgetary allocations and administrative and personnel measures. The development of legislation is, however, the initial practical obstacle to compliance by a State party with resolution 1373 (2001) and to ratification of the global anti-terrorism conventions.

8. Some countries will not, either because of domestic law or as a matter of policy, ratify a treaty until legislation that permits the satisfaction of all of its juridical obligations is in place. This may be true both with respect to domestic ratification, that is, the constitutional process by which a State commits itself to accept the obligations of the agreement, and international ratification, that is, the formal notification to the designated treaty depository that the State has accepted the reciprocal obligations of the agreement. In other countries, a ratified treaty may have the same status as domestic law, but legislation may be required to provide elements necessary for implementation that are not contained in the treaty. For example, if financing an act of terrorism to take place in another country were not otherwise penalized in domestic law, ratification of the International Convention for the Suppression of the Financing of Terrorism would not permit such an act to be punished until domestic legislation had established a penalty.

9. Providing reference materials and technical advice (online, telephonically, and in person when cost-effective) to those responsible for drafting legislation and other persons involved in the incorporation of anti-terrorism conventions in national legislation directly helps achieve the international cooperation and full implementation of anti-terrorism instruments called for in Security Council resolution 1373 (2001), paragraph 3 (e). Because the development of acceptable legislation also removes technical obstacles to ratification, legislative assistance is an indirect but practical way of encouraging States to become parties to the instruments promptly, as called for in the same resolution, paragraph 3 (d). The present *Legislative Guide* was therefore developed to inform those responsible for drafting legislation and other readers of the development and requirements of the

¹⁶ The Office for Drug Control and Crime Prevention became the United Nations Office on Drugs Crime on 1 October 2002.

12 international conventions. The International Association of Penal Law, the International Institute of Higher Studies in Criminal Sciences and the Monitoring Body on Organized Crime hosted a meeting of international experts in Siracusa, Italy, from 3 to 5 December 2002 to provide general comments and guidance on the proposed text. The present *Legislative Guide* provides drafting resources in the form of laws currently in force or under parliamentary consideration, as well as access to illustrative model laws developed by the Commonwealth Secretariat and others. The *Legislative Guide* and accompanying checklists of the convention requirements have already been used in technical consultations conducted with a total of 25 countries. The process involves a review, carried out with national authorities, of the status of ratification of the 12 conventions and protocols, an examination of whether domestic legislation effectively implements the requirements of those instruments and identification of necessary improvements consistent with resources and legal traditions of the State concerned.

10. The *Legislative Guide* is posted on the web site of the United Nations Office on Drugs and Crime¹⁷ and periodically updated. Accordingly, the Office would welcome suggestions of additional examples of national legislation effectively implementing the penalization, jurisdiction or international cooperation obligations of one or more of the 12 anti-terrorism conventions, as well as information regarding problems which may arise in legislative implementation, drafting or application.¹⁸

C. Development of anti-terrorism instruments and models

11. The conventions and protocols examined in the present *Legislative Guide* were negotiated over four decades, from the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft to the International Convention for the Suppression of the Financing of Terrorism of 1999. They cover topics as disparate as detection markers in plastic explosives and the prevention and punishment of crimes against internationally protected persons. Their approach changed significantly during that time. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft provides that none of its provisions authorize or require action in respect of an offence against penal laws of a political nature, which could be considered to include laws against terror-producing violence committed in furtherance of revolutionary and separatist movements or wars of national liberation. The most recent conventions contain articles expressly rejecting any “political offence” exception.

12. Considering the number of subjects covered, the evolution of language and content over time and the variety of legal systems in which the conventions and protocols must be ratified and implemented, it is essential to recognize the validity of many possible approaches to their implementation. The present *Legislative Guide* is intended to provide a country considering ratification and implementation of one or more of the anti-terrorism conventions and protocols with an overview of the

¹⁷ The present *Legislative Guide* is available at www.unodc.org/odccp/terrorism.html?id=11702.

¹⁸ Staff of the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime can be contacted by e-mail at cicp.tpb@cicp.un.or.at, by telephone at + (43) (1) 26060-4177 or by facsimile at + (43) (1) 26060-5968.

relevant general principles and experience. In order to provide legislative templates adaptable to a wide variety of legal systems, models of an illustrative nature are presented. The Commonwealth Secretariat has prepared model laws and explanatory materials for the 12 conventions and protocols, collectively entitled *Implementation Kits for the International Counter-Terrorism Conventions*, as well as comprehensive model legislation and explanatory guides for implementation of all the requirements of Security Council resolution 1373 (2001), entitled *Model Legislative Provisions on Measures to Combat Terrorism*.¹⁹

13. In addition to presenting model laws prepared by the Commonwealth Secretariat and other sources, the *Legislative Guide* attempts to provide or refer the reader to examples of, or references to, national legislation currently in force or under parliamentary consideration for each of the 12 instruments. Various means of satisfying the core requirements of the instruments are discussed, emphasizing possible means of combining implementing legislation for related conventions and protocols. The reader is alerted when other applicable international standards require more than the mandatory obligations imposed by the conventions and protocols, such as those relating to the financing of terrorism. Additional useful materials can be found at the web site of the Counter-Terrorism Committee,²⁰ which contains reports from Member States, some of which contain summaries of aspects of the national legislative scheme and attach the text of relevant legislation.

¹⁹ These materials are available at www.thecommonwealth.org/law/model.html. Additional information may be obtained from Kimberly Prost, Head, Criminal Law Unit, Deputy Director, Legal and Constitutional Affairs Division of the Commonwealth Secretariat, at k.prost@commonwealth.int, telephone + (44) 207 747 6420 or + (44) 207 839 3302.

²⁰ The web site of the Counter-Terrorism Committee is at www.un.org/docs/sc/committees/1373.

II. Penalization requirements of the anti-terrorism conventions and protocols

A. General considerations and definitions

14. In two of the 12 anti-terrorism instruments, offences are not defined. Although clearly aimed at unlawful aircraft seizures, commonly called hijackings, the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft simply requires a State party to establish jurisdiction over offences defined according to its domestic law that are committed on board aircraft registered in that Contracting State. Many of the provisions of that Convention are substantially refined in subsequent aviation instruments. The Convention on the Marking of Plastic Explosives for the Purpose of Detection requires its parties to take measures, which may be penal in nature but are not required to be, to prohibit and prevent the movement of unmarked explosives.

15. Of the 12 anti-terrorism instruments, eight conventions and two related protocols obligate parties to penalize offences defined in the instrument: the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, the 1973 Internationally Protected Persons Convention, the 1979 Hostages Convention, the 1980 Nuclear Material Convention, the 1988 Safety of Maritime Navigation Convention and its 1988 Fixed Platforms Protocol, the 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention. The format used in each of these 10 instruments comprised four elements:

(a) The definition as an offence of a particular type of terrorist activity that was at that time causing great concern, as were unlawful seizures of aircraft in 1970 and attacks involving bombs and other dangerous devices in the 1990s;

(b) The requirement that parties to the instrument penalize that conduct;

(c) The identification of certain bases upon which the parties agreed to exercise their criminal jurisdiction to control the defined offence, such as the country of registration of a ship or vessel, territoriality or nationality;

(d) The creation of the further jurisdictional obligation that a State party in whose territory a suspect is found must establish and exercise competence over the offence and refer it for prosecution if extradition is not granted pursuant to the particular convention or protocol. This last element is popularly known as the principle of “no safe haven for terrorists”.

16. The core elements of the offences established in the various conventions are summarized in the present chapter, with references to illustrative models or legislation currently in force as examples of how these penalization requirements can effectively be met. This may be achieved by passage of a single consolidated anti-terrorism law; legislative action addressing related groups of anti-terrorism instruments, such as the three conventions and one protocol relating to air travel; or separate legislative implementation of each convention and protocol.

17. The publication of the Commonwealth Secretariat entitled *Model Legislative Provisions on Measures to Combat Terrorism* provides a comprehensive anti-terrorism statute intended to achieve compliance with the mandatory requirements of Security Council resolution 1373 (2001). These requirements are broader in many ways than the penal offences and other actions required under the 12 anti-terrorism instruments, as is explained in the publication. In part I of *Model Legislative Provisions*, entitled “Interpretation”, the terms used throughout the model are defined. In part III, entitled “Offences”, the elements of 16 specified types of criminal conduct related to terrorist acts are listed, including financing, facilitation, support, supply, recruitment, incitement and participation offences. As terrorist acts are defined in part I of the model to include any act or omission constituting an offence within the scope of the 12 relevant conventions and protocols, adoption of this model would satisfy the penalization requirements of all the instruments by incorporation.

18. Since differing national definitions of offences can create problems of dual criminality and other procedural issues, it is desirable to repeat the terminology used in the conventions in national implementing laws or to adopt the definitions used in the conventions by reference.

19. The Anti-Terrorism Act, 2002, of Barbados defines an offence of terrorism as including any offence under nine of the penal conventions and protocols examined in the present *Legislative Guide* (that is, all the instruments examined in the present publication, with the exception of the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1991 Plastic Explosives Convention and the 1999 Financing of Terrorism Convention, the last being dealt with by the creation of the separate crime of financing of terrorism in the Barbados statute). 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 sub-paragraph (B) or an interference or disruption of the kind mentioned in sub-paragraph (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).”

20. This formulation corresponds to part I, “Interpretation”, option 1 of *Model Legislative Provisions on Measures to Combat Terrorism*, in which “terrorist act” is defined. *Model Legislative Provisions* presents alternative ways of defining a terrorist act: option 1 defines the offence as not requiring a political, ideological or religious motivation in addition to the intent to intimidate by killing, damaging or threatening to do so, while option 2 requires such a motive. The Terrorism Act 2000 of the United Kingdom of Great Britain and Northern Ireland, discussed in paragraph 37 below, is an example of an option 2 statute, requiring both an intent to influence or intimidate and an ideological motivation. One practical consideration in choosing between these options is that, unless a suspected offender confesses, such a subjective motivation could be impossible to prove. Another is that dual criminality is a standard requirement for granting extradition; adding a motivation element may be used as the basis of claims that dual criminality is lacking when States request extradition or mutual legal assistance. Others believe that dual criminality should be judged only on whether the intentional physical act would be punishable under the law of both countries, without regard to motivation.

B. Offences related to civil aviation

21. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation all derive from a common concern about the safety of air transportation and were negotiated under the auspices of the International Civil Aviation Organization. While aimed at acts jeopardizing the safety, good order and discipline of aircraft and of persons and property on board, the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft only requires the establishment of jurisdiction over the location of offences. While providing rules and procedures in cases of “seizure, or other wrongful exercise of control of an aircraft in flight” (art. 11, para. 1), the initial Convention simply obligates a party 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, para. 2). There is no requirement to define any particular conduct endangering the safety of an aircraft and/or persons on board as an offence. Moreover, the requirement to establish jurisdiction only applies to acts committed on board an aircraft in flight, defined in that Convention as from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

22. The three subsequent aviation instruments progress incrementally in reacting to terrorist acts. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft defines a crime which parties are required to punish by severe penalties. It requires a party to penalize 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” (art. 1, para. (a)). Performing or attempting to perform any such act and acting as accomplice of a person who performs or attempts to perform such an act

are only required to be penalized when committed on board an aircraft in flight, but the meaning of that term is expanded to mean after closure of its external doors following embarkation until the moment when any such door is opened for disembarkation (art. 3, para. 1), not just from take-off to landing.

23. Historically, both the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft and the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft were responses to and focused upon hijacking attempts to gain control of aircraft in flight. Terrorist acts aimed at the destruction of aircraft were addressed by the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. This instrument requires penalization of attacks on aircraft in service, meaning from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until 24 hours after any landing (art. 2, para. (b)) and not just in flight and extends to acts of violence against persons on board an aircraft in flight, aircraft or air navigation facilities if those acts are likely to endanger aircraft safety (art. 1). The penalization requirement also extends to attempts to commit such offences (art. 1, para. 2) and accomplices without the limitation in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft that they be committed on board aircraft.

24. The most recently adopted air travel instrument, the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, is integrally related to the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, which must be ratified by any party wishing to ratify the Protocol. The Protocol defines and applies the attempt and accomplice concepts to the additional offence committed by a person if he, using any device, substance or weapon:

“(a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or

“(b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport,

if such an act endangers or is likely to endanger safety at that airport”
(art. 2, para. 1).

25. From a domestic law perspective, the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation defines as an offence acts that would already be criminal in any country, that is, violence likely to cause serious injury or death committed on the State’s territory. However, the 1988 Montreal Protocol has the significant effect of imposing an international treaty obligation to either extradite or to assume domestic jurisdiction and to extend international cooperation. As described above, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation define an evolving series of offences, from hijacking of an aircraft in flight, through violence against persons on an aircraft in flight and attacks on an aircraft on the ground, to violence against persons in airports and attacks against airports and other ground facilities. A number of countries responded

to these evolving convention offence requirements with separate acts of ratification and separate implementing statutes, first for the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, then for the later conventions.

26. Models for such separate implementation are available in the Commonwealth Secretariat *Implementation Kits*, which provide model statutes to implement each of the four aviation instruments. Legislative implementation has been achieved in other countries by combining the jurisdictional bases and the offences required by the various aviation instruments in a single statute. After negotiation of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation a number of countries approved legislation that combined implementation of the related 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation relating to air travel safety. Among 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 these statutes were later amended by the insertion of an article incorporating the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, as was done by Mauritius. Its Hijacking and Other Offences Act of 1985 had provided for offences of hijacking, violence against passengers or crew and endangering the safety of aircraft, corresponding to the types of offence addressed in the air travel safety conventions negotiated up to 1971.²¹ In 1994, it was amended by the addition of a single article in response to the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation on endangering the safety of airport and airport facilities, of which the text follows (section 6A):

“(1) Any person who, at an airport, unlawfully and by means of any device, substance or weapon—

“(a) makes use of violence against any person which causes or is likely to cause serious injury or death to that person;

“(b) performs any act which causes or is likely to cause serious damage to the environment;

“(c) destroys or seriously damages any aircraft not in service located thereon;

“(d) disrupts the services of an airport,

“shall, where any of the acts specified in subsection (1) (a) to (d) endangers or is likely to endanger safety at that airport, commit an offence;

“(2) Any person who attempts to do or is an accomplice of any person who does any of the acts specified in subsection (1) shall commit an offence”.

Subparagraph (1) (b) was not defined as an offence in the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.

²¹ *National Laws and Regulations on the Prevention and Suppression of International Terrorism: Part I*, United Nations Legislative Series (United Nations publication, Sales No. E/F.02.V.7), pp. 246-250.

27. Other consolidated laws enacted after negotiation of the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation incorporate not only the offences defined therein, but go beyond the requirements of the Convention by penalizing the unauthorized introduction of weapons and other dangerous articles into airports and on board aircraft. The Australia Crimes (Aviation) Act 1991²² and the Fiji Civil Aviation (Security) Act 1994²³ are comprehensive post-1988 rewritings of prior aircraft enactments. These laws not only incorporate the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, but also provide ancillary airport security measures, such as forbidding the introduction of weapons and other dangerous articles and, in the law of Fiji, include provisions on airport access, security searches and related topics.

C. Offences based on the status of the victim

28. The 1973 Internationally Protected Persons Convention required parties to criminalize violent attacks directed against heads of State and foreign ministers and their family members in a foreign State, as well as those directed against diplomatic agents when those agents are entitled to special protection under international law. The 1979 Hostages Convention requires penalization of any seizure or detention and threat to kill, injure or continue to detain a hostage to compel any State, international organization or person to do or abstain from any act. Penalization is also required for attempts to perform such acts and acting as an accomplice of a person who performs or attempts to perform such acts. This Convention only addresses the seizure, detention, threats and demands involved in hostage-taking if it has an international dimension. If a death or injury results, other conventions and treaties could be implicated, but the incidental seizure, detention and threats would provide a basis for invocation of the provisions of this Convention.

29. The Cook Islands Crimes (Internationally Protected Persons and Hostages) Act 1982, No. 6,²⁴ implements these two conventions in one statute. It should be noted that, while the 1973 Internationally Protected Persons Convention requires penalization of attacks upon internationally protected persons, it is silent as to whether that intent must include knowledge of the victim's protected status. The Cook Islands legislation criminalizes the offences established by the two conventions and addresses the issue of knowledge of the victim's protected status in the following manner:

“7. Prosecution need not prove certain matters

“Notwithstanding anything in sections 3 to 6 of this Act [Crimes against persons; Crimes against premises or vehicles; Threats against persons; Threats against premises or vehicles], in any proceedings brought under any of those sections it shall not be necessary for the prosecution to prove the following matters:

²² Ibid., pp. 28-58. Available at <http://scalepus.law.gov.au/html/comact/7/3826/top.htm>.

²³ Ibid., pp. 158-177. Available at www.unodc.org/pdf/crime/terrorism/fijian_act_english.pdf.

²⁴ Ibid., pp. 120-129. Available at [www.vanuatu.usp.ac.fj/Paclawmat/Cook_Islands_legislation/Crimes_\(Internationally_Protected\).html](http://www.vanuatu.usp.ac.fj/Paclawmat/Cook_Islands_legislation/Crimes_(Internationally_Protected).html).

“(a) In respect of any internationally protected person to whom paragraph (a) or paragraph (c) of the definition of that term in section 2 of this Act applies, that defendant knew, at the time of the alleged crime, the identity of that person or the capacity in which he was internationally protected;

“(b) In respect of any internationally protected person to whom paragraph (b) of that definition applies, that defendant knew, at the time of the alleged crime, that the internationally protected person was accompanying any other person to whom paragraph (a) of that definition applies;

“(c) In respect of any internationally protected person to whom paragraph (c) of that definition applies, the defendant knew, at the time of the alleged crime, that the internationally protected person was entitled under international law to special protection from attack on his person, freedom or dignity;

“(d) In respect of any internationally protected person to whom paragraph (d) of that definition applies, that defendant knew, at the time of the alleged crime, that the internationally protected person was a member of the household of any other person referred to in paragraph (c) of that definition.”

30. Such an approach is typically used by those countries that provide particular penalties or special jurisdiction, for example, by national authorities in a federal system, for assaults on government officials. Invocation of such special jurisdiction or particular penalties does not depend upon proof that the perpetrator knew that the victim occupied an official position. The necessary element of a criminal intent is supplied by the fact that an assault upon any person is a clearly criminal act, *malum in se*. Such legislation can be regarded as a demonstration of a Government’s commitment to protecting functionaries of and relationships with other States rather than as a special deterrent to criminal conduct.

D. Offences related to dangerous materials

31. Three conventions deal with inherently dangerous substances, the 1980 Nuclear Material Convention, the 1991 Plastic Explosives Convention and the 1997 Terrorist Bombings Convention, dealing with bombs and other lethal devices. The first two have significant regulatory elements that require coordination with authorities other than those concerned with criminal justice matters. The 1980 Nuclear Material Convention requires penalization of the possession or handling without lawful authority of nuclear material that is likely to cause death, serious injury or substantial damage to property; the theft, robbery, embezzlement or fraudulent obtaining of nuclear material; demanding nuclear material by force or intimidation; threatening to use nuclear material to cause death or serious injury to any person or substantial property damage; and threatening to commit one of the offences defined above in order to compel a natural or legal person, international organization or State to do or refrain from doing something. This Convention is only one of several dealing with the protection of nuclear or other radioactive material and nuclear facilities. A draft amendment to strengthen its provisions is currently being prepared by an expert group; those concerned with legislative implementation

of the Convention may obtain further information from the International Atomic Energy Agency.²⁵

32. The various conventions dealing with the protection of nuclear or radioactive material and nuclear facilities employ different wording for the definition of offences, but most employ wording similar to that used in the statutes established by Australia and Ireland that are reproduced below. The Nuclear Non-Proliferation (Safeguards) Act 1987 of Australia²⁶ corresponds to that used in the Nuclear Material Convention. The definition is given below:

“Interpretation

“32. In this Division, ‘nuclear material’ has the same meaning as in the Physical Protection Convention.

“Stealing nuclear material

“33. A person shall not:

“(a) steal;

“(b) fraudulently misappropriate;

“(c) fraudulently convert to that person’s own use; or

“(d) obtain by false pretences;

“any nuclear material.

“Penalty: \$20,000 or imprisonment for 10 years, or both.

“Demanding nuclear material by threats

“34. A person shall not demand that another person give nuclear material to the first-mentioned person or some other person by force or threat of force or by any form of intimidation.

“Penalty: \$20,000 or imprisonment for 10 years, or both.

“Use of nuclear material causing injury to persons or damage to property

“35. A person shall not use nuclear material to cause:

“(a) serious injury to any person; or

“(b) substantial damage to property.

“Penalty: \$20,000 or imprisonment for 10 years, or both.

“Threat to use nuclear material

“36. A person shall not:

²⁵ Those concerned with legislative implementation of the 1980 Nuclear Material Convention may obtain further information from Maria de Lourdes Vez Carmona at the International Atomic Energy Agency by sending an e-mail to Carmona.Vez@iaea.org.

²⁶ *National Laws and Regulations ...*, pp. 18-21. Available at <http://scaletext.law.gov.au/html/pasteact/0/12/top.htm>.

- “(a) threaten;
- “(b) state that it is his or her intention; or
- “(c) make a statement from which it could reasonably be inferred that it is his or her intention;

“to use nuclear material to cause:

- “(d) the death of, or injury to any person; or
- “(e) damage to property.

“Penalty: \$20,000 or imprisonment for 10 years, or both.

“*Threat to commit offence*

“37. A person shall not:

- “(a) threaten;
- “(b) state that it is his or her intention; or
- “(c) make a statement from which it could reasonably be inferred that it is his or her intention;

“to do any act that would be a contravention of section 33 in order to compel a person (including an international organisation or the Government of Australia or of a foreign country) to do or refrain from doing any act or thing.

“Penalty: \$20,000 or imprisonment for 10 years, or both.”

33. The Radiological Protection Act 1991 of Ireland,²⁷ giving effect to the Convention, includes the following provisions:

“Interpretation.

“2. ... ‘nuclear material’ has the meaning assigned to it by Article 1 of the Protection Convention.

“Offences relating to nuclear material.

“38.—(1) A person who—

- “(a) possesses, uses, transfers, alters, disposes or disperses nuclear material in such a manner so as to cause or be likely to cause death or serious injury to any person, or substantial damage to property, or
- “(b) steals nuclear material, or
- “(c) embezzles or fraudulently obtains nuclear material, or
- “(d) does any act constituting an unlawful demand for nuclear material, by the threat of the use of force, by the use of force, or by a threat of any kind, or

²⁷ The Radiological Protection Act 1991 of Ireland is available at www.bailii.org/ie/legis/num_act/rpa1991240/.

“(e) threatens—

“(i) to use nuclear material to cause death or serious injury to any person or substantial property damage,

“(ii) to commit an offence under paragraph (b) of this subsection in order to compel any person, an international organisation or state to do or to refrain from doing any act

shall be guilty of an offence.

“39.—...

“40.—(1) ...

“(2) A person who is guilty of an offence under this Act shall be liable:

“(a) ...

“(b) ...

“(c) on conviction on indictment for an offence under section 38 of this Act, to a fine not exceeding £1,000,000 or to imprisonment for life or other term decided by the court or to both ...”

34. Unlike all the other conventions examined in the present publication apart from the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1991 Plastic Explosives Convention defines no offence. It requires parties to take the necessary measures to establish controls over unmarked explosives stocks and to prohibit and prevent the manufacture of unmarked explosives. The Convention does not specify whether those controls and their enforcement should be penal, regulatory or administrative in nature. This is another convention for which the depository is the International Civil Aviation Organization, as it is for the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation. That organization may serve as a resource for technical advice on implementing legislation.²⁸

35. The Government of South Africa has submitted an explosives bill to parliament that would adopt the technical definitions in the 1991 Plastic Explosives Convention. If enacted, the bill would provide criminal penalties to enforce its provisions that:

“(1) Notwithstanding any other provision in this Act but subject to subsection (3), no person may manufacture, import, transport, keep, store, possess, transfer, purchase, sell, supply or export any unmarked plastic explosives.

“(2) (a) The marking of plastic explosives must be done in such a manner as to achieve homogeneous distribution in the finished product;

“(b) The minimum concentration of a detection agent in the finished product must be in accordance with the Technical Annex to the Convention.”

²⁸ The web site of the International Civil Aviation Organization is at www.icao.int.

Subsection (3) goes on to deal with the exceptions provided in the Convention for the disposal of existing stocks, and so forth.

36. Unlike the predominantly regulatory 1980 Nuclear Material Convention and the 1991 Plastic Explosives Convention, the 1997 Terrorist Bombings Convention is penal in nature and requires parties to criminalize knowing participation in the placement or use of an explosive, incendiary, toxic, biologically dangerous or radioactive 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 the Convention, as they are subject to the separate rules of international humanitarian law. Some countries have enacted legislation that essentially tracks the language of the Terrorist Bombings Convention in defining the offence.

37. Other statutes, such as the Terrorism Act 2000 of the United Kingdom, include a specific terrorist intent element, a further political, religious or ideological requirement and address not only the threats listed in the Convention, but also attacks on electronic data or control systems. An extract from the section on interpretation of the Terrorism Act 2000 is given below:

- “(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.
- “(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.”

E. Offences related to vessels and fixed platforms

38. The hijacking of vessels and aircraft present analogous considerations, involving as they do the safety of passengers and crew, elements of mobility and historical parallels based on the authority of the commander and the concept of extraterritorial sovereignty based upon the registration or flag of the conveyance. However, the four air travel instruments were negotiated under the auspices of the

International Civil Aviation Organization, while the 1988 Safety of Maritime Navigation Convention and its contemporaneous Fixed Platforms Protocol were negotiated under the auspices of the International Maritime Organization. Given the independent interests and separate technical and advisory programmes of the two depository organizations, it was considered advisable to treat the 1988 Safety of Maritime Navigation Convention and its Protocol separately.

39. The 1988 Safety of Maritime Navigation Convention combines many of the provisions developed in the preceding decades in dealing with attacks upon aircraft. It requires the penalization of seizures of a ship, 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 or by communicating false information and injuring or killing any person in connection with the commission of the previously listed offences. Attempts to commit such offences and participation in them are also required to be penalized. A virtually contemporaneous Protocol extends the coverage of the Convention to attacks upon fixed platforms located on the continental shelf. The Commonwealth Secretariat *Implementation Kits* include separate model laws for implementation of the Convention and its Protocol. An example of legislation from a coastal country is the Australia Crimes (Ships and Fixed Platforms) Act 1992,²⁹ simultaneously implementing the Convention and Protocol.

40. Opened for signature in March 1988, the 1988 Safety of Maritime Navigation Convention and the 1988 Fixed Platforms Protocol entered into force on 1 March 1992 and had gained 69 ratifications, accessions or successions as at 2 July 2002. This number is smaller than the 80 recorded for the more recent 1991 Plastic Explosives Convention, but almost equal to the 64 recorded for the 1997 Terrorist Bombings Convention. The status of ratifications can be found at the web site of the Counter-Terrorism Committee.³⁰

41. It may be perceived by some countries that are landlocked, do not have oil drilling or other fixed platforms on a continental shelf and do not have a significant commercial fleet under their flag and registration that the 1988 Safety of Maritime Navigation Convention and its Fixed Platforms Protocol are inapplicable to their interests. However, a country may be confronted by situations in which its nationals are killed or injured on board a ship or fixed platform or commit an offence under the Convention or Protocol, suspected offenders are found within its territory, or preparations for the commission of offences against the safety of maritime navigation or a fixed platform are made within its territory. All of those situations are covered by these two instruments and legal procedures agreed to in advance under these international agreements could minimize post-attack friction between States. It should also be remembered that ratification and implementation of the global anti-terrorism instruments were called for in Security Council resolution 1373 (2001) and by the Counter-Terrorism Committee, without regard to whether or not a State possessed a sea coast. Non-coastal countries such as Austria and Hungary have ratified both the Convention and its Protocol.

²⁹ *National Laws and Regulations ...*, pp. 59-70.

³⁰ The web site of the Counter-Terrorism Committee is at www.un.org/Docs/sc/committees/1373/.

F. Offences related to the financing of terrorism

42. The 1999 Financing of Terrorism Convention requires parties to penalize conduct by any person who (art. 2, para. 1):

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

“(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex [meaning the nine treaties predating the Financing of Terrorism Convention which defined terrorist offences]; 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.”

43. Subparagraph (a) incorporates by reference the offences penalized by nine of the previous global anti-terrorism instruments 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, either in its body or in an annex listing all of the defined offences. Subparagraph (b) sets out a self-contained definition of a terrorist act. An example of national legislation that parallels the 1999 Financing of Terrorism Convention in this two-part definition of acts for which the provision or collections of funds is prohibited is the Barbados Anti-Terrorism Act, 2002 (discussed in paras. 14-20 above). This Act creates the crime of terrorism and the offence of financing of terrorism, defined as follows:

“4. (1) A person who in or outside Barbados directly or indirectly, unlawfully and wilfully,

“(a) provides or collects funds; or

“(b) provides financial services or makes such services available to persons

“with the intention that the funds or services are to be used or with the knowledge that the funds or services are to be used in full or in part, in order to carry out

“(i) an act that constitutes an offence under or defined in any of the Treaties listed in the Third Schedule [meaning all of the penal conventions/protocols except the Terrorism Financing Convention itself]; or

“(ii) any other act

“(A) 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

“(B) that is intended to cause

“(aa) 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;

“(bb) the risk, damage, interference or disruption of the kind mentioned in subparagraph (B), (C), or (D) of section 3 (1) as the case may be.

“is guilty of an offence ...”

44. By its Act of 15 November 2001, France defined the specific offence of financing of terrorism by the following law, the original version of which can be found in the French-language version of the *Legislative Guide*:

“It also constitutes an act of terrorism to finance a terrorist organisation 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.”³¹

45. An updated version of the *Legislative Guide* will, through hyperlinks, make available relevant national legislation and model laws being developed in both the civil and common law traditions.³² The Commonwealth Secretariat *Implementation Kits* provides model legislation and carefully explores the issues and terminology found in the 1999 Financing of Terrorism Convention (and their relationship to the 1997 Terrorist Bombings Convention) and should be consulted in regard to the criminalization of offences under either of those Conventions.

46. In addition to the obligation to penalize the financing of terrorism, the 1999 Financing of Terrorism Convention contains significant non-penal elements. It obligates parties to have legislation to enable a legal entity to be held civilly, administratively or criminally liable when a person responsible for its management or control has committed an offence set forth in article 2 of the Convention. It also requires States 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. Parties must cooperate to prevent the commission of terrorist acts by adapting their national legislation to require financial institutions and other professions involved in financial transactions to identify their customers and to report transactions suspected of stemming from a criminal activity.

47. It is noteworthy that this last obligation, found in article 18 (b), is not confined to the reporting of suspected terrorist activity, but extends to all suspected criminal activity. This broad formulation of the reporting obligation is necessary to recognize the reality that a financial professional may fairly be expected to identify transactions with no apparent business rationale, but cannot and should not be expected to determine what kind of illegal activity may lie behind such transactions. Article 18 (b) (iii) deals with regulations imposing on financial institutions the obligation to report “... all complex, unusual large transactions and unusual patterns

³¹ French Criminal Code, Art. 421-2-2 (added by Law No. 2001-1062 of 15 November 2001).

³² The present *Legislative Guide* is available at www.unodc.org/unodc/en/terrorism.html.

of transactions, which have no apparent economic or obviously lawful purpose”. Under this classic formulation of what constitutes a suspicious transaction for anti-money laundering purposes, there is no need for an apparent connection to drug trafficking or terrorism and the simple lack of an apparent economic or lawful purpose is sufficient. Once that condition appears, it is the financial institution’s responsibility to report the transaction, leaving it to government authorities to determine whether trafficking in drugs, arms, terrorism or any other serious crime, or a legitimate business or personal purpose, lies behind the transaction.

48. There are obviously significant factual differences between the practices and offences of money-laundering and terrorist financing. Money-laundering typically involves transferring significant proceeds from illegal transactions into legitimate commerce or banking channels, often divided or disguised to avoid detection. Conversely, terrorist financing may involve aggregating sums derived from lawful activities or microcriminality and transferring them to a person or organization, which ultimately may send relatively small payments to support terrorist activities. Such funds become legally tainted only when a person handling them forms the intention to use them to finance a terrorist act. Despite these differences in the two phenomena, global efforts to fight money-laundering and suppression of the financing of terrorism both have need of the assistance of financial institutions and professions in the detection of suspicious transactions and both rely heavily upon intelligence collection and analysis, often through financial intelligence units. As illustrated by the application to terrorist financing of suspicious activity reporting, a control mechanism initially developed to combat the laundering of drug money, the global regimes for control of money-laundering and financing of terrorism are increasingly becoming integrated.

49. The 1999 Financing of Terrorism Convention is only one aspect of a larger international effort to prevent, detect and suppress the financing and support of terrorism. Under Security Council resolution 1373 (2001), Member States are required to take measures not only against the financing of terrorism, but also against other forms of support, such as recruitment and the supply of weapons. The 1999 Financing of Terrorism Convention only prohibits the provision or collection of “funds”, meaning assets or evidence of title to assets. However, when legislation to implement the Convention is enacted, the resolution’s requirement to suppress recruitment and the supply of weapons should also be considered.

50. A 1994 statute of the United States of America (United States Code, Title 18, sect. 2339a) predates both the 1999 Financing of Terrorism Convention and resolution 1373 (2001) and creates the offence of “Providing material support to terrorists”. This law criminalizes not only the provision or collection of funds prohibited by the 1999 Financing of Terrorism Convention, but virtually all forms of material support and the concealment of such support, a crime with obvious similarity to a money-laundering concealment offence:

“(a) Offense.—

Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation ... or in preparation for, or in carrying

out, the concealment of an escape from the commission of any such violation ... shall be [guilty of an offence].

“(b) Definition.—

In this section, the term ‘material support or resources’ means currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation and other physical assets, except medicine or religious materials.”

51. The United States has also enacted a law specifically implementing the 1999 Financing of Terrorism Convention and utilizing its terminology and definitions, entitled “The Suppression of the Financing of Terrorism Convention Implementation Act of 2002”, Title II of Public Law 107-197 of 25 June 2002.

52. Decree Law No. 25475 of 5 May 1992 of Peru treats terrorist financing as one form of prohibited act of collaboration with terrorism. The original version of the law can be found in the Spanish-language version of the *Legislative Guide*; the English-language version of article 4 of that Decree Law, concerning collaboration, provides that:

“Anyone who wilfully secures, gathers, collects or supplies any goods or means or in any manner engages in acts such as to further the commission of offences referred to by this Decree Law or furthers the goals of a terrorist group, shall be punished by a term of imprisonment of no less than 20 years”.

53. Authorities considering legislation to implement the 1999 Financing of Terrorism Convention may also take into consideration the work of the Financial Action Task Force on Money Laundering, an intergovernmental organization housed at the Organisation for Economic Cooperation and Development in Paris and originally formed to combat money-laundering. In October 2001, the Task Force issued eight special recommendations on terrorist financing, which go beyond the requirements of the 1999 Financing of Terrorism Convention and Security Council resolution 1373 (2001) in several respects. These were in addition to its original 40 recommendations on the control of money-laundering, which were issued in 1990, revised in 1996 and further revised in 2003 to be applicable to both money-laundering and terrorism. The eight special recommendations deal with (I) ratification and implementation of the 1999 Financing of Terrorism Convention and implementation of the United Nations resolutions relating to the financing of terrorism; (II) penalization of the financing of terrorism, terrorist acts and terrorist organizations and designation of such offences as money-laundering predicate offences; (III) freezing and confiscating terrorist assets; (IV) 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) control of alternative remittance systems; (VII) strengthening of originator information requirements for wire transfers; and (VIII) controls to prevent the misuse of non-profit organizations in the financing of terrorism. The first five special recommendations overlap, to a great extent, the provisions of the 1999 Financing of Terrorism Convention and Council resolution 1373 (2001), whereas the last three cover new ground regarding informal remittance

systems, identifying information to accompany wire transfers, and controls to prevent the use of non-profit organizations in financing terrorism.

54. In the above-mentioned article, participation in the financing of terrorism is defined as including:

“... any kind of economic action, assistance or intervention undertaken voluntarily for the purpose of financing the activities of terrorist elements or groups.”

55. In 2002, the International Monetary Fund (IMF) and the World Bank added the Forty Recommendations on money-laundering of the Financial Action Task Force and the eight special recommendations on terrorist financing to their list of useful standards and undertook a pilot project of assessments that will involve IMF, the World Bank, the Financial Action Task Force and Task Force-style regional bodies. The assessments will be undertaken by IMF and the World Bank in their Financial Sector Assessment Programme and by IMF under its programme of assessments of offshore financial centres. In order to guide these assessments, the plenary meeting of the Task Force adopted a detailed *Methodology for Assessing Compliance with Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Standard*, which had been developed in cooperation with IMF and the World Bank.

56. For all of the above reasons and because of the inherent complexity of the issues, when drawing up legislation to implement the 1999 Financing of Terrorism Convention or the related financing of terrorism obligations set out in Security Council resolution 1373 (2001), Member States are encouraged to consult available resources. These resources include the Global Programme against Money-Laundering of the United Nations Office on Drugs and Crime, which has developed model legislation targeting money-laundering and proceeds of crime,³³ the Anti-Money Laundering Unit of IMF, which has published *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting*,³⁴ the World Bank³⁵ and the Financial Action Task Force on Money Laundering.³⁶

³³ Staff of the Global Programme against Money Laundering may be contacted by e-mail at gpml@unodc.org, by telephone on + (43) (1) 26060-4313, or by facsimile on + (43) (1) 26060-6878.

³⁴ International Monetary Fund, *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting* (2003).

³⁵ The web site of the World Bank is at www.worldbank.org.

³⁶ The staff of the Financial Action Task Force on Money Laundering may be contacted by e-mail at contact@fatf-gafi.org.

III. Other core elements of the anti-terrorism conventions and protocols

A. Establishment of jurisdiction over the offence

1. No safe haven for terrorists

57. The most prevalent and perhaps most significant type of jurisdiction that the universal instruments require to be established is that necessary to ensure that there shall be no safe haven for terrorists. The principle of *aut dedere aut judicare*, which states that a country that does not extradite an alleged offender shall assume jurisdiction to judge that person according to its own laws, is now the fundamental principle of anti-terrorism instruments and was prominently restated in Security Council resolution 1373 (2001), in which the Council:

“ ...

“2. *Decides also* that all States shall:

“ ...

“(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens”.

58. Ten of the conventions and protocols require the penalization of defined offences (meaning all but the initial 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft and the 1991 Plastic Explosives Convention). All of those instruments require States parties to establish jurisdiction whenever the alleged offender is present in the State and the party with custody does not extradite to a party that has established jurisdiction pursuant to that Convention or Protocol. A direct approach to this jurisdictional obligation was adopted by China at the twenty-first meeting of the Standing Committee of the Sixth National People’s Congress on 23 June 1987, as follows:

“The 21st Meeting of the Standing Committee of the Sixth National People’s Congress resolves that the People’s Republic of China shall, within the scope of its treaty obligations, exercise criminal jurisdiction over crimes prescribed in the international treaties to which the People’s Republic of China is a party or has acceded.”³⁷

59. The appendices to the legislation then quote the articles of five of the global Conventions, which provide that a State party in whose territory an alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purposes of prosecution, thus clearly demonstrating the statutory intent to establish such jurisdiction.

³⁷ *National Laws and Regulations on the Prevention and Suppression of International Terrorism: Part I*, United Nations Legislative Series (United Nations publication, Sales No. E/F.02.V.7), p. 115.

60. The same effect is achieved by section I, article 4, of the Russian Federation Federal Act on the Suppression of Terrorism of 25 July 1998.³⁸ That article states that:

“The Russian Federation, guided by the interests of ensuring the safety and security of the individual, society and the State, shall prosecute persons within its territory who are involved in terrorism [defined in art. 3 on definition of terms as including various Convention offences] including in circumstances where the acts of terrorism were planned or committed outside the Russian Federation but caused harm to the Russian Federation, and in other circumstances provided for by the Russian Federation’s international agreements.”

61. The Commonwealth Secretariat *Implementation Kits* for individual conventions and protocols does not suggest statutory language explicitly referencing the “extradite or prosecute” imperative in the global instruments, but it does refer to the issue in prominent notes and explains that for the obligation to be implemented, a State must have legislation permitting prosecution when the only jurisdictional basis is the alleged offender’s presence. The Commonwealth Secretariat models given in the Implementation Kits provide the options of jurisdiction based on the presence of the person or a more restricted jurisdiction based upon presence plus the impossibility of extradition, which presumably would arise from an impediment, such as a legitimate fear of discriminatory prosecution or a constitutional ban against extradition of nationals.

62. The other circumstances in which parties are required to establish jurisdiction over defined offences vary according to the nature of the terrorist activity being addressed and to the evolution of anti-terrorist measures over the decades. They are discussed below.

2. Jurisdiction based on registration of aircraft or ships or on territoriality

63. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft addresses hijacking and requires parties to establish jurisdiction over offences committed on board aircraft based upon their registration. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft contains the requirement to establish jurisdiction based upon registration, as does the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, which add a requirement to establish territorial jurisdiction over the offences defined in those Conventions. This new requirement of territorial jurisdiction reflects the nature of these two instruments as reactions to attacks on aircraft on the ground before and after flight and at ground facilities such as airports.

64. The 1973 Internationally Protected Persons Convention also requires that jurisdiction be established by a State party for offences committed in its territory or on board a ship or an aircraft registered in that State, as does the 1979 Hostages Convention. The 1980 Nuclear Material Convention focuses on the protection of nuclear material and its transit, requiring that jurisdiction over offences involving

³⁸ Ibid., pp. 347-361.

such materials be established based upon territoriality and registration of the ship or aircraft involved. The 1988 Safety of Maritime Navigation Convention and its 1988 Fixed Platforms Protocol require that jurisdiction be established based upon territoriality (specified in the Protocol as location on the continental shelf of a State) and upon registration of a ship on which an offence is committed. The 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention both require the establishment of jurisdiction based upon territoriality and upon registration of a ship or aircraft. The Criminal Code of the Republic of Korea³⁹ expresses these types of jurisdiction very clearly:

“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.

“...

“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.”

65. Another form of jurisdiction or competence dealt with under the 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention is jurisdiction over offences committed within a State’s territory that affect another State. Article 6 of the 1997 Terrorist Bombings Convention and article 7 of the 1999 Financing of Terrorism Convention are divided into two categories of grounds upon which jurisdiction may be established. Article 6 of the 1997 Terrorist Bombings Convention requires in paragraph 1 that jurisdiction be established on the basis of territoriality, registration of a vessel or aircraft and the nationality of the offender. Paragraph 2 of article 6 refers to various grounds upon which parties may choose to establish jurisdiction, such as the nationality of a victim or an attempt to compel that State to do or abstain from doing any act. Article 7 of the 1999 Financing of Terrorism Convention requires in paragraph 1 the same obligatory grounds of jurisdiction as does the 1997 Terrorist Bombings Convention. Paragraph 2 of article 7 of the 1999 Financing of Terrorism Convention then lists discretionary grounds upon which jurisdiction may be established, similar to those in paragraph 2 of article 6. In considering this division between mandatory and discretionary grounds under the 1997 and 1999 Conventions, it is worthwhile to consider Security Council resolution 1373 (2001), which provides in the mandatory language of paragraph 2, subparagraphs (d) and (e), that all States shall:

“(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;”

³⁹ Ibid., pp. 331-332.

3. Jurisdiction based upon the nationality of the alleged offender

66. The 1973 Internationally Protected Persons Convention was the first of the universal anti-terrorism instruments to introduce the requirement that a State party should establish jurisdiction over an alleged offender who is a national of that State. The 1980 Nuclear Material Convention, the 1988 Safety of Maritime Navigation Convention and its 1988 Fixed Platforms Protocol, the 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention all require jurisdiction to be established based upon the nationality of the alleged offender.

67. The Criminal Code of the Republic of Korea provides a clear statement of this type of jurisdiction:

“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.”

4. Jurisdiction based upon the protection of other specified interests

68. 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 Aviation require a Contracting State to establish jurisdiction when the lessee of an aircraft has his principal place of business in that State. The 1973 Internationally Protected Persons Convention requires the establishment of jurisdiction over crimes committed against a person whose protected status derives from the functions exercised for a State which is a party to the Convention. The 1979 Hostages Convention, the 1980 Nuclear Material Convention, the 1988 Safety of Maritime Navigation Convention, its 1988 Fixed Platforms Protocol and the 1997 Terrorist Bombings Convention all define as offences violence or threats used to compel a Government or international organization to do or refrain from doing an act. However, only the 1979 Hostages Convention affirmatively requires that jurisdiction be established over an offence committed to compel that State to do or refrain from doing any act. The 1988 Safety of Maritime Navigation Convention and its 1988 Fixed Platforms Protocol, the 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention list this circumstance as among those discretionary grounds for which a State may establish jurisdiction.

69. Sections 129 and 129a of the German Criminal Code define the offences of forming, being a member of, supporting or recruiting for a criminal (section 129) or terrorist (section 129a) organization. Section 129b establishes the following jurisdiction, based upon various State interests, as reflected in the following unofficial translation:

“Sections 129 and 129a shall also apply to organisations abroad. If the offence relates to an organisation outside the Member States of the European Union, this shall only apply if the offence was committed by virtue of an activity exercised within the territorial scope of this law or if the perpetrator or the victim is a German or is within Germany. In cases that fall under the second sentence, the offence shall only be prosecuted on authorisation by the Federal Ministry of Justice. Authorisation may be granted for an individual case or in general for the prosecution of future acts relating to a specific organisation. When deciding on whether to give authorisation, the Federal Ministry of

Justice shall take into account whether the efforts of the organisation are directed against the fundamental values of a state order which respects human dignity or against the peaceful coexistence of peoples, and which seem to be reprehensible when the entire circumstances are weighed up.”⁴⁰

5. Jurisdiction required to be maintained for extradition or prosecution once an alleged offender is present

70. Practical implementation of the fundamental principle of “no safe haven for terrorists” is accomplished in the 11 conventions that define criminal offences or establish criminal jurisdiction (that is, all except the 1991 Plastic Explosives Convention) by the requirement that a State party in whose territory the offender or alleged offender is present shall ensure that person’s presence for the purpose of prosecution or extradition. 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 Aviation contain provisions requiring a contracting State to establish jurisdiction when the aircraft on which the offence was committed lands in its territory with the alleged offender still on board. In most circumstances these two places would be the same, but there have been circumstances in which a hijacked plane has first landed in one State and then continued on to another State. In that case, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft would require the States of registration, landing and where the suspect is eventually found to establish jurisdiction and the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation would also require the State in whose territory the offence was committed to do so.

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

71. All of the conventions that define a criminal offence (that is, all of the conventions examined in the present publication, except the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft and the 1991 Plastic Explosives Convention) require that a State party which is obligated to ensure the presence of a person for criminal or extradition proceedings to be instituted shall conduct a preliminary inquiry into the facts, report its findings to concerned States and indicate whether it intends to exercise jurisdiction. The 1980 Nuclear Material Convention uses more generic language, providing that a State party ensuring the presence of an alleged offender for prosecution or extradition shall take appropriate measures and shall notify them to concerned States.

72. Paragraph 6 of the Suppression of Terrorist Bombings Act No. 11 of 1999 of Sri Lanka⁴¹ implements the reporting obligation in the following terms:

“Where a request is made to the Government of Sri Lanka, by or on behalf of the Government of a Convention State for the extradition of any person accused or convicted of an offence specified in the Schedule to this Act, the Minister shall, on behalf of the Government of Sri Lanka, forthwith notify the

⁴⁰ See Germany, *Strafgesetzbuch* (Criminal Code), section 1296b.

⁴¹ *National Laws and Regulations ...*, pp. 405-410.

Government of the requesting State of the measures which the Government of Sri Lanka has taken, or proposes to take, for the prosecution or extradition of that person for that offence.”

C. Obligation to submit for prosecution

73. While the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft did not require submission for prosecution, all of the subsequent instruments containing penal offences (that is, all except the 1991 Plastic Explosives Convention) require that a State party where the alleged offender is present shall, if it does not extradite him, without exception, submit the case for prosecution. This does not mean that an allegation which is investigated and determined to be unfounded must 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, but the Conventions require the prosecution process to be invoked as it would be for a serious domestic offence. Statutes such as those of China and the Russian Federation, discussed in paragraphs 57-62 above, explicitly convert these convention obligations into domestic law.

D. Elements of knowledge and intent

74. In order to avoid the danger of overly broad criminal prohibitions in statutes penalizing terrorism offences, careful drafting is required to maintain full respect for the rule of law and to avoid the penalization of innocent conduct. Two crucial issues are the degree of knowledge or intent required for criminalization of an offence and the extent of knowing participation that justifies the imposition of criminal liability. The 1997 Terrorist Bombings Convention requires the criminalization of unlawful and intentional conduct which “in any other way contributes to the commission of one or more offences ... by a group of persons acting with a common purpose” (art. 2, para. 3c.). This broad prohibition is then qualified by the explicit requirement that “such contribution shall be intentional and either made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned”.

75. Similarly, the 1999 Financing of Terrorism Convention is applicable to fund-raising, which can have benevolent as well as sinister purposes. Its criminal intent language requires not merely a general intent that the providing or collecting of funds be done “unlawfully and wilfully”, but also the specific factual qualification that it be done “with the intention that they be used or in the knowledge that they are to be used, in full or in part, in order to carry out ...” (art. 1) a terrorist act. This intention or knowledge requirement ensures that the Convention offence applies only to conduct which is both harmful to society and recognizable as such. Some national legislation defining the offence of terrorist financing, such as the Barbados Anti-Terrorism Act, 2002, uses a similar formulation.

76. In the Prevention of Terrorism Act, 2002, of India, section 22, entitled “Fund raising for a terrorist organization to be an offence”, reckless disregard is equated

with knowledge, by making acts of financing punishable if there is reasonable cause to suspect that the money or other property will be used for terrorism:

“(1) A person commits an offence if he—

“(a) invites another to provide money or other property, and

“(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.

“(2) A person commits an offence if he—

“(a) receives money or property, and

“(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.

“(3) A person commits an offence if he—

“(a) provides money or other property, and

“(b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

“(4) In this section, a reference to the provision of money or other property is a reference to its being given, lent or otherwise made available, whether or not for consideration.”

77. In section 2332d of Title 18 of the United States Code, entitled “Financial transactions”, a similar approach is adopted with regard to any financial transaction with a Government of a country designated as supporting international terrorism. The intent element of the statute can be satisfied either by “knowing or having reasonable cause to know that a country is designated ... as a country supporting international terrorism” (section 2332d, para. (a)). This type of statute is useful and may be required to carry into domestic effect measures imposed under Chapter VII of the Charter of the United Nations, such as those decided upon in Security Council resolution 1373 or in resolutions requiring measures not involving the use of armed force. A model is given in *Model Legislative Provisions on Measures to Combat Terrorism*, part II, entitled “Specified entities”.

E. Offences of participation

78. A related issue is the extent of participation that justifies the imposition of criminal liability. Nine of the 10 conventions and protocols listed above as creating criminal offences expressly require the penalization of participation as an accomplice and many require that other specified forms of participation be made offences, such as organizing or directing a terrorist bombing offence. The 1980 Nuclear Material Convention refers simply to “participation” in any of the offences described in article 7 of that Convention. It is difficult to determine whether “participation” should be considered as equivalent to the criminal liability of an accomplice or was intended to move toward a broader liability for participation, which has developed in many legal systems.

79. In Italy, various associations to commit crimes generally, to engage in Mafia-type activities and to engage in terrorism, including international terrorism, are

penalized. A well-developed jurisprudence exists on the degree of internal or external participation necessary to establish criminal liability. See article 416 of the Codice penale, Associazione per delinquere, article 416 bis, Associazione di tipo mafioso and new article 270 bis, Associazione con finalità di terrorismo anche internazionale. In order to combat its own organized crime phenomenon, the United States has developed not only an expansive concept of conspiracy, but also the concept of a membership in a racketeering enterprise proved by participation in a pattern of specified crimes and the further possibility of a conspiracy to engage in a racketeering enterprise involving various crimes, including terrorism offences. See sections 371 and 1962, Title 18, of the United States Code.⁴²

80. Law No. 599 of 24 July 2000 of Colombia, the original of which appears in the Spanish-language version of the *Legislative Guide*, is entitled “Concerning (agreement) or (joint action), terrorism, threats and instigation”. “When a number of persons (agree together) or (act together) for the purpose of committing crimes, each of them will be punished, for this conduct alone, with imprisonment”. Article 343, entitled “Terrorism”, is translated below:

“Whoever provokes a state of fright or terror in the population or a sector of it, through acts that endanger life, the physical integrity or the liberty of persons or structures or means of communication, transport, processing or transmission of fluids or energy, using means capable of causing mass destruction, will be incarcerated for this offence, without prejudice to the separate penalties provided for the crimes committed in the course of this conduct ...”.

81. While this law unquestionably requires the *mens rea* (guilty mind) of a criminal agreement, whether the necessary *actus reus* (criminal act) is closer to what would be called an attempt in many legal cultures or to conspiracy as applied in common law legal systems requires interpretation by persons familiar with Colombian jurisprudence.

82. Article 2 of the Federal Act against Organized Crime of Mexico provides that:

“When three or more persons organize or agree to organize in order to engage, continuously or repeatedly, in conduct which in itself or in combination with other conduct has as its purpose or result the perpetration of one or more of the following offences, they shall be punished, solely by virtue of that fact, as members of organized crime:

“1. Terrorism, provided for in article 139, first paragraph, ... of the Federal Penal Code.”⁴³

83. These technical difficulties can be overcome by the use of language such as that used in article 5 of the Law against Acts of Terrorism of Cuba, Law No. 93 of 20 December 2001:⁴⁴

“Under this Law, preparatory acts, attempts and consummated acts of terrorism shall be punishable in connection with the offences envisaged in this

⁴² Available at www4.LAW.CORNELL.EDU/USCODE/18/.

⁴³ *National Laws and Regulations* ..., p. 254.

⁴⁴ The English-language version of the Law against Acts of Terrorism of Cuba is available at www.unodc.org/pdf/crime/terrorism/Cuban_law_english.pdf.

Law. Likewise, under the rules established in the Penal Code for preparatory acts, the following shall be punished:

- “(a) any person who, having decided to commit one of the offences envisaged in this Law, proposes to another or to other persons that they participate in carrying out the act in question;
- “(b) any person who conspires with one or more persons to carry out some of the offences envisaged in this Law, and they decide to commit them;
- “(c) any person who incites or induces another or other persons, by spoken word, in writing or in any other form, publicly or privately, to carry out some of the offences envisaged in this Law. If the offence is committed following such incitement or inducement, the person who provokes it shall be punished as the perpetrator of the offence committed.”

84. In connection with all of these concepts of participation, it is necessary to maintain the distinction that participation with others in a terrorism offence cannot be characterized, as can an organized crime associational offence, as being committed for financial or other material advantage. At the same time, defining an ideological or religious purpose to be an element of the offence may create a nearly impossible burden of proof. Proof of such a subjective, internal mental element may be impossible to establish unless the alleged offender voluntarily declares such a purpose. Such an element may not be regarded as necessary when the offence is objectively characterized by particularly harmful terrorist tactics, such as a bomb attack on a civilian population. In this regard, see the Terrorism Act 2000 of the United Kingdom, discussed in paragraph 37 above, on offences related to dangerous materials.

F. Mutual assistance

85. The requirement that parties afford assistance in criminal proceedings appeared first in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft. It is repeated in all of the subsequent penal conventions (meaning all except the 1991 Plastic Explosives Convention). 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 all obligate parties to take measures to prevent offences against other parties. This obligation was broadened in the 1973 Internationally Protected Persons Convention to a duty to exchange information and coordinate administrative and other preventive measures. All subsequent instruments incorporate such a duty, except the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation extending the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, as the original Convention had not contained such an obligation.

86. In the immediate aftermath of the terrorist attacks of 11 September 2001, the chief executives of a number of States issued decrees instructing governmental

bodies to increase their involvement in international cooperation. Since much non-judicial cooperation can be accomplished by the executive branch within its existing powers, these orders may be an expeditious and effective means of implementing basic mutual assistance requirements. More formal and binding arrangements can be secured by ratification and implementation of the universal anti-terrorism Conventions and by negotiation of bilateral or multilateral mutual assistance treaties (see the Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/117, annex) and the Manual on the Model Treaty on Mutual Assistance in Criminal Matters).⁴⁵

G. Extradition provisions

87. All of the penal conventions since 1970 (meaning all except the 1991 Plastic Explosives Convention) contain a provision that the offences which they define shall be deemed to be included as extraditable offences in any existing treaty between States parties, who undertake to include such offences in future extradition treaties. If a treaty is required, the Convention may be relied upon between parties. 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 Safety of Maritime Navigation Convention).

88. The Commonwealth Secretariat *Implementation Kits* for the various anti-terrorism instruments all contain virtually identical language for the extradition clauses. Paragraphs 7 and 8 of the Suppression of Terrorist Bombings Act No. 11 of Sri Lanka, given below, are typical expressions of language implementing the standard Convention obligation:

“7. Where there is an extradition arrangement made by the Government of Sri Lanka with any Convention State in force on the date on which this Act comes into operation, such arrangement shall be deemed, for the purposes of the Extradition Law, No. 8 of 1977, to include provision for extradition in respect of the offences specified in the Schedule to this Act.

“8. Where there is no extradition agreement made by the Government of Sri Lanka with any Convention State, the Minister may, by Order published in the Gazette, treat the Convention, for the purposes of the Extradition Law, No. 8 of 1977, as an extradition arrangement made by the Government of Sri Lanka with that Convention State providing for extradition in respect of the offences specified in the Schedule to this Act.”

See also the Model Treaty on Extradition (General Assembly resolution 45/116, annex) and the Manual on the Model Treaty on Extradition.⁴⁶

⁴⁵ *International Review of Criminal Policy*, Nos. 45 and 46, 1995 (United Nations publication, Sales No. E.96.IV.2).

⁴⁶ *Ibid.*

H. Exceptions made on grounds of political offence or discriminatory purposes

89. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft expressly exempted from its application offences against penal laws of a political nature or those based on racial or religious discrimination. Any reference to an exception based on political or discriminatory grounds was omitted from the subsequent conventions between 1970 and 1991 (the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, the 1980 Nuclear Material Convention, the 1988 Safety of Maritime Navigation Convention and its 1988 Fixed Platforms Protocol and the 1991 Plastic Explosives Convention, which in any event has no penalization obligation), but included in the 1979 Hostages Convention, as explained below.

90. The 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention contain similar articles requiring the parties to deny any validity, in their domestic political and legal institutions, to any political offence, defence or justification for the acts of terrorism defined in those conventions. In article 5, the 1997 Terrorist Bombings Convention states:

“Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this 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.”

91. This provision would seem to dictate that such considerations should not be allowable as mitigating circumstances for punishment purposes and that they should not be allowed to be presented or argued as a defence to criminal liability.

92. In addition, article 11 of the 1997 Terrorist Bombings Convention and article 14 of the 1999 Financing of Terrorism Convention provide that:

“None of the offences set forth in article 2 [the offence-defining article in both Conventions] shall 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. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.”

93. The articles eliminating the political offence exception are immediately followed in both conventions by anti-discrimination provisos in identical language. Article 12 of the 1997 Terrorist Bombings Convention and article 15 of the 1999 Financing of Terrorism Convention provide that:

“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."

94. Similar language, although referring only to extradition, is found in the 1979 Hostages Convention. Those anti-discrimination articles that accompany the articles eliminating the political offence exception correspond to and embody the principles of non-discrimination and impartiality of the Universal Declaration of Human Rights (General Assembly resolution 217 A (III)). Article 7 of the Declaration recognizes that:

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

95. Article 10 of the Declaration establishes that:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

96. An example of domestic legislation implementing these principles and the requirements of the Convention with respect to extradition is the Extradition Act 1988 No. 4 of Australia, amended by the Suppression of Financing of Terrorism Act 2002 No. 66, 2002. Section 5 of the amended act excludes from the definition of "political offence" a list of offences, which includes those referred to in article 2 of the 1999 Financing of Terrorism Convention. That article incorporates the other nine anti-terrorism instruments which define offences. Section 5 also excludes crimes declared by national regulation not to be offences of a political nature. The anti-discrimination elements of the 1999 Financing of Terrorism Convention are implemented in section 7, which lists possible extradition objections, including a discriminatory purpose for the request or such an effect if extradition is granted.

97. It should be noted that, in addition to the prohibitions set out in the 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention on the recognition of a political offence exception for crimes defined by those Conventions, the Security Council, in paragraph 3 (g) of its resolution 1373 (2001), calls upon all States to:

"Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists."

I. Rights of the alleged offender to communicate and to fair treatment

98. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft requires immediate notification to the State of nationality of an

alleged offender held for prosecution or extradition and provides that the person be accorded treatment no less favourable than that accorded to nationals of the custody State. The notification provision has become standard in all of the anti-terrorism conventions, although sometimes achieved with different verbal formulations. An example of how this obligation may be recognized appears in section 5 of the Suppression of Terrorist Bombings Act No. 11 of 1999 of Sri Lanka:

“Where a person who is not a citizen of Sri Lanka is arrested for an offence under this Act, such person shall be entitled—

“(a) to communicate without delay, with the appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights, or if he is a stateless person, with the nearest appropriate representative of the State in the territory of which he was habitually resident;

“(b) to be visited by a representative of that State; and

“(c) to be informed of his rights under paragraphs (a) and (b).”

99. Article 9 of the 1973 Internationally Protected Persons Convention states that:

“Any person regarding whom proceedings are being carried out in connexion with any of the crimes set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings.”

The offences covered by the Convention are defined in article 2.

100. The 1980 Nuclear Material Convention used the same language as above, but the 1979 Hostages Convention added the following words:

“... including enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present.”

101. That version was reproduced in the 1988 Safety of Maritime Navigation Convention, and additional language was again added in the 1997 Terrorist Bombings Convention, as follows:

“... and applicable provisions of international law, including international law of human rights.”

102. The latter part of that formulation was revised in the 1999 Financing of Terrorism Convention to read “including international human rights law”. Neither of those two conventions defines this terminology. Between members of regional groupings, the jurisprudence of forums such as the Inter-American Court of Human Rights or the European Court of Human Rights can provide a common frame of reference to interpret this phrase. When all parties involved in an interpretation dispute are not bound by such a common jurisprudence, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Assembly resolution 39/46, annex) and other applicable United Nations standards and instruments would certainly be consulted.