

D R A F T
(as of 25 February, 2003)

**UN Legislative Guide to the Universal Anti-Terrorism Conventions
and Protocols**

Part I. INTRODUCTION

1. Background

By its Resolution 1373 of 28 September 2001, the United Nations Security Council declared that:

“ . . . acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations”.

That resolution included a number of Security Council decisions requiring anti-terrorism actions by Member States, implementation of which would be monitored by the Council's newly formed Counter-Terrorism Committee (CTC). Because Security Council Resolutions 1368 and 1373 determined that international terrorism constitutes a threat to international peace and security, Article 25 of Chapter V of the UN Charter is applicable, under which Member States agree to accept and carry out the decisions of the Security Council. Among the actions required to be taken by Resolution 1373 are that States shall:

2. (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 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.

In elaborating means to accomplish these mandatory obligations, Resolution 1373 calls upon all States to:

- (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);

Those relevant conventions (meaning multilateral treaties) and protocols (meaning agreements supplemental to a convention) were collected by the United Nations Secretariat in a 2001 publications, *International Instruments related to the Prevention and Suppression of International Terrorism*. In its preface Secretary General Kofi Annan described the increasing danger faced by the world community in these words:

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 concentrated international effort to combat terrorism in all its forms and manifestations (Preface, *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations, 2001).

At the July, 2002 Symposium: *Combating Terrorism: The Role of the U.N.*, the CTC's Chairman expressed its desire that the UN Office on Drugs and Crime (UNODC) in Vienna play an important role by providing assistance in legislative implementation of anti-terrorism measures, as the CTC analyzes the anti-terrorism needs of Member States, but does not itself deliver technical assistance. Such a role for the UNODC had been envisioned by its guiding body, the Commission on Crime Prevention and Criminal Justice, and reaffirmed by Resolution 2002/19 of the Economic and Social Council on July 24, 2002, and by General Assembly Resolution 57/173 and 57/292 of 18 and 20 December, 2002. By October, 2002 the UNODC's Centre for International Crime Prevention had initiated projects on *Strengthening the Legal Regime Against Terrorism*, with the assistance of extra-budgetary funding.

2. Project Orientation

As noted above, Security Council Resolution 1373, operative paragraph 3 (d), calls upon Member States to “become parties as soon as possible to the relevant international conventions and protocols”, and in operative paragraph 3(e), “to increase cooperation and fully implement the relevant international conventions and protocols”. Effective implementation of an anti-terrorism agreement has many aspects, including national security doctrine, budgetary allocations, and administrative/personnel measures. “Full implementation” of the anti-terrorism conventions called for by the Security Council thus will mean far more than ratifying the pertinent international conventions and putting in place the supporting legislative framework. However, development of such legislation is perhaps the initial practical obstacle to a State Party's compliance with both Resolution 1373 and ratification of the global anti-terrorism conventions. Some countries will not, either because of domestic law or as a matter of policy, ratify a treaty until they have legislation in place, which permits the satisfaction of all of its juridical obligations. Other countries may theoretically incorporate international instruments into their domestic legal regimes by the act of ratification itself, but the specific obligations of an anti-terrorism convention can rarely be fully observed and enforced until implementing legislation is in place. As a practical example, even if a convention becomes part of a country's domestic legal framework by virtue of its ratification, a court cannot punish someone who commits a convention offence, such the financing of terrorism, if no applicable penalty has been established and the conduct is not otherwise punishable under some other criminal law.

Providing reference materials and technical consultation (on-line, telephonically, and in-person when cost-effective) to drafters and other persons involved in legislative adoption of the anti-terrorism conventions directly helps achieve the international cooperation and full implementation of anti-terrorism instruments called for by Security Council Resolution 1373, paragraph 3(e). Because development of acceptable legislation also removes technical obstacles to ratification, legislative assistance is an indirect but practical way to encourage countries to promptly become parties to the instruments, as called for in Resolution 1373, paragraph 3(d). Consequently, this explanatory text, entitled *UN Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, was developed to inform legislative drafters and other readers of the development and requirements of the twelve international conventions. This document provides drafting resources in the form of implementing laws actually in force or under parliamentary consideration, as well as access to illustrative model laws developed by the Commonwealth Secretariat and others. This overview document, in draft form, and accompanying checklists of the convention requirements, are now being used in technical consultations which are intended to reach as many as thirty countries. The process involves a review with national authorities of the state of ratification of the twelve conventions and protocols, an examination of whether their domestic legislation effectively implements the requirements of those

instruments, and identification of necessary improvements consistent with the country's resources and legal tradition.

This document is posted on the UNODC's anti-terrorism webpage, <http://www.unodc.org/odccp/terrorism.html>, and periodically updated. Accordingly, suggestions as to additional examples of national legislation effectively implementing the penalization, jurisdictional or international cooperation obligations of one or more of the twelve anti-terrorism conventions are requested to be provided to the UNODC, as well as information regarding problems which may arise in legislative implementation, drafting or application. Communications should be addressed to the Terrorism Prevention Branch, cicp.tpb@cicp.un.or.at, to telephone 43 1 26060-4177 or to telefax number 43 1 26060-5968.

3. Scope and Format of the Project

This document focuses upon twelve universal anti-terrorism instruments, which are open to signature by all Member States of the United Nations, as opposed to regional instruments open to limited participation. These are the twelve conventions or protocols referred to in the Secretary-General's report of 2 July 2002, *Measures to eliminate international terrorism*, A/57/183, as the global anti-terrorism instruments, and in UN publication E.01.V3, *International Instruments related to the Prevention and Suppression of International Terrorism* as universal instruments.

1. [1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft](#) (Documents which are referenced in these Explanatory Materials can be viewed by use of a hyperlink whenever identified by the appropriate text marking)
2. [1970 Convention for the Suppression of Unlawful Seizure of Aircraft](#)
3. [1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation](#)
4. [1973 Convention on the Prevention and Punishment of Offences Against Internationally Protected Persons, Including Diplomatic Agents](#)
5. [1979 International Convention Against the Taking of Hostages](#)
6. [1980 Convention on the Physical Protection of Nuclear Material](#)
7. [1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation](#)
8. [1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation](#)
9. [1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf](#)
10. [1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection](#)
11. [1997 International Convention for the Suppression of Terrorist Bombings](#)
12. [1999 International Convention for the Suppression of the Financing of Terrorism](#)

The English versions of the conventions/protocols can be accessed at <http://www.un.org/terrorism/>. Translations in the other official UN languages can be found at:

<http://www.un.org/arabic/terrorism/>

<http://www.un.org/chinese/terrorism/>
<http://www.un.org/french/terrorism/>
<http://www.un.org/spanish/terrorism/>
<http://www.un.org/russian/terrorism/>

4. Development of Anti-Terrorism Instruments and Models

The conventions and protocols to be examined were negotiated over four decades, beginning with the Tokyo Aircraft Convention of 1963 and continuing through the Terrorism Financing Convention 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 has evolved drastically. The 1963 Aircraft Convention 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.

Considering the number of subjects covered, the evolution of language and content over time, and the variety of legal systems in which the conventions/protocols must be ratified and implemented, it is essential to recognize the validity of many possible approaches to their implementation. This *Legislative Guide* attempts to provide a country considering ratification and implementation of one or more of the anti-terrorism conventions or protocols with an overview of the general principles and experience relevant to the instrument(s). In order to provide legislative templates adaptable to a wide variety of legal systems, models of an illustrative nature are presented. The Commonwealth Secretariat, headquartered in London, has prepared model laws and explanatory materials for the twelve 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 Resolution 1373 (entitled *Model Legislative Provisions on Measures to Combat Terrorism*).

In addition to presenting models 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 actually in force or under parliamentary consideration for each of the twelve instruments. Alternative means of satisfying the core requirements of the instruments are discussed, emphasizing possible means of combining implementing legislation for related conventions/protocols. The reader is also 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 CTC website, containing reports from Member States, which often summarize aspects of the country’s legislative scheme and sometimes attach the text of relevant legislation (<http://www.un.org/docs/sc/committees/1373>).

Part II. PENALIZATION REQUIREMENTS UNDER PARTICULAR CONVENTIONS

1. General Considerations and Definitions

Two of the twelve anti-terrorism instruments do not themselves define offences. Although clearly aimed at unlawful aircraft seizures, commonly called hijacking, the 1963 Aircraft Convention simply requires a party to establish jurisdiction over unspecified offences committed on board aircraft registered in that state. Many of that convention’s provisions are substantially refined in subsequent aviation instruments. The 1991 Explosives Convention requires its parties to take measures, which may be but are not required to be penal in nature, to prohibit and prevent movement of unmarked explosives.

Of the twelve anti-terrorism instruments, eight conventions and two related protocols obligate their parties to penalize offences defined in the particular instrument. (1970 Unlawful Seizure Convention, 1971 Civil Aviation Convention and its 1988 Airport Protocol, 1988 Maritime Convention and its Fixed Platform

Protocol, 1973 Diplomatic Agents Convention, 1979 Hostage Taking Convention, 1980 Nuclear Material Convention, 1997 Terrorist Bombing Convention, and the 1999 Financing of Terrorism Convention). The common format used in those ten instruments involves four elements:

- (1) Definition as an offence of a particular type of terrorist activity which is at that moment causing great concern, as were the unlawful seizure of aircraft in 1970 or attacks involving bombs and other dangerous devices in the 1990s;
- (2) a requirement that Parties to the instrument penalize that conduct;
- (3) identification of certain bases upon which the Parties agree to exercise their criminal jurisdiction to control the defined offense, such as registration of a ship or vessel, territoriality or nationality;
- (4) creation of the further jurisdictional obligation that a Party where 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 convention or protocol. This last element is popularly known as the principle of no safe haven for terrorists,

The core elements of the offences established in the various conventions are summarized in this Part, with references to illustrative models or actual legislation as examples of how these penalization requirements can effectively be satisfied. Alternative means of accomplishing this goal may include passage of a single consolidated anti-terrorism law; legislative action addressing related groups of anti-terrorism instruments, such as the four air travel conventions/protocol; or separate legislative implementation of each convention/protocol

The omnibus Commonwealth Secretariat *Model Legislative Provisions on Measures to Combat Terrorism* provide a comprehensive anti-terrorism statute intended to achieve compliance with the mandatory requirements of Security Council Res. 1373. These are broader in many ways than the specific penal offences and other actions required under the twelve anti-terrorism instruments, as is well explained in the Commonwealth Secretariat materials. Part I of the Secretariat Model Legislative Provisions, Interpretation, defines terms used throughout the model. Part III, Offences, provides the elements of sixteen specified types of criminal conduct related to terrorist acts, including financing, facilitation, support, supply, recruitment, incitement and participation offences. Terrorist acts are defined in Part I of the model to include any act or omission constituting an offence within the scope of the relevant twelve conventions and protocols, so adoption of this model would satisfy the penalization requirements of all the instruments by incorporation.

A number of terms are defined in the various conventions, often in the opening articles, and many reasons suggest the desirability of repeating those same definitions in national laws implementing those conventions, or adopting the convention definitions by reference.

The Barbados Anti-Terrorism Act, 2002, defines an offence of terrorism as including any offence under nine of the penal conventions/protocols examined in this Legislative Guide, (meaning all of the instruments examined except the 1963 Aircraft Convention, the Explosives Convention, and the Financing of Terrorism Convention, the last being dealt with by creation of the separate crime of Financing of Terrorism in the Barbados statute). In addition to offences defined by reference to the conventions, terrorism consists of:

- (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 organisation 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 sub-paragraph (B)

This formulation corresponds to Option 1 of the *Commonwealth Model Legislative Provisions on Measures to Combat Terrorism*, used to define terrorist acts, referenced above. That model 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. Option 2 requires such a motive. The United Kingdom Terrorism Act 2000, discussed in Part II, Section 4, is an example of an Option Two type statute, requiring both an intent to influence or intimidate and an ideological motivation. One practical consideration in choosing between these options is that, absent a confession by a suspected offender, such a subjective motivation could be virtually impossible to prove in many circumstances. Another is that dual criminality is a standard requirement for granting extradition. Adding a motivation element may be the basis of claims that dual criminality is lacking when countries 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.

2. Offences Related to Aviation.

The 1963 Aircraft Convention, the 1970 Unlawful Seizure Convention, the 1971 Civil Aviation Convention and its 1988 Airport Protocol all derive from a common concern about the safety of air transportation and were negotiated under the auspices of the International Civil Aviation Organization (<http://www.icao.int/>). While aimed at acts jeopardizing the safety, good order and discipline of aircraft and of persons and property on board, the 1963 aircraft convention only requires the establishment of jurisdiction over the location of offences. While providing rules and procedures in cases of “unlawful seizure, or other wrongful exercise of control of an aircraft”, the initial 1963 Aircraft 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”. 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 start of take-off until landing.

The three subsequent aviation instruments progress incrementally in reacting to terrorist actions. 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”. Attempts and accomplice participation 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 doors and until their opening for disembarkation, not just from take-off to landing.

Historically, both the 1963 and 1970 conventions were responses to and focused upon hijacking attempts to gain control of aircraft in flight, defined in the 1963 Convention as from the start of take-off until landing,

and in the 1970 Convention as from the closing of the aircraft doors following embarkation until their opening for disembarkation. Terrorist actions 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 pre-flight preparation until 24 hours after landing, and not just in flight, and extends to acts of violence against persons, aircraft or navigation facilities likely to endanger aircraft safety. The penalization requirement also extends to attempts and accomplices, without the limitation in the 1970 Convention that they be committed on board the aircraft.

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

- (a) perform 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 act endangers or is likely to endanger safety at that airport

From a domestic law perspective, this protocol defines as an offence acts which 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 Convention has the significant result of imposing an international treaty obligation to either extradite or to assume domestic jurisdiction, and to extend international cooperation. As described above, the 1970 Unlawful Seizure Convention, the 1971 Civil Aviation Convention and the 1988 Airport Protocol define an evolving series of offences, from hijacking of an aircraft in flight, to violence against persons on an aircraft in flight and attacks on an aircraft on the ground, and finally 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 Aircraft Convention, then for the successive conventions.

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, a number of countries approved legislation, which combined implementation of the related 1963, 1970, and 1971 Conventions relating to air travel safety. Among these were the New Zealand Aviation Crimes Act of 20 October 1972, the Malawi Hijacking Act of 31 December 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 Aircraft Protocol, as was done by Malawi. Its 1972 law had provided for offences of hijacking, violence against passengers or crew, and endangering the safety of aircraft, corresponding to the types of offences addressed in the air travel safety conventions negotiated through 1971. In 1994, it was amended by adding a single article responsive to the 1988 Airport Protocol, number 6A, endangering the safety of airport and airport facilities:

- (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 (not defined as an offence in the 1988 Airport Protocol); (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:

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.

Other consolidated laws enacted after negotiation of the 1988 Airport Protocol incorporate not only the offences defined therein, but go beyond the convention requirement by penalizing the unauthorised introduction of weapons and other dangerous articles into airports and on board aircraft. The Australia Crimes (Aviation) Act 1991 and the Fijian Act No. 10 of 12 July, 1994 are comprehensive post-1988 rewritings of prior aircraft enactments. These laws not merely incorporate the 1988 Airport Protocol, but provide ancillary airport security measures, such as forbidding the introduction of weapons and other dangerous articles, and in the Fijian law, including provisions on airport access, security searches and related topics. The Fijian statute can be viewed through the preceding hyper-link and the Australian statute is available in UN publication ST/LEG/SER.B22, *National Laws and Regulations on the Prevention and Suppression of International Terrorism*, at pages 28-59.

3. Offences Based on the Status of the Victim

The 1973 Diplomatic Agents 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 against diplomatic agents when 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 a government to do or abstain from any act. Penalization is also required for attempts and accomplices. This convention only addresses the seizure, detention, threats and demands involved in hostage taking, so long as some international element is present. If a death or injury results, other conventions and provisions of domestic law would be implicated, but the incidental seizure, detention and threats would provide a basis for invocation of this convention's provisions.

The Cook Islands Crimes (Internationally Protected Persons and Hostages) Act 1982, No. 6, implements these two conventions in one statute. This act can be found in the UN publication on *National Laws and Regulations* at pages 120-129. It should be noted that while the Diplomatic Agents 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 knowledge issues in the following manner:

Notwithstanding anything in sections 3 to 6 of this Act (Crimes against persons, Crimes against premises or vehicles, Threats against persons, or 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:

- (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,

This approach is representative of those countries which provide particular penalties or special jurisdiction, e.g. by national authorities in a federal system, for assaults on government officials. Such special penalties or jurisdiction need not require proof that the perpetrator knew the victim occupied an official position, because an assault upon any person is a clearly criminal act, *malum in se*. Such legislation can be regarded as a reciprocal governmental undertaking to protect functionaries of and relationships with other sovereigns, rather than as a special deterrent to criminal conduct.

4. Offences Related to Dangerous Materials

Three conventions deal with inherently dangerous substances, that is nuclear material, plastic explosives, and bombs and other dangerous devices. The first two have significant regulatory elements, which will require coordination with authorities other than those concerned with criminal justice matters. The 1980 Convention on the Physical Protection of Nuclear Material does require penalization of the possession without lawful authority of nuclear materials which are likely to cause death, serious injury or substantial property damage; theft, robbery or embezzlement of such material; a threat to use such materials to commit one of the offences defined above or to force a natural or legal person, international organisation or State to do or refrain from doing something; and a demand for nuclear material by force or intimidation. This Convention is only one of several dealing with protection of nuclear or other radioactive material and nuclear facilities, and a draft amendment to strengthen its provisions is currently being prepared by an expert group. Accordingly, anyone concerned with legislative implementation of the Convention should contact the International Atomic Energy Commission at Carmona.Vez@iaea.org.

Although there are differences in the wording used for the offence definition, criminal offences are typically dealt with by statutes similar to those from Australia and Ireland, which are reproduced below. Australia's Nuclear Non-Proliferation (Safeguards) Act 1987, quoted in pertinent part, corresponds to the Convention definition.

32. . . . "nuclear material" has the same meaning as in the Physical Protection Convention.

33. A person shall not:

- (a) steal;
- (b) fraudulently misappropriate;
- (c) fraudulently convert to that person's own use; or
- (d) obtain by false pretenses; any nuclear material.

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.

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.

36. 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 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.

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 organizations 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.

Ireland's Radiological Protection Bill, 1990 (<http://www.bailii.org>), giving effect to the Convention, includes the following provisions:

2. . . . "nuclear material" has the meaning assigned by Article 1 of the Protection Convention.

38-(1) A person who -

- (a) possess, 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) embexxles 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
- (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 organization or state to do or to refrain from doing any act, shall be guilty of an offence.

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 L. 1,000,000 or to imprisonment for life or other term decided by the court or to both. . .

Unlike all the other conventions except the 1963 Aircraft Convention, the 1991 Explosives Convention defines no offence. It does require parties to take necessary means to establish controls over unmarked explosives stocks and to prohibit and prevent 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 Organisation, as is the case with the aircraft conventions and the 1988 Airport Protocol, and that organisation may serve as a resource for technical advice on implementing legislation. Its website is <http://www.icao.int/>.

South Africa's Government has submitted an Explosives Bill to Parliament, which would adopt the technical definitions in the 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.

(Subsection 3 then deals with the exceptions provided in the Convention for disposal of existing stocks, etc.)

Unlike the predominantly regulatory Nuclear Material and Explosives Conventions, the 1997 Terrorist Bombing Convention is penal in nature and requires the 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, such as the Geneva Conventions and Protocols. Some countries have enacted legislation, such as the Terrorism Act 2000 of the United Kingdom, which includes a specific terrorist intent element and a further political/religious/ideological requirement, and addresses not only the threats listed in the Convention, but also attacks on electronic data or control systems.

(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.

5. Offences Related to Vessels and Fixed Platforms

In some ways 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 extra-territoriality sovereignty based upon the registration or flag of the conveyance. As a practical matter, however, the four air travel instruments were negotiated under the auspices of the International Civil Aviation Organisation. The 1988 Maritime Safety Convention and its contemporaneous Fixed Platform Protocol were negotiated under the auspices of the International Maritime Organisation. Given the independent interests and separate technical and advisory programs of the two depository organisations, it was considered advisable to treat the 1988 Maritime Safety Convention and its Protocol separately. The IMO website is <http://www.imo.org/>.

The 1988 Maritime Safety 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 which 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 and participation offences are also required to be penalized. A virtually contemporaneous Protocol extends its coverage to attacks upon fixed platforms located on the continental shelf. The Commonwealth Secretariat *Implementation Kits for the International Counter-Terrorism Conventions* 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, simultaneously implementing both the Convention and Protocol, available in UN publication ST/LEG/SER.B/22, *National Laws and Regulations on the Prevention and Suppression of International Terrorism*.

Opened for ratification since March 1988, the Maritime Convention and Fixed Platform Protocol had gained 69 and 61 ratifications, accessions or successions as of the preparation of a Secretary-General's Report of 02 July 2002, *Measures to eliminate international terrorism*, A/57/183. This number is smaller than the 80 recorded for the more recent 1991 Plastic Explosives Convention, and approximately equal to the 64 acceptances already recorded for the 1997 Terrorist Bombing Convention. The status of ratifications can be found at the CTC website, <http://www.un.org/Docs/sc/committees/1373/>.

It may be perceived by some countries which 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 Maritime Convention and its Fixed Platform Protocol are inapplicable to their interests. However, such a country may be confronted by situations in which its nationals are killed or injured on board a ship or fixed platform, its nationals commit an offence under the Convention or Protocol, or suspected offenders are found in the State's territory. All of those situations are covered by these two instruments, and legal procedures agreed to in advance under these international agreements can minimize post-attack friction between states. Moreover, it must be recognized that ratification and implementation of the global anti-terrorism instruments have been called for in Security Council Resolution 1373 and by the Counter-Terrorism Committee, without regard to the presence or absence of a sea coast. Non-coastal countries, such as Austria and Hungary have ratified both the Convention and its Protocol

6. Offences Related to Financing of Terrorism

The 1999 Financing of Terrorism Convention requires the Parties to penalize conduct by any person who:

. . . 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 anti-terrorism conventions 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:

Subparagraph (a) uses incorporation by reference not merely to define statutory terminology, but to substantively define the offences for which the provision or collection of funds must be forbidden under the 1999 Financing of Terrorism Convention. An example of very current national legislation reflecting this incorporation technique and paralleling the Convention wording is the Barbados Anti-Terrorism Act, 2002, of 30 May 2002. This legislation creates the crime of terrorism (discussed under Part II-1) and an offence of financing of terrorism, defined as follows:

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

- (a) provides or collects funds; or 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
 - (b) 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
 - (c) 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 going 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 sub-paragraph (B), (C), or (D) of section 3(1) as the case may be.
- is guilty of an offence and is liable on conviction . . .

By its Act of 15 November 2001, France defined the specific offence of financing of terrorism as follows:

Likewise, the fact of financing a terrorist enterprise through the supply, collection or management of funds, valuables, or any other good, or through the provision of advice to this end, with the intention that such funds, valuables or goods be utilized, or knowing that they are going to be utilized, fully or partly, with the aim of committing any of the terrorist acts provided for in this chapter, constitutes a terrorist act, regardless of the actual commission of such an act. (Code penal, art. 421-2-2, insere par Loi No. 2001-1062 du novembre 2001).

An updated version of the UN Legislative Guide will, through hyperlinks, make available model laws, one developed in the continental law tradition by the Belgian Ministry of Justice (*Belgian Financing of Terrorism model*), and one in the common law tradition developed by the Canadian Ministry of Justice (*Canadian Financing of Terrorism model*). The Commonwealth Secretariat's *Implementation Kits* provides model legislation and carefully explores the issues and terminology found in the Financing of Terrorism Convention (and their relationship to the Terrorist Bombing Convention) and should be consulted in regard to criminalization of offences under either of those conventions.

In addition to the obligation to penalize the financing of terrorism, the 1999 Convention contains significant non-penal elements. It obligates the Parties to enable a legal entity to be held civilly, administratively or criminally liable for the financing of terrorism by a person responsible for its management or control. It also requires appropriate measures to identify, immobilize for the purpose of forfeiture, and forfeit funds which are 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 professions to identify their customers and to report transactions suspected to stem from a criminal activity. 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. A practical explanation for this broad obligation may be found in Article 18(b)(iii), dealing with the means by which Member States may satisfy this obligation. Article 18(b)(iii) deals with regulations imposing on financial institutions the obligation to report ". . . all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose".

This classic formulation of what constitutes a suspicious transaction for anti-money laundering purposes demonstrates that suspiciousness does not require an apparent connection to drug trafficking or terrorism, but a simple lack of an apparent economic or lawful purpose. 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 or arms, or terrorism, or some perfectly legitimate business or personal purpose, lies behind the transaction. Accordingly, Article 18(b) of this Convention requires the reporting of all suspicious transactions, not merely those with an apparent connection to terrorism.

There are obviously significant factual differences between money laundering and terrorist financing. Money laundering typically involves transferring proceeds from a large illegal transaction into legitimate commerce or banking channels. Terrorist financing, conversely, may involve sending relatively small sums for illegal operational purposes. Alternatively, it may involve aggregating sums that have their origin either from lawful activities or microcriminality and transferring them to a person or organization, which will use them to support or commit terrorism. Nevertheless, for a number of reasons it is helpful to examine together the regimes for control of money laundering and terrorist financing of terrorism. Global anti-money laundering efforts and the suppression of the financing of terrorism are increasingly becoming integrated, as illustrated by the application to terrorist financing of suspicious activity reporting, a control mechanism initially developed to combat drug money laundering.

The Convention for the Suppression of the Financing of Terrorism is only one aspect of a larger international effort to prevent, detect and to suppress the financing and support of terrorism. Under Resolution 1373 (2001) of the Security Council, 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. Obviously, the domestic legislation necessary to establish this capability under Res. 1373 will overlap issues involved in implementation of the Financing of Terrorism Convention, even though that instrument only speaks of funds, that is assets or evidence of title to assets. Thus, a statute of the United States of America, Section 2339A of Title 18, United States Code, creates the offence of "Providing material support to terrorists". This law criminalizes not only the provision or collection of funds prohibited by the Convention for the Suppression of the Financing of Terrorism, but virtually all forms of material support and the concealment of such support, a crime with obvious similarity to a money laundering offense:

(a) Offense - Whoever, within the United States, 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 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 offense)

(b) In this section, the term "material support or resources" means currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

The Republic of Peru's Decree Law No. 25475 of 5 May, 1992, treats terrorist financing as one form of prohibited acts of collaboration with terrorism, using the following language, unofficially translated:

Art. 4 Whoever by voluntary means obtains, collects, takes or provides any kind of instruments or resources or carries out any kind of acts of collaboration, favoring the perpetration of the crimes established in this decree law or the achieving or the accomplishment of the purposes of a terrorist group, shall be be punished by imprisonment for not less than twenty years.

. . .

f. Any type of economic activity, assistance or dealings done voluntarily with the purpose of financing the activities of terrorist groups or their members.

The Financial Action Task Force (FATF), an intergovernmental anti-money laundering group housed at the Organization for Economic Cooperation and Development in Paris, has taken actions which go beyond the requirements of the Convention for the Suppression of the Financing of Terrorism but should be considered by those considering its implementation. In October, 2001, the FATF adopted eight Special Recommendations on Terrorist Financing. These were in addition to its original 40 recommendations on the control of money laundering issued in 1990. The Special Recommendations dealt with matters such as ratifying and implementing the 1999 Financing of Terrorism Convention, Suspicious Transaction Reports, and controls over informal remittance systems and charitable organizations. In 2002 the International Monetary Fund and the World Bank joined the FATF in developing a detailed *Methodology for Assessing Compliance with Anti-Money Laundering and Combating the Financing of Terrorism Standards*, to be used by all three organizations in their audits and evaluations. Member States should be aware that compliance with the eight Special Recommendations on Terrorist Financing of 2001, and with the original 40 anti-money laundering recommendations from 1990, will now be considered not only by the FATF, a standard-setting and monitoring body, but by the two major global lending agencies, the World Bank and IMF, in their decisional processes.

For all of the above reasons, and because of the inherent complexity and potential for unintended consequences of financial legislation and regulation, Member States are encouraged to consult available resources when drawing up Financing of Terrorism legislation. Those resources include the UNODC's Global Program Against Money Laundering, which has developed model money laundering and proceeds of crime legislation. Its contact point is [The Global Programme against Money Laundering](#). Additional information can be secured from organizations such as the [International Monetary Fund](#) (index search for "Terrorism combating the financing"), the [World Bank](#), and the [FATF](#).

Part III. OTHER CORE ELEMENTS OF THE CONVENTIONS/PROTOCOLS

1. Establishment of Jurisdiction over the Offence

a. No Safe Haven for Terrorists

The most prevalent, and perhaps most significant, type of jurisdiction which 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, providing that a country which 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 by the Security Council in Resolution 1373:

“(The Council) Decides also that all States shall:

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

The ten conventions and protocols which require the penalization of defined offences (meaning all but the initial 1963 Aircraft Convention and the 1991 Explosives Convention) require a party to establish jurisdiction whenever the alleged offender is present in the state and it does not extradite to a party which has established jurisdiction pursuant to that convention. A direct approach to this jurisdictional obligation was adopted by China at the 21st 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.

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.

The same effect is achieved by Section II, Article 4, of the Russian Federation's Federal Act on the Suppression of Terrorism of 25 July 1998, Item 23 of the Appendix. 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 elsewhere 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.

The Commonwealth Secretariat *Implementation Kits* for individual conventions and protocols do not suggest statutory language explicitly referencing the "extradite or prosecute" imperative in the global instruments, but they refer to the issue in prominent notes and explain 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 Secretariat models 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.

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, and are discussed below.

b. Jurisdiction based on Registration of Aircraft/Ship or on Territoriality

The 1963 Aircraft Convention addresses hijacking and requires parties to establish jurisdiction over offences committed on board aircraft based upon their registration. The 1970 Unlawful Seizure of Aircraft Convention contains the requirement to establish jurisdiction based upon registration, as does the 1971 Civil Aviation Convention and its 1988 Airport Protocol, 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.

The 1973 Diplomatic Agents Convention again requires that jurisdiction be established for offences in a state's territory and on board its registered ship or aircraft, as does the 1979 Hostage Taking Convention. The 1979 Nuclear Material Convention focuses on the protection of nuclear material and its transit, requiring that jurisdiction over offences involving such materials be established based upon territoriality and registration of the ship or aircraft involved. The 1988 Maritime Convention and its Fixed Platform Protocol require that jurisdiction be established based upon territoriality (specified as location on the continental shelf of a state in the Protocol) and upon registration of a ship on which an offence is committed. The 1997 Terrorist Bombing 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 Republic of Korea Criminal Code 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.

Another form of jurisdiction or competence dealt with under the Terrorist Bombing Convention and the Financing of Terrorism Convention is jurisdiction over convention offences committed within a state's territory which impact on another state. Article 6 of the 1997 Bombing Convention and Article 7 of the 1999 Financing Convention are divided in two categories. Article 6 of the 1997 Terrorist Bombing 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 of jurisdiction which Parties may at their discretion choose to establish, 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 Financing of Terrorism Convention requires in paragraph 1 the same obligatory grounds of jurisdiction as in the Terrorist Bombing Convention. Paragraph 2 of Article 7 of the Financing 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, which provides in the mandatory language of Operative 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, preparations 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;

c. Jurisdiction Based Upon Nationality of Alleged Offender

The 1973 Diplomatic Agents Convention was the first of the universal anti-terrorism instruments to introduce the requirement that jurisdiction be established over an alleged offender who is a national of the State Party. The 1979 Nuclear Material Conventions, the 1988 Maritime Convention and its Fixed Platform Protocol, the 1997 Terrorist Bombing Convention, and the 1999 Financing of Terrorism Convention all require jurisdiction to be established based upon the nationality of the alleged offender.

Once again, the Republic of Korea Criminal Code 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.

d. Jurisdiction Based Upon Protection of Other Specified Interests

The 1970 Unlawful Seizure Convention and the 1971 Civil Aviation Convention require establishment of jurisdiction when the lessee of an aircraft has a principal place of business in the state. The 1973 Diplomatic Agents Convention requires the establishment of jurisdiction over crimes committed against a person whose protected status derives from the function exercised for a state which is a party to the Convention. The 1979 Hostage Taking Convention, the 1979 Nuclear Material Convention, the 1988 Maritime Convention, its Fixed Platform Protocol, and the 1999 Terrorist Bombing Convention all define as offences violence or threats used to compel a government or international organization to do or refrain from an act. However, only the 1979 Hostage Taking 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 Maritime Convention and its Protocol, the 1997 Terrorist Bombing Convention and the 1999 Financing of Terrorism Convention lists this circumstance as among those discretionary grounds for which a State may establish jurisdiction.

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

Sections 129 and 129a shall also apply to organizations abroad. If the offence relates to an organization 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 which fall under the second sentence, the offence shall only be prosecuted on authorization by the Federal Ministry of Justice. Authorization may be granted for an individual case or in general for the prosecution of future acts relating to a specific organization. When deciding on whether to give authorization, the Federal Ministry of Justice shall take into account whether the efforts of the organization 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.

e. Jurisdiction Required to be Maintained for Extradition or Prosecution Once an Alleged Offender is Present

Practical implementation of the fundamental principle of “no safe haven for terrorists” is accomplished in all of the conventions containing penal obligations (meaning all save the non-penal Explosives Convention) by the requirement that a state where a suspected offender is found shall ensure the suspect's presence for criminal or extradition proceedings. The 1970 Unlawful Seizure Convention and the 1971 Civil Aviation Convention contain provisions requiring jurisdiction to be established when the aircraft lands in the state with the offender on board. In most circumstances this would be the same place where the offender is present, 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 Unlawful Seizure Convention would require that the states of registration, of landing and where the suspect is eventually found all have established jurisdiction, and the 1971 Civil Aviation Convention would add the state in whose territory the offence was committed.

2. Obligation to Conduct Inquiry, Report Findings and Advise of Intent to Exercise Jurisdiction

All but one of the conventions defining a penal offence (but not the non-penal Explosives Convention) require that a party which is obligated to ensure the presence of a person for criminal or extradition proceedings, shall conduct a preliminary inquiry into the alleged offence, and report the findings to and advise concerned states of its intent to exercise jurisdiction. The 1980 Nuclear Material Convention uses more generic language, providing that a party ensuring the presence of an alleged offender for prosecution or extradition shall take appropriate measures and shall notify them to concerned states.

Article 6 of the Suppression of Terrorist Bombing Act No. 11 of 1999 of Sri Lanka 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 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.

3. Obligation to Submit for Prosecution

While the initial 1963 Aircraft Convention did not require submission for prosecution, all of the subsequent penal conventions (meaning all save the Explosives Convention) require that a state party where the alleged offender is present, if it does not extradite to a party which has established jurisdiction pursuant to that convention, shall, 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 country'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 like China's and Russia's, quoted in Part III-1(a), explicitly convert these convention obligation into domestic law.

4. Knowledge/intent elements

The danger of overly broad criminal prohibitions in statutes penalizing terrorism offences requires careful drafting 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/intent required for criminalization of an offence and the extent of knowing participation which justifies the imposition of criminal liability. The 1997 Terrorist Bombing 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". 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".

Similarly, the Financing of Terrorism Convention has potential applicability to fund raising, which can have benevolent as well as sinister purposes. Its criminal intent language requires not merely a general intent that the act be done "unlawfully and wilfully" but also the specific factual qualification that the provision or collection of funds 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 ..." a terrorist act. This intention/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 use this same formula of words, as has the Barbados Anti-Terrorism Act, 2002.

India's Prevention of Terrorism Act, 2002, Fund raising for a terrorist organization to be an offence, equates reckless disregard 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 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.

Section 2332d of Title 18 of the United States Code adopts a similar approach 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 (so) designated. . . ." This type of statute is useful and may be required to carry into effect domestically measures imposed under Article 41 of the UN Charter, that is sanctions not involving military force against governments and individuals designated as supporting or committing terrorism by the Security Council. A model appears in the Commonwealth Secretariat *Model Legislative Provisions on Measures to Combat Terrorism*, Part II, Specified Entities.

5. Participation offences

A related issue is the extent of participation which justifies the imposition of criminal liability. Nine of the ten 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 1979 Nuclear Material Convention refers simply to "participation in any offence". It is difficult to determine whether this phrase 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.

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 Art 416 of the Codice penale, Associazione per delinquere of the Codice penale, Art. 270-bis, Associazione di tipo mafioso, and new article 270-bis, Associazioni con finalita' di terrorismo anche internazionale, at <http://digilander.libero.it/castelfranco/Codice%20penale.htm>). In order to combat its own organized crime phenomenon, the United States of America 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 articles 371 and 1962, Title 18, of the United States Code at www.4.LAW.CORNELL.EDU/USCODE/18/.

Colombian law No. 599 of 24 July 2000 addresses "Del concierto, el terrorismo, las amenazas y la instigacion", and in Artículo 340 deals with "Concierto para delinquir". "Cuando varias personas se concierten con el fin de cometer delitos, cada una de ellas será penada, por esa sola conducta, con prisión". Unofficially translated, this may be read as: When several persons act jointly with the purpose of committing crimes, each of them will be punished, for this conduct alone, with imprisonment. Artículo 343 is entitled "Terrorismo":

El que provoque o mantenga en estado de zozobra o terror a la población o a un sector de ella, mediante actos que pongan en peligro la vida, la integridad física o la libertad de las personas o las edificaciones o medios de comunicacion, transporte, procesamiento o conduccion de fluidos o fuerzas motrices, valiéndose de medios capaces de causar estragos, incurrirá en prisión . . . sin perjuicio de la pena que le corresponda por los demas delitos que se ocasionen con esta conducta..

Again translated unofficially, this states that 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 communications, transport, processing or transmission of fluids or energy, using means capable of causing mass destruction, will be imprisoned for this offence, without reducing the separate penalties for the crimes that result from this use of terrorism. While this law unquestionably requires the mens rea, the guilty mind, of a criminal agreement, whether the necessary actus reus, or criminal act, is closer to what would be called an attempt in many legal cultures or to conspiracy, requires interpretation by persons familiar with Colombia's jurisprudence.

Mexico's Federal Act Against Organized Crime, in its Article 2, 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.

(Found at page 254 of UN publication ST/LEG/SER.B22, *National Laws and Regulations on the Prevention and Suppression of International Terrorism*).

Article 5 of the Cuban Law Against Acts of Terrorism, Law No. 93, 20 December 2001, reduces those technical difficulties by its formula that:

Under this Law, preparatory acts, attempts and consummated acts of terrorism shall be punishable in connection with the offences envisaged in this Law. Likewise, under the rules established in the Penal Code for preparatory acts, the following shall be punished:

- (a) Any persons, 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.

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 absent a voluntary declaration by the alleged offender. 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 United Kingdom Terrorism Act 2000 cited in Part II-4.

6. Mutual Assistance

The requirement that parties afford assistance in criminal proceedings appeared first in the 1970 Aircraft Convention. It is repeated in all of the subsequent penal conventions (meaning all save the Explosives Convention). In the 1979 Hostage Taking Convention and subsequent instruments, that assistance is specified as including the obtaining of evidence at a party's disposal. Beginning with the 1971 Civil Aviation Convention, the conventions all obligate parties to take measures to prevent offences. This obligation was broadened in the 1973 Diplomatic Agents Convention to a duty to exchange information and coordinate administrative and other preventive measures. All subsequent instruments incorporate such a duty except the 1988 Airport Protocol extending the 1971 Civil Aviation Convention, as the original Convention had not contained such an obligation.

In the immediate aftermath of the terrorist attacks of September 11, 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 to implement 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 multi-lateral

mutual assistance treaties (*see the [Model Treaty on Mutual Assistance in Criminal Matters](#) and the UN Manual on the Model Treaty on Mutual Assistance in Criminal Matters*).

7. Extradition Provisions

All of the penal conventions since 1970 (meaning all save the Explosives Convention) contain a provision that they shall be deemed to be included as extraditable offences in any existing treaty between parties, who undertake to include them 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 formula of words used only in the 1988 Maritime Convention).

The Commonwealth *Implementation Kits* for the various anti-terrorism instruments all contain virtually identical language for the extradition clauses. The model article from the Hostage Taking Convention appears as Item 20. Articles 7 and 8 of Sri Lanka's Terrorist Bombing Act are typical expressions of language implementing the standard convention obligation:

7. Where there is an extradition arrangement made by the Government of Sri Lanka (hereafter Government) 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 . . . 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) with any Convention State, the Minister may, by Order published in the Gazette, treat the Convention, for the purposes of the extradition Law . . . as an extradition arrangement made by the (Government) 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 and the UN Manual on the Model Treaty on Extradition.

8. Political Offense and Discriminatory Purposes Exceptions

The 1963 Aircraft Hijacking 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 subsequent conventions between 1970 and 1991, except for the 1979 Hostage Taking Convention, as explained below. (The 1970 Aircraft Convention, the 1971 Civil Aviation Convention and its 1988 Airport Protocol, the 1979 Nuclear Material Convention, the 1988 Maritime Convention and its Fixed Platform Protocol, and the 1991 Explosives Convention, which in any event has no penalization obligation).

The 1997 Terrorist Bombing and the 1999 Financing of Terrorism Conventions 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.

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.

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

In addition, Article 11 in the Bombing Convention and Article 14 in the Financing 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.

The articles eliminating the political offence exception are immediately accompanied in both conventions by the following anti-discrimination proviso, Article 12 in the 1997 Terrorist Bombing Convention and Article 15 in the Financing of Terrorism Convention. Those articles provide in identical language, 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 those reasons.

Language which is similar, although referring only to extradition, is found in the 1979 Hostage Taking Convention. These accompanying articles correspond to and embody the non-discrimination and impartiality principles of the [Universal Declaration of Human Rights \(http://www.un.org/Overview/rights.html\)](http://www.un.org/Overview/rights.html) of 10 December 1948. 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.

Article 10 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.

An example of domestic legislation implementing these principles and the requirements of the convention is Australia's Extradition Act 1988, 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 Article 2 of the Terrorism Financing Act. 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 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.

It should be noted that, in addition to the prohibitions in the Terrorist Bombing and Financing of Terrorism Conventions against recognition of a political offence exception for crimes defined by those conventions, Security Council Resolution 1373 expressly 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.

9. Right of Alleged Offender to Communicate and to Fair Treatment

The 1963 Aircraft Convention 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 favorable 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 the Sri Lanka legislation, Suppression of Terrorist Bombing Act No. 11 of 1999, Section 5:

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).

The 1973 Diplomatic Agents Convention introduced an additional article, stating that:

Any person regarding whom proceedings are being carried out in connexion with any of the crimes set forth in (the offence-defining article) shall be guaranteed fair treatment at all stages of the proceedings.

The 1979 Nuclear Material Convention used the same language as the 1973 Diplomatic Agents Convention, but the 1979 Hostage Taking Convention added additional words, that is:

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

That version was followed in the 1988 Maritime Convention, and additional language was again added in the 1997 Terrorist Bombing Convention, with the words:

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

That formula was revised in the 1999 Financing of Terrorism Convention to read “international human rights law”. Neither of those two conventions defines this terminology. Between members of regional groupings, the jurisprudence of fora 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](#) and the [Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#), and other applicable UN standards and instruments would certainly be consulted.