

DRAFT



UNODC

United Nations Office on Drugs and Crime

TERRORISM PREVENTION BRANCH

MODEL LEGISLATIVE PROVISIONS AGAINST TERRORISM



VIENNA, February 2009

This document constitutes a technical assistance tool to be used for supporting technical assistance activities carried out by the Terrorism Prevention Branch of UNODC

Table of Contents

| | |
|---|-----------|
| INTRODUCTION | 3 |
| Chapter 1 DEFINITIONS..... | 6 |
| Chapter 2 OFFENCES..... | 12 |
| Section 1 Offences related to International Treaties..... | 12 |
| <i>Sub-section 1 Offences related to Civil Aviation.....</i> | <i>13</i> |
| <i>Sub-section 2 Offences related to Maritime Navigation and Fixed Platforms</i> | <i>15</i> |
| <i>Sub-section 3 Offences based on the Status of the Victim</i> | <i>17</i> |
| <i>Sub-section 4 Offences related to Terrorism Bombings</i> | <i>18</i> |
| <i>Sub-section 5 Offences related to Radioactive/Nuclear Material and Nuclear Facilities</i> | <i>19</i> |
| <i>Sub-section 6 Offences related to Terrorism Financing.....</i> | <i>22</i> |
| Section 2 Terrorist Acts and Support Offences..... | 23 |
| Section 3 Attempt and Complicity | 30 |
| Section 4 Liability of Legal Entities..... | 31 |
| Chapter 3 JURISDICTION | 33 |
| Chapter 4 PROCEDURAL MEASURES..... | 35 |
| Section 1 Investigation, Pre-trial measures, Rights of the person subject to proceedings for offences under [these Model Provisions] | 35 |
| Section 2-1 Preventive measures under Security Council resolution 1373 (2001).... | 37 |
| Section 2-2 Provisional measures and Forfeiture | 40 |
| Section 2-3 Common provisions to Sections 2-1 and 2-2..... | 42 |
| Section 3 Restrictive measures concerning Individuals, Groups, Undertakings and Entities placed on the Consolidated List pursuant to Security Council resolution 1267 (1999) and following resolutions..... | 43 |
| Chapter 5 INTERNATIONAL COOPERATION..... | 52 |
| Section 1 Extradition | 52 |
| Section 2 Mutual Assistance in Criminal Matters..... | 55 |
| Section 3 Common Provisions and Duties of Information..... | 56 |
| ANNEX | 59 |
| Annex I Excerpt from the 1969 Vienna Convention on the Law of Treaties | 59 |
| Annex II Complementary Legal Tools and Information available online..... | 60 |
| Annex III Guidelines of the 1267 Sanctions Committee for the conduct of its work.. | 62 |
| Annex IV International treaties: Depositories and Contact Details | 68 |

INTRODUCTION

1. The context: assisting Member States in strengthening the legal regime against terrorism

Since January 2003, based on the mandate received by a number of General Assembly Resolutions, the Terrorism Prevention Branch (TPB) of the United Nations Office on Drugs and Crime (UNODC) has provided specialized legal assistance in counter-terrorism to requesting countries, under the framework of its global project on “Strengthening the legal regime against terrorism”. The overall objective of the global project is to support Member States in achieving a functional universal legal regime against terrorism in accordance with the principles of the rule of law, especially by facilitating the ratification and implementation of the universal legal instruments against terrorism and enhancing the related capacity building of the national criminal justice systems. Its four immediate objectives are:

- For requesting countries to achieve full and expeditious ratification of the universal legal instruments against terrorism;
- Strengthened national expertise and capacity of requesting Governments to develop and apply the domestic legislation required for the effective implementation of the universal legal instruments against terrorism;
- Improved international cooperation in criminal matters pertaining to terrorism; and
- Enhanced collaboration on legal aspects of counter-terrorism between UNODC/TPB and sub-regional, regional and international organizations.

To facilitate the delivery of assistance and achieve long-term impact, TPB has developed a set of specialized technical tools and substantive publications, including the *‘Model legislative provisions against terrorism’*. The tools and publications (*see list in annex*) are accessible on TPB’s website (www.unodc.org/unodc/terrorism.html); print copies are available upon request from TPB.

2. Purpose and contents of the Model Legislative Provisions against terrorism

The Model Provisions are one of the main tools that TPB uses for the delivery of its legal advisory services under the Global project. It complements UNODC’s other technical assistance tools, particularly its legislative guides, by providing a uniform and harmonized model of how the universal legal framework against terrorism can be “translated” into concretely applicable domestic legal provisions.

The Model Provisions are mainly addressed to Governmental officials who plan or are in the process of implementing the universal counter-terrorism instruments (conventions and relevant Security Council resolutions such as resolution 1373 of 2001) into domestic law, but can also be used as a reference tool for researchers and criminal justice officers.

This updated version addresses various additional issues: it has expanded the “offences” section to cover the criminalization requirements contained in recently adopted instruments; it contains a new part dealing with some procedural aspects of counter-terrorism (including freezing and confiscation of funds, and the procedural rights

of the accused), and entirely new provisions dealing with the Al Qaida/ Taliban sanctions regime. The expanded set of provisions is also accompanied by detailed commentaries explaining the rationale for each provision, and their legal bases.

Despite their covering new areas, the Model Provisions do not provide States with the whole array of measures required to give Security Council resolution 1373 full implementation, or otherwise deemed necessary to counter terrorism in a broad sense. They rather address requirements that are instrumental to set up a sound criminal justice- based response to terrorism. Whenever appropriate, reference has been made to other model legislation/ legislative provisions elaborated by UNODC and/ or other organizations in related areas (for example, extradition and mutual assistance in criminal matters), recommending that such additional models be taken into account as a complementary guide.

3. User's tips

The Model Provisions closely match the requirements of and language used in the relevant international instruments related to the prevention and suppression of international terrorism ("International treaties") International treaties and Security Council resolutions. Since these instruments have been drafted at the international level without taking as a reference any specific legal system, the aim being to offer language acceptable by as many legal systems as possible (notably, "common law" and "civil law" jurisdictions), they are not necessarily "ready for use".. Although care should be exercised in departing from the language used therein, the Model Provisions have to be adapted to the drafting requirements, legal principles and traditions of each domestic system. It is for this reason that reference is often made to "competent authorities" without further specification: absent any indication in the International treaties, it is up to each State to identify the authorities that have the responsibility to take required action.

Some States may not need to adopt the Model Provisions in their entirety, either because they already have corresponding provisions in their legislation, or because they can directly apply the text of ratified international treaties without the need to transpose such text into domestic law. However, it is to be noted that because of the requirement of legality treaty provisions on a State obligation to criminalize never suffice as the legal basis for conviction, as all elements of the crime and the applicable penalty need to be transposed in domestic law.

Also, some States might not find it useful or appropriate, given the structure of their domestic laws, to reproduce the Model Provisions into their national law as a "block", but rather to use parts of them to amend specific sectors of their legal systems. For example, whereas the Model Provisions group together substantive criminal law and procedural provisions, some States may prefer to address them under separate legal texts. In any case, UNODC/TPB stands ready to provide additional legal advice.

Finally, certain technical requirements stemming from the universal legal framework (relating for example to the powers of an aircraft commander to restore security onboard airplanes, or the regulatory framework for nuclear material) are not covered. States are encouraged to take note of such requirements directly from the text of the conventions, and implement them through the appropriate regulatory, operational and legislative channels available domestically. If in need of assistance for specific technical parts not covered by *these* Model Provisions, UNODC/TPB can direct States to the competent providers of assistance.

UNODC/TPB acknowledges with gratitude the substantive legal contribution of various agencies and entities belonging to the UN system in developing these Model Provisions, namely: the Counter-terrorism Executive Directorate, the International Monetary Fund, the World Bank, the Analytical Support and Sanctions Monitoring Team of the Al Qaeda and Taliban Sanctions Committee, the UN Secretary General's Special Rapporteur on the promotion and protection of human rights while countering terrorism, and the Office of the UN High Commissioner for Human Rights. The sections dealing with nuclear related matters have been jointly drafted with the International Atomic Energy Agency.

MODEL PROVISIONS

Chapter 1 DEFINITIONS

This Chapter defines terms used throughout the Model Provisions in accordance with the meaning given to them in the International treaties.

Terms that are not defined in the International treaties are not defined in the present document either.

States are free to introduce their own definition of terms that are not defined in the International treaties, in accordance with their own legal principles. In doing so, unduly restrict the scope of application of the International treaties. In this respect, the interpretation of concepts and notions that are not explicitly defined in the Model Provisions should take into account relevant provisions of the 1969 Vienna Convention on the Law of Treaties, as reproduced in Annex I.

Certain States may not need to introduce this Chapter, or parts of it, into their domestic law, particularly when international treaties are directly applicable following ratification and publication of the official journal of the country. However, it follows from the requirement of legality that the actual criminalization and penalties need to be specified in domestic law.

Some States may also wish to incorporate all or some of the definitions contained in this Chapter directly within the articles in which the terms are used (for example, placing the definition of "aircraft in flight" in the context of aviation-related offences).

Within these Model Provisions:

Aircraft in flight means an aircraft at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; in the case of a forced landing, the flight shall be deemed to continue until the [competent authorities] take over the responsibility for the aircraft and for persons and property on board.

Aircraft in service means an aircraft from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight.

BCN weapon means:

- 1) "biological weapons", which are:
 - a) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; or
 - b) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.
- 2) "chemical weapons", which are, together or separately:
 - a) toxic chemicals and their precursors, except where intended for:
 - i. industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; or

- ii. protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons; or
- iii. military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; or
- iv. law enforcement including domestic riot control purposes,

as long as the types and quantities are consistent with such purposes;

- b) munitions and devices specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph a), which would be released as a result of the employment of such munitions and devices;
- c) any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph b).

3) Nuclear weapons and other nuclear explosive devices.

There is no universally accepted definition of either "nuclear weapons" or "nuclear explosive devices". Reference can be made to the various regional nuclear-weapon-free zone treaties some of which include definitions for purposes of those treaties.

International treaties means any of the following:

- 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft
- 1970 Convention for the Suppression of Unlawful Seizure of Aircraft ("Aircraft Convention")
- 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Civil Aviation Convention")
- 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons ("Diplomatic Agents Convention")
- 1979 International Convention against the Taking of Hostages ("Hostage Convention")
- 1980 Convention on the Physical Protection of Nuclear Material ("Physical Protection Convention")
- 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Airport Protocol")
- 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("Maritime Convention")
- 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf ("Fixed Platforms Protocol")

- 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection
- 1997 International Convention for the Suppression of Terrorist Bombings (“Bombings Convention”)
- 1999 International Convention for the Suppression of the Financing of Terrorism (“Financing Convention”)
- 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (“Nuclear Terrorism Convention”)
- 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (“2005 Maritime Protocol”)
- 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (“2005 Fixed Platforms protocol”)
- 2005 Amendment to the Convention on the Physical Protection of Nuclear Material (“Physical Protection Amendment”)

Device means:

- 1) any nuclear explosive device; or
- 2) any radioactive material dispersal or radiation-emitting device which may, owing to its radiological properties, causes death, serious bodily injury or substantial damage to property or to the environment.

Explosive or other lethal device means:

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

Fixed platform means an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes.

Funds means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travelers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit, and any interest, dividends, or other income on or value accruing from or generated by such funds or other assets.

The proposed definition of funds reflects language used in the 1999 Terrorist Financing Convention. The phrase “any interest, dividends, or other income on or value accruing from or generated by such funds or other assets” has been added based on the Recommendations of the FATF (see Interpretative Note,

Special Recommendation III).

IAEA means the International Atomic Energy Agency.

Infrastructure facility means any publicly or privately owned facility providing or distributing services for the benefit of the public, such as water, sewage, energy, fuel or communications.

Internationally protected person means:

- 1) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him;
- 2) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.

The definition above is taken from the 1973 Diplomatic Agents Convention and serves the purpose of clarifying the scope of application of article...of these Model Provisions. This is without prejudice to the meaning that "internationally protected person" receives in the framework of international refugee law.

Nuclear facility means:

- 1) any nuclear reactor, including reactors installed on vessels, vehicles, aircraft or space objects for use as an energy source in order to propel such vessels, vehicles, aircraft or space objects or for any other purpose;
- 2) any plant or conveyance being used for the production, storage, processing or transport of radioactive material.

The above definition of "nuclear facility" stems from the 2005 Nuclear Terrorism Convention, and differs from the one contained in the 2005 Amendment to the Physical Protection Convention, which covers: "a facility (including associated buildings and equipment) in which nuclear material is produced, processed, used, handled, stored or disposed of, if damage to or interference with such facility could lead to the release of significant amounts of radiation or radioactive material".

In choosing which definition to adopt, States should have regard to their obligations under either convention. It should be noted, in any case, that the definition contained in the 2005 Nuclear Terrorist Convention appears to be broader in scope.

Nuclear material means plutonium except that with isotopic concentration exceeding 80% in plutonium-238; uranium-233; uranium enriched in the isotope 235 or 233; uranium containing the mixture of isotopes as occurring in nature other than in the form of ore or ore-residue; any material containing one or more of the foregoing.

Place of public use means those parts of any building, land, street, waterway or other location that are accessible or open to members of the public, whether continuously, periodically or occasionally, and encompasses any commercial, business, cultural,

historical, educational, religious, governmental, entertainment, recreational or similar place that is so accessible or open to the public.

Precursor means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

Proceeds means any funds derived from or obtained, directly or indirectly, through the commission of an offence set forth in article 16 of this Law [Financing of terrorist acts and other terrorism- related offences].

Public transportation system means all facilities, conveyances and instrumentalities, whether publicly or privately owned, that are used in or for publicly available services for the transportation of persons or cargo.

Radioactive material means nuclear material and other radioactive substances which contain nuclides which undergo spontaneous disintegration (a process accompanied by emission of one or more types of ionizing radiation, such as alpha-, beta-, neutron particles and gamma rays) and which may, owing to their radiological or fissile properties, cause death, serious bodily injury or substantial damage to property or to the environment.

Sanctions Committee means the Committee of the Security Council of the United Nations established by paragraph 6 of Resolution 1267(1999)

Consolidated list means the list of individuals, groups, undertakings and entities associated with the Taliban, Usama Bin Laden and the Al-Qaida organization who are subject to the sanctions measures imposed by the Security Council.

Serious injury or damage means:

- 1) serious bodily injury; or
- 2) extensive destruction of a place of public use, State or government facility, infrastructure facility, or public transportation system, resulting in major economic loss; or
- 3) substantial damage to the environment, including air, soil, water, fauna, or flora.

The proposed definition of "serious injury or damage" reflects the one given in the 1997 Terrorist Bombings Convention with the addition of para. 3), which was introduced by the 2005 Nuclear Terrorism Convention. The exact combination of para. a); b) and c) is used in the 2005 Maritime Protocol.

In deciding whether injuries and damage are "serious", or destruction "extensive", States are encouraged to avoid broad interpretations. It is to be noted, also, that a number of legal systems have either legislation or jurisprudence defining "serious bodily injury".

Ship means a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft.

Source material and **special fissionable material** have the same meaning as given to those terms in article XX of the Statute of the International Atomic Energy Agency, approved in New York on 23 October 1956.

State or government facility means any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.

Toxic chemical means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

Transport means to initiate, arrange or exercise effective control, including decision-making authority, over the movement of a person or item.

The proposed definition serves the purpose of clarifying the meaning of "transport" within the scope of article 6 of these Model Provisions (Transportation of BCN weapons and other substances on board a ship). It reflects the definition contained in the 2005 Maritime Protocol.

Uranium enriched in the isotope 235 or 233 means uranium containing the isotope 235 or 233 or both in an amount such that the abundance ratio of the sum of these isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature.

Chapter 2 OFFENCES

The first Section of this Chapter deals with conducts that States Parties to the International treaties listed in the Definitions Part are required to establish as criminal offences into their domestic legislation. The second Section proposes various options for the criminalization of "acts of terrorism, while acknowledging that no such criminalization obligation is imposed either by treaty or through any other binding arrangement at the global level.

States may wish to introduce the offences described below in an order different from the one suggested in these Model Provisions. For example, they may wish to place them in different sections/sub-sections/articles/paragraphs.

It is understood, in line with the International treaties, that the conducts described therein have to be criminalized by States Parties when committed "unlawfully" and "intentionally. For this reason, these Model Provisions refrain from reproducing such requirements in each offence-creating provision. Often, in most countries, issues relating to the "mens rea" requirement will be dealt with by the general principles applicable to their penal laws. If needed, however, countries may add such requirements directly into the text of each offence-creating provision. As to the "unlawfulness" of the conducts, for example, there might be a need to explicitly exempt police forces from criminal responsibility when they carry out (some of) the described conducts during an undercover operation (ex: buying nuclear material).

It is also understood that the general principles of criminal law of each State dealing with conditions for criminal liability, attenuating or aggravating circumstances, etc., will be applicable to the offences set forth in this Chapter.

It is for each State to set the nature and amount of the applicable penalties. The International treaties only guidelines are that such penalties shall take into account the "grave nature" of the corresponding criminal conducts. Most States would normally impose custodial penalties as a main sanction.

Section 1 Offences related to International Treaties

This Section proposes the criminalization of the conducts set forth in the conventions and protocols listed in the Chapter 1, Definitions under "International Treaties", namely:

- 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft
- 1970 Convention for the Suppression of Unlawful Seizure of Aircraft ("Aircraft Convention")
- 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Civil Aviation Convention")
- 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons ("Diplomatic Agents Convention")
- 1979 International Convention against the Taking of Hostages ("Hostage Convention")
- 1980 Convention on the Physical Protection of Nuclear Material ("Physical Protection Convention")
- 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Airport Protocol")
- 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("Maritime Convention")
- 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf ("Fixed Platforms Protocol")
- 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection
- 1997 International Convention for the Suppression of Terrorist Bombings ("Bombings Convention")
- 1999 International Convention for the Suppression of the Financing of Terrorism ("Financing Convention")
- 2005 International Convention for the Suppression of Acts of Nuclear Terrorism ("Nuclear Terrorism Convention")
- 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("2005 Maritime Protocol")
- 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ("2005 Fixed Platforms protocol")
- 2005 Amendment to the Convention on the Physical Protection of Nuclear Material ("Physical Protection

Amendment")

Although there is technically no obligation to do so, States might consider introducing offences relating to non-ratified conventions. This step would be especially advisable in the light of ongoing Governmental plans to accede to new international instruments.

The discretion left to States in deciding the naming/order/positioning of the various offences within their domestic laws should not affect the need to ensure that the elements of treaty-based offences be faithfully reflected in domestic law.

Sub-section 1 Offences related to Civil Aviation

Article 1 Hijacking of aircrafts

Whoever on board an aircraft in flight seizes or exercises control of that aircraft by force, threat or any other form of intimidation,

shall be punished with [penalties which take into account the grave nature of those offences].

This article reproduces the language of Article 1 of the 1970 Aircraft Convention.

For the meaning of "aircraft in flight" see Chapter 1, Definitions.

The conducts described in the 1970 Convention are restricted to "hijacking" committed through use of force, threat or intimidation. However, States may want to include modalities of taking control of an aircraft through means other than force, threat or intimidation: for example, the act of someone taking control of an aircraft after having disguised himself as the pilot, and managing to enter the cockpit.

Language from the 1970 Aircraft Convention suggests that the hijacker must be physically present on the aircraft. This excludes cases where the plane is effectively hijacked from a separate location: for example, someone on the ground takes actual control of the plane by threatening the pilot. States may wish to extend the scope of application of this provision to cover such cases.

Article 2 Offences against the safety of civil aviation

- 1) Whoever commits any of the following acts:
 - a) committing an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft;
 - b) destroying an aircraft in service, or causing damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight;
 - c) placing or causing to be placed on an aircraft in service, by any means whatsoever, a device or a substance which is likely to destroy that aircraft, or causing damage to it which renders it incapable of flight, or causing damage which is likely to endanger its safety in flight;
 - d) destroying or damaging air navigation facilities or interfering with their operation, if any such act is likely to endanger the safety of the aircraft in flight;

- e) communicating information which the person knows to be false, thereby endangering the safety of the aircraft in flight.

shall be punished with [penalties which take into account the grave nature of those offences].

- 2) Whoever threatens, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit an offence set forth in paras.1(a), 1(b), or 1(d), if the threat is likely to endanger the safety of the aircraft,]

shall be punished with [penalties which take into account the grave nature of those offences].

This article reproduces the language of Article 1 of the 1971 Civil Aviation Convention.

For the meaning of "aircraft in flight" and "aircraft in service" see Chapter 1, Definitions.

Para.2 is technically not required by the 1970 Civil Aviation Convention. Its inclusion is suggested for consistency with an identical provision to be found in the maritime-related offences (see article 5).

Article 3
Offences against safety at airports serving civil aviation

- 1) Whoever commits any of the following acts, using any device, substance or weapon, if such acts are likely to endanger the safety at an airport serving international aviation:
 - a) committing 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;
 - b) destroying or seriously damaging the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupting the services of the airport;

shall be punished with [penalties which take into account the grave nature of those offences].

- 2) [Whoever threatens, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in para.1, if the threat is likely to endanger the safety at the airport,]

shall be punished with [penalties which take into account the grave nature of those offences].

This article reproduces the language of Article 2 of the 1988 Airports Protocol.

The meaning of "aircraft not in service", as appears in para.1) b), is not explicitly defined, but can be inferred a contrario from the existing definition of "aircraft in service".

Para.2 is technically not required by the 1970 Convention. Its inclusion is suggested for consistency with an identical provision to be found in the maritime-related offences (see article 5)

Although the scope of application of this article is technically limited to international airports, States may consider extending its reach to cover domestic airports.

Sub-section 2

Offences related to Maritime Navigation and Fixed Platforms

Article 4

Offences against the safety of ships and fixed platforms

- 1) Whoever commits any of the following acts against a ship or a fixed platform shall be punished with [penalties which take into account the grave nature of those offences]:
 - a) seizing or exercising control of a ship or a fixed platform by force, threat or any other form of intimidation;
 - b) committing an act of violence against a person on board a ship or a fixed platform, if that act is likely to endanger its safety;
 - c) destroying a ship or causing damage to it or its cargo which is likely to endanger its safe navigation;
 - d) placing or causing to be placed on a ship, by any means whatsoever, a device or substance likely to destroy or cause damage to that ship or its cargo which endangers or is likely to endanger its safe navigation;
 - e) destroying a fixed platform or causing damage to it which is likely to endanger its safety, or placing or causing to be placed on a fixed platform, by any means whatsoever, a device or substance likely to destroy that fixed platform or to endanger its safety;
 - f) destroying or seriously damaging maritime navigational facilities or seriously interfering with their operation, if any such act is likely to endanger the safe navigation of a ship;
 - g) communicating information which that person knows to be false, thereby endangering the safe navigation of a ship;
 - h) injuring or killing any person in connection with the commission of any of the offences set forth in para. a) to g)

shall be punished with [penalties which take into account the grave nature of those offences].

- 2) [Whoever threatens, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paras.1) b), c), e), and f), if the threat is likely to endanger the safe navigation of the ship or the safety of the fixed platform,]

shall be punished with [penalties which take into account the grave nature of those offences].

The proposed article merges the offences set forth in Article 2 of the 1988 Maritime Convention and Article 3 of the 1988 Fixed Platforms Protocol.

For the meaning of "ship" and "fixed platform" see Chapter 1, Definitions.

Article 5**Use and discharge of BCN weapons and other substances from a ship or fixed platform**

- 1) Whoever commits any of the following acts, when the purpose of the 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:
 - a) using against or on a ship or a fixed platform, or discharging from a ship or a fixed platform any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage;
 - b) discharging, from a ship or fixed platform, oil, liquefied natural gas or other hazardous or noxious substance, which is not covered by para.1 a), in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
 - c) using a ship in a manner that causes death or serious injury or damage,

shall be punished with [penalties which take into account the grave nature of those offences

- 2) Whoever threatens to commit an act set forth para.1),

shall be punished with [penalties which take into account the grave nature of those offences

| |
|---|
| <p><i>This article reproduces part of the offences set forth in Article 3-bis, para.1, of the 2005 Maritime Protocol as well as the offences contained in Article 2-bis of the 2005 Fixed Platforms Protocol.</i></p> |
|---|

| |
|---|
| <p><i>For the meaning of "BCN weapon" see Chapter 1, Definitions.</i></p> |
|---|

Article 6**Transportation of BCN weapons and other substances on board a ship**

- 1) Whoever transports on board of a ship:
 - a) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act;
 - b) any BCN weapon, knowing it to be a BCN weapon;
 - c) any source of material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an (IAEA) comprehensive safeguards agreement;
 - d) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose;

shall be punishable with [penalties which take into account the grave nature of those offences].

- 2) Causing injuries or killing any person in connection with the perpetration of any of the crimes set forth in paragraphs (1) of the present Article,

shall be punished with [penalties which take into account the grave nature of those offences].

The proposed article reproduces the remaining criminalization requirements of Article 3-bis, para.1, of the 2005 Maritime Protocol.

For the meaning of "serious injury or damage", "transport", "BCN weapon", "source material", and "special fissionable material" see Chapter 1, Definitions.

Para.1)c) exempts from the punishable conducts the transport of certain materials that, although destined to be used in a nuclear activity, takes place under an IAEA safeguards agreement.

States might consider criminalizing the same "transport" conducts also when they take place onboard different means of transport, for example trains, or planes, despite the absence of a specific international requirement to this effect.

Article 7

Transportation of certain offenders on board ships

Whoever transports another person on board a ship, knowing that the person has committed an act that constitutes an offence set forth in [these Model Provisions], and intending to assist that person to evade criminal prosecution,

shall be punished with [penalties which take into account the grave nature of those offences].

This article reproduces the language of Article 3-ter of the 2005 Maritime Protocol.

Sub-section 3

Offences based on the Status of the Victim

Article 8

Offences against internationally protected persons

- 1) Whoever commits any of the following acts:
 - a) murdering, kidnapping or carrying out other attacks upon the person or liberty of an internationally protected person;
 - b) carrying out a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his or her person or liberty;
- 2) Whoever threatens to commit any of the acts set forth in para. 1,

shall be punished with [penalties which take into account the grave nature of those offences].

The proposed article covers the offences set forth in Article 2 of the 1973 Diplomatic Agents Convention.

For the definition of “internationally protected person” see the Chapter 1, Definitions.

The recommended interpretation of this provision is that the perpetrator must have prior knowledge of the “diplomatic status” of the victim. Although, during the elaboration of the 1973 Convention, some States had proposed to restrict the scope of application of this offence to the case in which the perpetrator’s acts are motivated by the official status of the victim, it was eventually decided that the motive was irrelevant.

Conducts defined in this article will already be offences under the criminal law of most States. However, enacting specific offences in relation to internationally protected persons would:

- ensure the applicability of higher penalties due to the special status of the victim;*
- ensure the fulfillment of the “dual criminality” requirement;*
- specify conducts that, unlike ordinary offences, are the object of a specific legal regime under the 1973 Convention (extraterritorial jurisdiction, “aut dedere aut judicare”, etc.), and other International treaties (for example, the duty to freeze and confiscate funds related to certain offences).*

Article 9

Taking of hostages

Whoever seizes or detains and threatens to kill, to injure or to continue to detain another person, in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage,

shall be punished with [penalties which take into account the grave nature of those offences].

The proposed article covers the offences set forth in Article 1 of the 1979 Hostages Convention.

The article does not explicitly cover NGOs as targets of the demands of the hostage-takers, as it only makes reference to “intergovernmental organizations”. States may wish to include explicit reference to these entities, although these latter would often fall within the general notion of “juridical persons” as reflected in the present Model Provision.

Sub-section 4

Offences related to Terrorism Bombings

Article 10

Offences with explosives or other lethal devices

- 1) Whoever delivers, places, discharges or detonates an explosive or other lethal device into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause:
 - a) death or serious bodily injury; or
 - b) extensive destruction of such a place, facility or system, where such destruction results in, or is likely to result in, major economic loss,

shall be punished with [penalties which take into account the grave nature of those offences].

The proposed article covers the offences set forth in Article 2 of the 1997 Bombings Convention.

For the meaning of “place of public use”, “explosive or other lethal device”, and “infrastructure facility” see Chapter 1, Definitions.

Art.5 of the 1997 Bombings Convention highlights the fact that the above offences shall be under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, particularly when they are intended or calculated to provoke a state of terror in the population.

Some States may wish to establish a separate aggravating circumstance for the repression of the conducts set forth in Article 10 whenever they are committed with a specific intention to provoke a state of terror in the population.

Sub-section 5 Offences related to Radioactive/Nuclear Material and Nuclear Facilities

This Sub-section merges the offences set forth in the 1980 Physical Protection Convention), and the 2005 Nuclear Terrorism Convention. Bracketed parts reflect additional language introduced by the 2005 Amendment to the 1980 Physical Protection Convention, which has not entered into force.

The rationale for the merge is that the offences to be found in the two legal regimes deal with the same offences to a great extent. This Sub-section proposes therefore to handle them in an integrated and coordinated manner.

With regard to attempt, participation, contribution and other ancillary conducts reference is made to Section 2 and 3 of this Chapter.

Article 11 Handling of radioactive/ nuclear material and devices

- 1) Whoever, without lawful authority, receives, possesses, transfers, alters, or disposes, radioactive/ nuclear material or possesses a device,
 - a) with the intent to cause:
 - i) death or serious bodily injury; or
 - ii) substantial damage to property or to the environment; or
 - b) which causes or is likely to cause death or serious injury to any person or substantial damage to property or to the environment,

shall be punished with penalties which take into account the grave nature of those offences.

- 2) Whoever commits:
 - a) a theft or robbery of radioactive /nuclear material; or
 - b) an embezzlement or fraudulent obtaining of radioactive /nuclear material; or
 - c) [an act which constitutes the carrying, sending, or moving of radioactive material into or out of a State without lawful authority,]

shall be punished with penalties which take into account the grave nature of those offences.

- 3) Whoever threatens to commit an offence set forth in para. 2) a) of this article in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act,
- 4) Whoever demands radioactive /nuclear material or a device by threat, or by use of force, or by any other form of intimidation,

shall be punished with penalties which take into account the grave nature of those offences.

National authorities can choose to criminalize the above acts by either referring to radioactive or nuclear materials, taking into consideration:

- *That the definition of "radioactive material" in the 2005 Nuclear Terrorism Convention includes "nuclear material" (see Chapter 1, Definitions)*
- *That the 1980 Physical Protection Conventions only requires States Parties to establish as offences acts committed in relation to "nuclear material used for peaceful purposes", whereas the 2005 Nuclear Terrorism Convention has an expanded scope of application covering "radioactive material" "in general."*

The specific intention to "cause death or serious bodily injury". etc., contained in para. 1(a), reflects language used in the 2005 Nuclear Terrorism Convention. Such intention is not found in the 1980 Physical Protection Convention, which requires, instead, that the acts in question "cause or are likely to cause" such death, injury or damage. The intent language used by the Physical Protection Convention is reflected in para. 1(b),

States that are Parties to both legal frameworks are advised to adopt both para. 1(a) and (b) for full consistency with their overall treaty obligations.

States that are only parties to one of the two legal frameworks should choose either para. 1(a) or (b) depending on which conventions they are bound by.

For the meaning of "device", appearing in para.1, see Chapter 1, Definitions.

Article 12

Use of radioactive/ nuclear material

- 1) Whoever, without lawful authority, uses or disperses in any way radioactive /nuclear material or uses or makes a device,
 - a) with the intent to cause:
 - i) death or serious bodily injury; or
 - ii) substantial damage to property or to the environment; or
 - b) to compel a natural or legal person, an international organization, or a State to do or refrain from doing an act; or
 - c) which causes or is likely to cause death or serious injury to any person or substantial damage to property or to the environment,

shall be punished with [penalties which take into account the grave nature of those offences].

- 2) Whoever threatens to commit the offence set forth in para.1 of this article,

shall be punished with [penalties which take into account the grave nature of those offences].

See commentaries to previous article.

For reasons related to the legal practice followed by a number of States, it is proposed to deal with "handling" and "using" offences in two separate articles. This preference is also motivated by the fact that some States might prefer to apply different sets of penalties, lighter in the case of "handling" and more severe in the case of "using". States may of course decide otherwise, and re-group all of the relevant offences according to their specific criminal policies and legal structures.

Article 13

Offences relating to nuclear facilities

- 1) Whoever uses or damages a nuclear facility, [interferes with its operation, or commits any other act directed against a nuclear facility] in a manner which releases or risks the release of radioactive material,
 - a) with the intent to cause:
 - i) death or serious bodily injury; or
 - ii) substantial damage to property or to the environment; or
 - b) [with knowledge that the act is likely to cause death or serious injury to any person or substantial damage to property or to the environment by exposure to radiation or release of radioactive substances unless the act is undertaken in conformity with the national law of the State Party in the territory of which the nuclear facility is situated]; or
 - c) to compel a natural or legal person, an international organization or a State to do or refrain from doing an act,

shall be punished with penalties which take into account the grave nature of those offences.

- 2) Whoever threatens to commit an offence set forth in para.1 of this article,

shall be punished with penalties which take into account the grave nature of those offences.

- 3) Whoever demands a nuclear facility by threat, or by use of force or by any other form of intimidation,

shall be punished with penalties which take into account the grave nature of those offences.

The proposed article contains the criminalization requirements of the 2005 Nuclear Terrorist Convention in relation to "nuclear facilities". As already mentioned in the general commentary to this Sub-section, bracketed language reflects similar provisions to be found in the 2005 Amendment to the Physical Protection Convention, not yet in force.

To the extent that States choose to implement the 2005 Nuclear Terrorist Convention only, the term "nuclear facility" is taken to mean, as a minimum::

- Any nuclear reactor, including reactors installed on vessels, vehicles, aircraft or space objects for

use as an energy source in order to propel such vessels, vehicles, aircraft or space objects or for any other purpose;

- Any plant or conveyance being used for the production, storage, processing or transport of radioactive material.

As highlighted in the Definitions Part, the above definition of "nuclear facility" differs from the one contained in the 2005 Amendment to the Physical Protection Convention, which includes:

"a facility (including associated buildings and equipment) in which nuclear material is produced, processed, used, handled, stored or disposed of, if damage to or interference with such facility could lead to the release of significant amounts of radiation or radioactive material".

Note: The difference in the definition of "nuclear facility" would have practical as well as legal implications in respect of Article 14(1)[b].

It should also be noted that the Physical Protection Amendment introduces the definition of "sabotage" as "any deliberate act directed against a nuclear facility or nuclear material in use, storage or transport which could directly or indirectly endanger the health and safety of personnel, the public or the environment by exposure to radiation or release of radioactive substances.

Sub-section 6 Offences related to Terrorism Financing

Article 14 Financing of offences

- 1) Whoever by any means, directly or indirectly, provides or collect 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) any of the offences set forth in Chapter 2, Section 1 [Offences related to International treaties]
 - 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,

shall be punished with [penalties which take into account the grave nature of those offences].

- 2) For an act to constitute an offence under paragraph. 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraphs 1 a) and b).

The proposed article covers the offence set forth in Article 2 of the 1999 Financing Convention.

Para. a) ensures that the financing offence is punishable whenever it is directed to the commission of any of the conducts described in the International Treaties listed in the Definitions Part. States that have not ratified one or more such treaties have the option to restrict the scope of the financing offence to conducts described in ratified instruments only. A specific declaration to this effect is, however, required under Article 2.2. (a) of the Financing Convention.

Para b) reflects language used in the Financing Convention to cover violent conducts committed with a

specific intention which are not necessarily dealt with in existing treaties.

For the meaning of “funds” see Chapter 1, Definitions.

Section 2

Terrorist Acts and Support Offences

Although none of the International Treaties listed in the Definitions Part of these Model Provisions require States parties to define or criminalize terrorist acts as such, article 15 provides drafting guidelines for States that choose to define and criminalize them. For those States, various options are proposed reflecting descriptions to be found in different UN texts and regional legal instruments.

States are reminded that they ARE NOT BOUND by any UN instrument to define “terrorist acts” along the proposed lines. Accordingly, they can change, expand or restrict the proposed definitions in accordance with their specific needs, or taking into account alternative definitions. In departing from the proposed formulation, however, particular attention should be given to ensuring that chosen language is sufficiently precise and unambiguous to suit criminal law drafting requirements.

It should be stressed that the criminalization of “terrorist acts” is without prejudice to the obligation of States Parties to any of the International Treaties to meticulously criminalize the conducts described therein.

Articles 16 to 21 propose the criminalisation of support/ preparatory conducts to terrorist acts as autonomous offences, thus promoting the use of criminal law mechanisms as a preventive tool. The suggested approach implements the requirements set out in Security Council Resolution 1373, which expects States to criminalise support, planning and preparatory conducts for terrorist acts.

A similar approach also appears in the 1979 Hostage Convention and the 2005 Nuclear Terrorism Convention, according to which States Parties shall take “all practicable measures, including, if necessary, adapting their national law, to prevent and counter preparations in their respective territories for the commission within or outside their territories of the offences set forth in [the respective conventions], including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or knowingly provide technical assistance or information or engage in the perpetration of those offences”.

*For a comprehensive guidance on the theory and practical implications of using criminal law for preventive purposes, States can consult the TPB Technical Assistance Working Paper “Preventing Terrorist Acts: a Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments”, also available online through the TPB Website at:
http://www.unodc.org/images/Strategy%20Paper%20Mike%2006-52890_ebook.pdf*

Article 15

Terrorist acts

Option A

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

shall be punished with [penalties which take into account the grave nature of those offences].

Source: Article 2-1 (b), International Convention for the Suppression of the Financing of Terrorism; FATF Interpretative Note to Special Recommendation II on the Financing of Terrorism, defining terrorist act as the above, in addition to offences under the universal anti-terrorism conventions and protocols negotiated as of 1999.

Option B

- 1) Any person commits an offence who, by any means, unlawfully and intentionally, causes:
 - a) death or serious bodily injury to any person; or
 - b) serious damage to public or private property, including a p[lace of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
 - c) damage to property, places, facilities or systems referred to in paragraph 1) b) of the present article resulting or likely to result in major economic loss,

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act,

shall be punished with [penalties which take into account the grave nature of those offences].

Source: Draft Comprehensive Convention against International Terrorism, Appendix II to Letter from the Chairman of the 6th Committee addressed to the President of the General Assembly. This definition in proposed Article 2 is subject to the negotiating rule that no provision has been finally decided until all are decided.

Option C

Whoever commits an act intended to cause death or serious bodily injury to one or more members of the general population or segments of it, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act,

shall be punished with [penalties which take into account the grave nature of those offences].

Source: 1999 Terrorist Financing Convention + Security Council Resolution 1566 + Reports by the Special Rapporteur on Human Rights and Counter-Terrorism.

Option D

- 1) Whoever commits any of the following acts, which, given their nature or context, may seriously damage a country or an international organization, where committed with the aim of:
 - a) seriously intimidating a population; or
 - b) unduly compelling a Government or international organization to perform or abstain from performing any act; or
 - c) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization,

shall be punished with [penalties which take into account the grave nature of those offences]:

- i. attacks upon a person's life which may cause death;
 - ii. attacks upon the physical integrity of a person;
 - iii. kidnapping or hostage taking;
 - iv. causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
 - v. seizure of aircraft, ships or other means of public or goods transport;
 - vi. manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
 - vii. release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
 - viii. interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
 - ix. threatening to commit any of the acts listed in (a) to (h).
- 2) Acts causing serious interference with or serious disruption of an essential service, facility or system, whether public or private, as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in any of the conducts referred to paragraphs (a) to (i), do not constitute terrorist acts for the purposes of this article.

| |
|---|
| Source: EU Framework Decision of 13 June 2002 on Combating terrorism. |
|---|

Option E

- 1) Whoever commits an act which is a violation of the criminal laws of the State and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
 - a) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
 - b) disrupt any public service, the delivery of any essential service to the public; or

- c) to create a public emergency; or
- d) create general insurrection in a State,

shall be punished with [penalties which take into account the grave nature of those offences].

Source: Article 1-3, Organization of African Unity Convention on the Prevention and Combating of Terrorism, 1999.

Option F

- 1) Whoever commits an illegal act punishable under (the Penal Code) for the purpose of undermining public safety, influencing decision making by the authorities or terrorizing the population, and taking the form of:
 - a) violence or the threat of violence against natural or juridical persons;
 - b) destroying (damaging) or threatening to destroy (damage) property and other material objects so as to endanger people's lives;
 - c) causing substantial damage to property or the occurrence of other consequences dangerous to society;
 - d) threatening the life of a statesman or public figure for the purpose of putting an end to his State or other public activity or in revenge for such activity;
 - e) attacking a representative of a foreign State or an internationally protected staff member of an international organization, as well as the business premises or vehicles of internationally protected persons;

shall be punished with [penalties which take into account the grave nature of those offences]:

Source: Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism.

Article 16 Recruitment

Whoever recruits another person to be a member of a group, or to participate in the commission of a terrorist act,

shall be punished with [penalties which take into account the grave nature of those offences].

The inclusion of a specific "recruitment" offence stems from Security Council Resolution 1373, which specifically requires States to "suppress[ing] recruitment of members of terrorist groups" (para. 2-a). Accordingly, this Model Provision, followed by others, introduces the notion of "group", whose definition is left to each State to determine. In doing so, States can either adopt legislation defining the elements of the notion of "group" for the purposes of this article, leave the concept to be developed by the jurisprudence, or use both approaches (There is no international requirement, instead, for States to identify/ designate in advance specific groups or organizations as being terrorist group).

For drafting purposes, States may wish to consider that the most recent International treaties (Bombings, Financing, Nuclear, etc.) stress the element of “acting with a common purpose” (see, in particular, article 24, Complicity and contribution).

The definition of “organized criminal group” contained in the UN Convention against transnational organized crime (Article 2 (a)) can also offer some helpful drafting guidance.

The Model legislative provisions on measures to combat terrorism, elaborated by the Commonwealth Secretariat, might be of further guidance where they refer to “an entity that has one of its activities and purposes the committing of, or the facilitation of the commission of, a terrorist act”.

The EU Framework Decision of 13 June 2002 on Combating Terrorism defines ‘terrorist group’ as a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. According to this definition, ‘Structured group’ shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

Concerning the material elements of the “recruitment” offence, legislative drafters may also wish to draw from article 6 of the Council of Europe Convention on the prevention of terrorism.

Article 17

Supply of weapons

Whoever supplies or offers to supply weapons to a group, a member of a group, or to another person to participate in the commission of a terrorist act,

shall be punished with [penalties which take into account the grave nature of those offences].

The adoption of a “supply of weapons” Model Provision stems from Security Council Resolution 1373, which specifically requires States to “eliminate the supply of weapons to terrorists” (para. 2-a).

Although Resolution 1373 does not specifically refer to “groups”, but rather to “terrorists”, for reasons of logic and consistency it is proposed to cover supply of weapons to “groups” as well.

For the definition of “group”, see remarks to article 17 [Recruitment].

States are encouraged to adopt as broad a definition of “weapons” as possible, notably inclusive of:

- “firearms, their parts and components and ammunition”, as defined in the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (article 3);

- “Explosives or other lethal device”, as defined in the 1997 Terrorist Bombings Convention (see Chapter 1, Definitions);

- “BCN weapon” as defined in the 2005 Maritime Protocol (see Chapter 1, Definitions);

- “Explosives” as referred to in the Technical Annex to the Marking of Plastic Explosives Convention.

Article 18

Provision of support

Whoever provides support [as defined in national law or jurisprudence] to a group, a member of a group, or to another person to participate in the commission of a terrorist act,

shall be punished with [penalties which take into account the grave nature of those offences].

Whereas previous articles of this Sub-section spell out a number of specific support conducts, this article is meant to contain a “catch all” provision, reflecting also a general requirement of Security Council resolution

1373.

For the sake of legal precision, it is for each State's laws or jurisprudence to identify exactly the types of support conducts to be criminalized. In this context, the Model Legislative Provisions on Measures to Combat Terrorism, produced by the Commonwealth Secretariat, provides examples of such conducts (harboring of persons, provision of training and facilities, arrangements of meetings, etc.).

The full-text electronic version of the Commonwealth Secretariat's Model Provisions is available at: http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B32AF830D-F83A-4432-8051-750C789531A5%7D_final_terrorism_law.pdf

Also, legislative drafters may wish to refer to article 7 of the Council of Europe Convention on the prevention of terrorism, which proposes its own definition of the offence of "training for terrorism".

Article 19

Agreement to commit a terrorist act

- 1) Whoever agrees with one or more persons to commit a terrorist act

shall be punished with [penalties which take into account the grave nature of those offences].

- 2) [For the person to be punishable, one of the parties to the agreement must have undertaken an [overt] act by in furtherance of that agreement.]

The language of this article draws in part from article 5 (a)(1) of the UN Convention against transnational organised crime (TOC Convention).

States have the possibility to either criminalise the described offence as the mere agreement between two or more people or subordinate punishment to the commission of an "overt act" as a follow-up to such an agreement (as required in a number of legal systems). This latter possibility is reflected in para.2 (optional) of this article. It is worth stressing that such "overt act" needs not be criminal in nature (for example, the purchase of a flight ticket in furtherance of the agreement would be enough).

Countries belonging to the "common law" legal tradition will recognise in this article the typical features of "conspiracy" offences.

Para.1) a) criminalise, among others, the agreement to commit some of the support conducts set forth in this sub-section (recruitment, supply of weapons, etc.).

Article 20

Planning and preparation

Whoever makes plans or preparations with the intention or in the knowledge that such planning or preparation is for the purpose of committing a terrorist act

shall be punished with [penalties which take into account the grave nature of those offences].

This article contains another "catch all" provision. It differs from article 18 (Provision of support) in that the offence set forth in this article may well include plans for a terrorist act to be committed by the planner himself, whereas article 18 covers support given to others, or for the benefit of a group.

The conducts set forth in this article are also distinct from the attempt to commit offences: whereas an attempt is usually punishable on condition that the completed crime does not take place for reasons that are independent of the willingness of the person, the perpetrator of the planning conducts set forth in this article is punishable even when he voluntarily desists (for whatever reason) from the commission of the planned offence (for example, a person makes careful preparations with a view to committing a terrorist act, and then decides not to carry it out because he deems that the political climate is no longer appropriate, or because he receives instructions to cancel the operation).

The planning conducts set forth in this article are different from those set forth in article 19 (Agreement to commit an offence), since the planning may well be committed by one individual only.

In principle, under the proposed approach, a person that plans to commit a terrorist act and subsequently carries it out (or at least attempts it), would be charged with both the planning conduct and the terrorist act. The concrete penalty applicable for a plurality of offences committed by the same persons is then for each State to identify, in accordance with national rules concerning the calculation of the final penalty to be applied in case of cumulative offences.

Article 21 Incitement

Whoever distributes, or otherwise makes a message available to the public, with the intent to incite the commission of a terrorist act, where such conduct, whether or not directly advocating the commission of a terrorist act, causes a danger that one or more such acts may be committed,

shall be punished with [penalties which take into account the grave nature of those offences].

The proposed article takes into account requirements stemming from a series of universal legal instruments, notably:

- Security Council resolution 1624(2005), paragraphs 1(a) and 3 of which call upon States to “prohibit by law incitement to commit a terrorist act or acts” and “to counter incitement of terrorist acts motivated by extremism and intolerance”.

- The International Covenant on Civil and Political Rights, Article 20, which requires action to ensure that: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. While the Covenant does not require that the prohibition of incitement be achieved by means of criminal law, criminalization can certainly be considered an appropriate channel, as it is difficult to imagine non-penal sanctions being adequate to control the more extreme cases of incitement to violence.

- The 1979 Hostage Taking Convention (Article 4), and the 2005 Nuclear Terrorism Conventions (Article 7), requesting States to “Tak[ing] all practicable measures, to prevent and counter preparations in their respective territories for the commission within or outside their territories of the offences [...], including measures to prohibit in their territories illegal activities of persons, groups and organizations that [...] instigate [...] the perpetration of those offences”.

Language used for the identification of the elements of the proposed offence draws from article 5 of the Council of Europe Convention on the Prevention of Terrorism, which establishes the offence of “public provocation to commit a terrorist offence”, and which the Counter Terrorism Committee of the Security Council recommends as a “best practice”. The proposed definition requires a “public message”, even though the evidence may be based upon only one witness to a public act, such as a radio broadcast. It also requires the objective causation of a “danger”. It is to be noted that the offence of “public provocation” described in the Council of Europe Convention extends its scope of application to the commission of any of the conducts set forth in the universal International treaties, whereas the present proposal limits the reach of the offence to “terrorist acts” as defined in article 15.

In drafting and subsequently applying their “incitement” provisions, States are reminded of the need to fully respect human rights obligations in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in applicable international instruments.

Further drafting suggestions and examples of national laws may be found in the following:

*- Report of the Counter-Terrorism Committee to the Security Council on the implementation of resolution 1624 (2005), available online at:
<http://daccessdds.un.org/doc/UNDOC/GEN/N06/520/37/PDF/N0652037.pdf?OpenElement>*

- *Apologie du terrorisme and "incitement to terrorism", Council of Europe Publishing, 2004.*

Article 22

Irrelevance of commission of an act of terrorism

- 1) For a conduct listed in articles 16 to 21 to constitute an offence, it shall not be necessary that a terrorist act under article 15 be actually attempted or committed.
- 2) A conduct constitutes an offence under articles 16 to 21 regardless of whether or not it is aimed at supporting, preparing, or instigating an offence in the same State.

Para.1 of this article clarifies that the offences set forth in this Section are punishable as "autonomous" criminal conducts, i.e. regardless of whether or not they lead to the actual commission of a terrorist act. Also, the perpetrator of the support offences should be distinguished from the accomplice, this latter usually being held criminally responsible on condition that the main offence takes place, or is at least attempted. (Provisions relating to complicity are covered separately in Section 3 of this Chapter).

When accompanied by the appropriate investigative/procedural legal tools, para.1 has the potential to provide national authorities with the legal authority to disrupt ongoing preparations for terrorist offences, without having to "wait" for the actual violence/ damage to occur.

Para.2 ensures that support/ preparatory conducts are punishable even when the criminal plans are aimed to the commission of a terrorist act / offence related to terrorism abroad (example: If A recruits B in country X with a view of having him/her committing a terrorist offence in country Y, A has committed an offence under the laws of country X).

In doing so, para.2 reflects the broad requirement of Security Council Resolution 1373, calling upon States to "prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories [...] against other States or their citizens" (para. 2-d).

A practical implication of this principle among States Parties to the same CT convention, combined with the application of the "aut dedere aut judicare" rule (reflected in both Article 26(2)(b) and Article 56) would be the following: Country X will have an obligation to submit to its national prosecutorial authorities the case of A, who, having recruited B in Country Y with a view to B committing a terrorist act in Country Z, is found in Country X, if this latter decides not to extradite A.

Section 3

Attempt and Complicity

Article 23

Attempt

Whoever attempts to commit any of the offences established in Section 1 [Offences related to international treaties] and the offence set forth in article 15 [Terrorist acts]

shall be punished with [penalties which take into account the grave nature of those offences].

The requirement to criminalize attempt is to be found in all of the International treaties, and reflected in this Model Provision accordingly. The notion of "attempt" is to be construed in line with the way in which the criminal laws and/ or jurisprudence of each adopting State define it.

Article 24

Complicity and contribution

- 1) To the extent not otherwise defined by law, the following acts defined as offences under Section 1 [Offences related to international treaties] and article 15 [Terrorist acts],

shall be punished with [penalties which take into account the grave nature of those offences]:

- a) participating as an accomplice in conducts];
- b) organising or directing others to commit such offences;
- c) contributing to the commission of one or more such offences by a group of persons acting with a common purpose, where such contribution is intentional and is made with the aim of furthering the criminal activity or criminal purpose of the group [in the knowledge of the intention of the group to commit such offence].

The requirement to criminalize participation as an accomplice (letter a) is found in all of the International treaties listed in the Definitions Part of these Model Provisions.

The wording of para. b) and c) is taken from the Financing Convention as reproduced in subsequent International treaties. Although previous conventions do not contain the same provision, for uniformity purposes it is proposed to extend its applicability to all of the offences set forth in these Model Provisions.

The "contribution" appearing in para. b) can either aim at furthering the criminal activities of the group or simply be made in the knowledge of the criminal intention of the group.

It is up to each State to interpret the notions set forth in this article (such as that of complicity) in line with their laws and jurisprudence applicable to the various degrees of participation in criminal offences.

This Model Provision only covers accessory offences before the act, as required by the conventions. Ancillary offences after the act ("harboring" provision) may be introduced by national authorities. In some countries this may not be needed because of the existence of a "catch-all" provision in the general part of the penal code.

Section 4

Liability of Legal Entities

Article 25

Liability of legal entities

- 1) Any legal person located in the territory of the [name of the State] or organized under its laws [mention, if appropriate, such laws] is liable when a person responsible for its management or control has, in that capacity, committed an offence set forth in [these Model Provisions].
- 2) The legal entities liable in accordance with para.1 of this article are subject to [effective, proportionate and dissuasive criminal, civil or administrative sanctions].
- 3) The application of para.1 of this article is without prejudice to the responsibility of those individuals as perpetrators of or accomplices to the offence.

This article reflects the language used in article 5 of the Financing Convention and the 2005) Maritime Convention.

For the sake of uniformity, the liability of legal persons' principle is extended to all of the offences set forth in

these Model Provisions.

States may wish to make legal persons responsible for omissions, i.e. in case the offence was caused by lack of supervision or control on the part of the entity's managers.

As to the applicable sanctions (para.2), there is no international requirement that they be criminal in nature, as they can also be civil or administrative. The International treaties explicitly refer to monetary sanctions only, but States can resort to different kinds of measures, including: barring the legal entity, permanently or for a certain period, from directly or indirectly carrying on certain business activities; placing it under court supervision; ordering the closing, permanently or for a certain period, of its premises which were used for the commission of the offence.

Chapter 3 JURISDICTION

Article 26 Jurisdiction

- 1) The Courts of [name of the State] shall have jurisdiction with respect to any of the offences set forth in [these Model Provisions] if they have been attempted or committed:
 - a) in the territory of [name of the State]; or
 - b) on board or against an aircraft registered in [name of the State], a ship flying the flag of [name of the State], [or a fixed platform located on the continental shelf of [name of the State]]
 - c) on board or against an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

- 2) In addition, the Courts of [name of the State] shall have jurisdiction for any of the offences set forth in [these Model Provisions] committed outside the territory of the State if:
 - a) the offence was committed by a national of [name of the State]; or
 - b) the alleged perpetrator is found on the territory of the (name of the State) and is not extradited to any State requesting extradition for the same conduct;
 - c) in the case of an offence involving aircrafts as set forth in article 1 [Hijacking of aircrafts] and article 2 [Offences against the safety of civil aviation], the offence was committed onboard the aircraft, if it lands in the territory of [name of the State] with the alleged offender still on board; or
 - d) in the case of the offence set forth in article 9 [Taking of hostages], the offence was committed in order to compel the Government of [name of the State] to do or abstain from doing any act; or
 - e) in the case of the offence set forth in Article 8[Offence against internationally protected persons], the offence was committed against an internationally protected person by virtue of functions that person exercises on behalf of the Government of [name of the State].

Chapter 3 outlines the grounds for jurisdiction which States Parties to the International treaties are required to establish vis-à-vis the offences set forth in this law.

Technically, the “active nationality principle”, outlined in para. 2) a) is not required in the context of the offences against the security of civil aviation. It is here extended to such offences for the sake of uniformity and because, arguably, it was not included in the aviation - related conventions due the early date of their adoption.

Para. 2) b) spells out the principle known as “aut dedere aut judicare”. For relevant commentaries, see article 56 (Obligation to submit for prosecution or extradite), in Chapter 5, International cooperation.

Depending on their legal tradition and structure of their legal instruments, some States would include this Chapter into the general part of their criminal code, whereas other would rather handle the jurisdictional grounds in the context of specific offence-creating laws.

Most States will already have in place some of the jurisdictional grounds mentioned, particularly the "territoriality principle". In such cases, no specific legislative interventions would be needed.

The International treaties do not address the issue of which domestic courts shall be competent to try the offences described therein. It is for each State to decide how to distribute the burden of the cases among its national judicial authorities, by applying its own domestic provisions regulating geographic and subject-matter jurisdiction.

Although they are not bound to do so, States Parties to the International treaties listed in the Definitions Part of these Model Provisions may consider introducing the following optional grounds for jurisdiction:

- a) if, during the commission of the offence, a national of the State is seized, threatened, injured or killed;*
- b) when the offence is committed:*
 - against a national of the State;*
 - by a stateless person whose habitual residence is in that State;*
 - on board an aircraft which is operated by the Government of that State;*
- c) when the offence was directed towards or resulted in the carrying out of an offence as set forth in the present Model Provisions:*
 - in the territory of or against a national of that State;*
 - in an attempt to compel that State to do or abstain from doing any act;*
 - against a State or government facility of that State abroad, including diplomatic or consular premises of that State.*

Chapter 4 PROCEDURAL MEASURES

This Chapter groups together the few elements of criminal procedure contained in the International treaties (Section 1), and other judicial/ administrative procedures relating to the freezing, seizure and forfeiture of terrorist assets contained in Security Council resolution 1373 and the Financing Convention (Section 2)

A separate Section 3 is devoted to the implementation of Security Council sanctions vis-à-vis persons and entities listed under the Al Qaida/ Taliban regime. In relation to this latter, States may, at their discretion, wish to extend that sanction regime (or create a parallel one) to individuals and entities included in other lists different from the Security Council's (whether by drawing up their own list, or "recognizing" the lists of foreign States/ organizations).

This Chapter does not cover, however, the procedural aspects relating to conduct of the trial, the sentencing, or the post-trial treatment of convicted offenders.

Likewise, there is no mention of the possibility of applying reduced penalties and/ or offering various forms of incentives for individuals that provide substantial cooperation in the investigation or prosecution of the offences set forth in this Model Law. States wishing to implement such schemes might usefully refer to article 26 of the UN Convention against transnational organized crime (TOC), "Measures to enhance cooperation with law enforcement authorities".

Witness protection is another area that is not the object of specific Model Provisions. Article 24 of the TOC might provide guidance for the establishment of a general framework. Interested states are also referred to the UNODC Model Witness Protection Bill, specifically designed for common law countries, and available in English at:

http://www.unodc.org/pdf/lap_witness-protection_2000.pdf

A commentary to the Bill can also be found at:

http://www.unodc.org/pdf/lap_witness-protection_commentary.pdf

Section 1 Investigation, Pre-trial measures, Rights of the person subject to proceedings for offences under [these Model Provisions]

Article 27 Investigation

- 1) When the [competent authority] is informed from any source in or outside the country that the perpetrator or alleged perpetrator of an offence set forth in [these Model Provisions] may be present in the territory of [name of the State], it shall investigate the facts contained in the information, and shall have such powers as it would have to conduct an investigation for any other criminal offence under national law.
- 2) In accordance with [applicable conditions and procedures], the [competent authority] shall ensure the presence of that person for purposes of prosecution or extradition, when necessary requesting that the person be placed under judicial control or in custody.

Absent any specific provision in International treaties or Security Council Resolutions, it is for each State to decide the procedures (identification of authorities empowered to make arrests, searches, seizures for evidentiary thresholds, judicial controls, etc.) applicable to the investigation of the offences set forth in these Model Provisions. Whereas most States rely on the general procedural law applicable to all crimes, others include special powers/ authorities. Especially if they decide to depart from ordinary criminal procedures, national authorities are reminded of their parallel obligations under international human rights law.

Para. 1 requires that police/prosecutorial authorities of the State investigate the facts based on information

that the alleged offender may be physically present on its territory. It is not specified what the source of the information should be. In addition, the formulation of the International treaties is such as to impose an obligation to launch an investigation even if it is not certain that the person is in the territory of the state. National authorities are encouraged to investigate based on as large a spectrum of reliable information as possible.

Para. 2 requires States to apply provisions available under their domestic law, including evidentiary thresholds, and judicial control procedures, necessary for placing an alleged offender into custody, or under judicial control, pending a criminal or an extradition proceeding. In applying domestic criminal procedure, specifically in matters of pre-trial detention, States are encouraged to conform to universally accepted standards

In particular, as to the length of time during which a person can be detained in a terrorism-related case before being charged or released, the ICCPR refers to the right to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power and to the right to trial or to release within a reasonable time (article 9).

National legislation varies widely, with many systems allowing extended investigative detention once a preliminary determination has been made by a magistrate that grounds for an investigation or a trial exist. Some guidance may be found in General Comment 8, issued by the Human Rights Committee, according to which: "Paragraph 3 of Article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the committee, delays must not exceed a few days".

The proposed article is compatible with the use of "special investigation techniques" (electronic surveillance, undercover operations, controlled deliveries) by States, subject to appropriate judicial review. Article 20 of the UN Convention against Transnational organized crime may be used as a guide for the drafting of relevant provisions as well as Council of Europe recommendation 10 (2005).

Article 28

Applicability of International law

Any person in relation to whom proceedings are taken for any of the offences set forth in this Law shall be granted fair treatment, including enjoyment of all rights and guarantees provided by domestic or international law, in particular international human rights law, refugee law, and, when applicable, humanitarian law.

The wording of this article draws from para.6 of Security Council Resolution. 1456(2003) and from common language used in most of the International treaties.

In construing the notion of "fair treatment", national authorities are expected to refer to the rights and standards embodied in international (including regional) conventions to which they are Parties, international customary law, and the meaning that domestic laws and national jurisprudence might have assigned to such concept.

The term "proceedings" mentioned in para.1 includes not only those aimed at establishing the guilt or innocence of the alleged perpetrator, but also other proceedings, including extradition proceedings triggered at the request of a foreign State, those established for the purpose of rendering mutual assistance in criminal matters as covered in this Model Provisions (ex., for the taking of statements), and those designed to execute the freezing and forfeiture of assets.

Also, the term "proceedings" should be understood in a broad sense to include not only court proceedings, but all phases of the investigation and post-trial proceedings

As specific human rights and guarantees may already be spelled out in other sections of the procedural law of the State, legislative drafters may not necessarily need to retain the exact formulation of the proposed article. Some States may find it superfluous or unnecessary to include it explicitly into their domestic laws, particularly when national authorities are automatically and directly bound to respect international norms forming an integral part of their legal system after ratification of the relevant conventions.

In any case, States are reminded of the absolute prohibition of committing acts constituting "torture" as

defined in the UN Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. .

Article 29

Right of communication and visit

- 1) Any person who has been placed under custody [or judicial control] for any of the offences set forth in [these Model Provisions] is entitled to:
 - a) communicate without delay with the nearest representative of the State where he or she is a citizen or with someone otherwise entitled to protect his or her rights or, in the case of a stateless person, the country where he or she customarily maintains a residence;
 - b) be visited by a representative of that State;
 - c) be informed of the rights afforded him or her under subparagraphs (a) and (b) of this paragraph.
- 2) The [competent authority] shall ensure that such person can communicate and be visited by a representative from the International Committee of the Red Cross whenever it is so requested by a State who has a claim to jurisdiction in accordance with a counter-terrorism convention to which both that State and the [name of the State] are Parties.

This article spells out some specific procedural obligations that States Parties to the International treaties have vis-à-vis persons whose freedom of movement has been restricted following measures adopted under article 27 (Investigation).

Most International treaties listed in the Definitions Part of these Model Provisions require that the domestic measures adopted to implement the above article "must enable full effect to be given to the purposes for which the rights accorded are intended". This seems to suggest, for example, that the information provided to the person in custody must be given in a language that he/ she can understand.

States may wish to consider providing concerned individuals with the right to be visited by representatives of United Nations special procedures and independent monitoring bodies or institution as they may exist in the concerned country.

Section 2-1

Preventive measures under Security Council resolution 1373 (2001)

This Sub-section establishes authority to freeze, with a few exceptions grounded on humanitarian reasons, the entire amount of funds belonging to persons and entities suspected of committing terrorist acts. It aims at implementing the specific preventive requirements of Security Council Resolution 1373 (para.1 (a)). It is thus a conceptually distinct regime from the one addressed in Section 2-2, which aims instead at the freezing [seizure] of funds necessary to preserve property which may eventually be the object of a forfeiture/confiscation order.

Article 30

Preventive measures

(Option 1: Freezing regime applicable to all offences set forth in the [International treaties listed in the Definitions Part of these Model Provisions])

The [competent authority] shall, either at its own initiative or at the request of the [public prosecutor's office/ other competent authority], order the freezing without delay of funds

of persons in relation to whom there are reasonable grounds to believe that they are committing or attempting to commit, or participating in or facilitating the commission of any of the offences set forth in [these Model Provisions].

(Option 2: Freezing regime only applicable to “terrorist acts” under Article 15)

The [competent authority] shall, either at its own initiative or at the request of the [public prosecutor's office/ other competent authority], order the freezing without delay of funds of persons in relation to whom there are reasonable grounds to believe that they are committing or attempting to commit, or participating in or facilitating the commission of a terrorist act as defined in article 15.

The proposed article provides the necessary authority to implement the freezing action envisaged by Security Council Resolution 1373. Such action should take place without delay and without prior notice to the designated persons involved.

Two alternative paragraphs are proposed, reflecting the fact that Resolution 1373 generically mentions individuals committing “terrorist acts” as the targets of its broad freezing obligation, without indicating exactly the meaning of “terrorist acts”.

Option 1 extends the scope of the freezing obligation to funds of persons that commit any of the offences set forth in the International treaties listed in the Definitions Part of these Model Provisions. Under this approach, the entire amount of funds belonging to individuals suspected of committing acts endangering civil aviation, maritime navigation, etc., as defined in the relevant parts of these Model Provisions, will be frozen.

Option 2 instead limits the extent of the “freezing action” under Resolution 1373 to funds belonging to individuals suspected of committing “terrorist acts” (as defined in Article 15 or in any other manner in which “terrorist acts” are defined at the national level).

It is for each State to decide whether they prefer to have a broad freezing regime encompassing all the treaty-based offences, even when such offences do not contain a “terrorist intention” as “dolus specialis”, or restrict the scope of the freezing action to acts committed with a specific “terrorist intention”.

In choosing between the two options, States are encouraged to consider the particularly severe consequences of the broad freezing regime enshrined in this resolution upon targeted individuals. Absent specific guidelines in Resolution 1373, Option 2 is the recommended choice for States wishing to limit the impact of the freezing regime to funds of individuals acting with a specific terrorist purpose.

The evidentiary threshold required to impose the order is not specified in Resolution 1373. This Model Provision adopts that of “reasonable grounds to believe”, but it is for each adopting States to set its own threshold. Likewise, it is for each State to identify the authorities competent to implement the measure.

It is for the national authorities, also, to decide upon the adoption of procedures through which a person or entity whose funds or other assets have been frozen can challenge that measure with a view to having it reviewed.

Article 30-1

Additional funds subject to preventive measures

The order set forth in para.1 extends to funds of:

- a) entities owned or controlled directly or indirectly by the persons mentioned in para.1);
- b) persons and entities acting on behalf of, or at the direction of the persons mentioned in para.1), including funds derived or generated from property owned or controlled directly or indirectly by such persons and entities.

- 3) The provisions of this sub-section [Preventive measures under Security Council resolution 1373(2001)] are without prejudice to the obligations under Section 3 of this Chapter [Restrictive measures concerning listed individuals and entities under SC resolution 1267(1999) and following],

As mentioned above, this Model Provision reflects the broad preventive approach taken by Security Council Resolution 1373. The scope of the freezing order envisaged in this article is particularly broad as it covers not only funds officially belonging to individuals reasonably believed of involvement in terrorist acts, but also funds of individuals and entities "linked" to the perpetrators by virtue of their acting under their control or on their behalf.

Article 31 **Revocation of preventive measures**

A freezing order under article 30 [Preventive measures] shall be revoked at any time by the [competent authority] at the request of the [public prosecutor's office/ other competent authority], or of any other person claiming to be affected by such measures, when there are no longer any reasonable grounds to believe that the persons or entities mentioned in articles 30 and 30-1 are committing or attempting to commit, or participating in or facilitating the commission of any of the offences mentioned in article 30.

Since the duration of the freezing action based on SC resolution 1373 is undetermined, this article makes it dependent on the national authorities' assessment that targeted persons and entities continue to be involved in terrorist activities.

Article 32 **Automatic review clause**

A freezing order issued under article 30 [Preventive measures] shall be automatically reviewed every [indicate period], and shall be revoked when there are no longer any reasonable grounds to believe that the persons or entities mentioned in articles 30 and 30-1 are committing or attempting to commit, or participating in or facilitating the commission of any of the offences mentioned in article 30.

This article complements the previous one by requiring that freezing measures be the subject of periodic review to determine if the conditions leading to their adoption have changed, and, if necessary, revoke them.

Article 33 **Humanitarian exemptions within Security Council Resolution 1373 (2001)**

Upon the request of any person whose funds have been affected by a freezing order under article 30 [Preventive measures] the [competent authority] may allow any or more of the following out of the funds covered by the order:

- 1) funds necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurances premiums, and public utility charges;
- 2) funds intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services; or

- 3) funds intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or frozen economic resources.

This Model Provision is drafted after Security Council Resolution 1452 (2002), which is primarily applicable in the context of the Al Qaida/ Taleban sanctions regime (see Article 45 of these Model Provisions). Para. 5 of Resolution 1452 "Urges Member States to take full account of the considerations set out above in their implementation of resolution 1373 (2001)".

The implementation of this provision might require that the applicant fully disclose to the competent authority all of his or her financial situation.

Section 2-2 Provisional measures and Forfeiture

This Sub-section deals with action necessary to temporarily "block" a certain category of funds, i.e. those that have been specifically used or allocated for the commission of an offence set forth in the present Model Provisions. By so doing, it implements the requirements of article 8 of the Terrorist Financing Convention aiming at the preservation of the availability of certain funds for possible forfeiture at a later stage.

The present Section refers to the concepts of "freezing" ["seizing"], reflecting alternative language contained in the Financing Convention. What these two notions have in common is that they are both based on an action initiated by a competent authority or a court prohibiting the transfer, conversion, disposition or movement of funds.

In this regards, it can be noted that FATF Interpretative Note to Special Recommendation 3 on terrorist financing suggests to distinguish between the two notions as follows: whereas "freezing" action entails that the targeted funds will continue to be administered by the financial institution or other arrangements designated the persons or the entities that held an interest in such funds prior to the initiation of a freezing action, under a "seizure" scheme the competent authority will take over possession, administration or management of such funds.

Some jurisdictions might prefer to use the term "restrain orders", if necessary attaching to them an order whereby the competent State agency takes control and administration of targeted funds. States could use any wordings depending on the procedural powers concretely available under their domestic law. Whatever language is adopted, what is important is that the targeted funds are temporarily "blocked", whether they are managed by the State or remain under the control of its owner, short of being permanently transferred to the State.

In most cases, States will already have in place legislation against money laundering, or dealing with proceeds of crime, which will already include powers, authorities and procedures that could be extended (with the necessary adjustments) to the context of terrorist financing.

Article 34 Provisional measures

- 1) The [competent authority] shall, either at its own initiative or at the request of the [public prosecutor's office/ other competent authority], order the freezing [seizing] of those funds that there are reasonable grounds to believe have been used or allocated for the purpose of committing any of the offences set forth in [these Model Provisions].
- 2) The order referred to in para.1 extends to proceeds derived from the commission of the offences set forth in [these Model Provisions].

As mentioned above, this Model Provision takes into account the need to preserve the availability of funds that might, upon conviction, become the object of a forfeiture order, in accordance to article 8(2) of the Financing Convention and article 36 of these Model Provisions.

It is noted that the freezing [seizure] action extends to funds that are simply intended to be used for certain criminal purposes, even if they have not been actually used.

National authorities may decide to introduce appropriate procedures through which a person or entity whose funds or other assets have been frozen can challenge that measure with a view to having it reviewed.

Article 35

Revocation of provisional measures

The freezing [seizing] order shall be revoked at any time by the [competent authority] at the request of the [public prosecutor's office/ other competent authority], or of any other person claiming to be affected by such measures, when there are no longer any reasonable grounds to believe that the frozen [seized] funds have been used or allocated for the purpose of committing an offence related to terrorism.

This article sets out the possibility for all persons or entities claiming to be affected by the freezing [seizing] order to ask for a review of that measure at "any time". A review might be requested for the purpose of having the measures modified or discontinued. This may be the case when, for instance, a person can produce new evidence that was not available at the time of the hearing when the measure was first imposed.

The freezing [seizing] order will obviously also be discontinued to the extent that, following criminal conviction, a forfeiture measure is imposed upon all or part of the funds that were the object of the order.

States may also consider setting time limits beyond which the freezing [seizing] order is automatically discontinued, for instance when formal proceedings against the person whose funds have been frozen [seized] have not been instituted. Such possibility would add an additional safeguard ensuring that persons affected by the freezing [seizing] order do not have to suffer the consequences of an excessively slow administration of justice. As a guidance, States might refer to the IMF Model Law on the financing of terrorism, which indicates a period of 6 months after which the funds have to be "unblocked".

Article 36

Forfeiture

- 1) Where a person is convicted for an offence under [these Model Provisions], the [competent authority] shall order the following funds to be forfeited to the State:
 - a) funds used for or allocated for the commission of such offence; and
 - b) funds obtained as proceeds from the commission of such offence, including property intermingled with such proceeds.
- 2) When the funds to be forfeited cannot be produced, forfeiture may be ordered for their value.
- 3) Before making a final order in respect of para.1 above, the [competent authority] shall give every person reasonably believed to have an interest in the funds an opportunity to appear and present evidence.

The purpose of this model article is to provide national bodies with the authorities to forfeit terrorism-related funds. The term "forfeiture" is used in the Terrorist Financing Convention, with reference to property liable to be transferred as such to the State. Some jurisdictions prefer to use the term "confiscation" instead of "forfeiture". The measures envisaged by this article shall cover the permanent transfer of the ownership of the targeted funds to the State.

The scope of the forfeiture order should be broad enough to encompass property that was previously the object of provisional measures under article 34 of this Model Provisions.

Para 2 covers what is known as “value confiscation”, namely the requirement to pay a sum of money based on an assessment of the value of the funds specifically used or destined to be to commit a certain offence (or proceeds). As a result of a value confiscation, the State can make a financial claim against the person in relation to whom the order is made, which, if not paid, may be realized in any property (whether legally or illegally acquired) belonging to that person.

It is up to the adopting States to determine the availability of legal processes for the review of forfeiture orders. As a rule, the forfeited funds accrue to the State when the period provided for lodging an appeal has ended without such an appeal having been lodged, or, if an appeal against the order has been lodged, the appeal lapses or is finally determined.

States may also wish to strengthen the protection of “bona fide” third parties that had not been notified before the adoption of the forfeiture order, and that could therefore not be heard. Such third parties might be allowed to apply to the competent authority within a certain period of time for an order declaring the nature, extent and value of their interest, with a view to having the property returned.

Whereas this model article proposes the adoption of a conviction-based forfeiture regime, States may also consider introducing civil non-conviction-based schemes, allowing for the recovery of property using, normally, a lower threshold of evidence than that available under criminal trials

As to the disposal of forfeited assets, the State might wish to reserve part of those assets for “public purposes”, including allocating them to a fund for law enforcement. The 1999 Terrorist Financing Convention suggests the compensation of victims as a possible destination of those assets (Article 8 (4)).

Section 2-3

Common provisions to Sections 2-1 and 2-2

Article 37

Fund management

Upon issuing a freezing [seizure] order, the [competent authority] may give directions as to the administration and management of the frozen [seized] funds.

Detailed provisions relating to the administration and management of targeted funds are beyond the scope of these Model Provisions. Special rules may be introduced concerning, among others, the management of perishable or rapidly depreciating objects, including the power to sell them, the management of possible interests produced by the frozen [seized] funds, the regime of responsibility of the administrator, etc.

National authorities might also wish to make it explicit in their legislation that, upon request by the competent authority, or of any other person or entity claiming to be affected by the freezing [seizing] measures, new/ other directions as to the administration and management of the frozen [seized] may be made.

Article 38

Notification of provisional measures

- 1) The [competent authority] shall ensure that the freezing [seizure] order be notified on the owners of the funds, on those who control it, and those persons who are reasonably believed to have an interest in the funds covered by the order,
- 2) The persons mentioned in para.1 shall be afforded an opportunity to be heard within such time as the [competent authority] determines.
- 3) The notification can be delayed for a specified period if the [competent authority] is of the opinion that serving such notice would result in the disappearance,

dissipation, or reduction in the value of the funds. In such case, the serving of the notice shall be effected as soon as practicable.

The proposed article affords an opportunity to the owners of the targeted funds to be heard.

It also aims at protecting “bona fide” third parties by requiring notification of the freezing [seizure] order on all persons that might be affected by the order itself. The notification shall contain details about the right of such persons to appear before the competent authority to state their case and submit relevant evidence.

As also highlighted by the FATF, the effectiveness of the freezing action can only be guaranteed if the notification is not given prior to the adoption and enforcement of the order (see Freezing of terrorist assets, International best practices, 3 October 2003).

Article 39 Exceptions for investigative requirements

Notwithstanding article 34 [Provisional measures], the [competent authority] may decide not to adopt a freezing [seizing] order for as long as is required by specific investigative/prosecutorial purposes

The purpose of this article is to ensure that persons that are being investigated for any of the offences set forth in these Model Provisions are not warned of this fact. This provision could be used, for example, when a covert investigation or controlled delivery is under way.

States will have to specify which authority can authorize the action described in this article.

Section 3 Restrictive measures concerning Individuals, Groups, Undertakings and Entities placed on the Consolidated List pursuant to Security Council resolution 1267 (1999) and following resolutions

This Section incorporates the requirements of the sanction regime established under Security Council resolution 1267 (1999) in relation to Al Qaida, Usama bin Laden, the Taliban, and other individuals, groups, undertakings, and entities associated with them (hereinafter referred to as “individuals and entities associated with Al Qaida and the Taliban”).

The Sanctions regime is overseen by the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities (the “Sanctions Committee”) consisting of the members of the Security Council. The Analytical Support and Sanctions Monitoring Team, established pursuant to Security Council resolution 1526 (2004) and subsequent relevant resolutions (hereinafter referred to as the “Monitoring Team”) has for function to assist the Sanctions Committee by providing it with expert advice on relevant matters and carry out specific tasks laid out in the annex to resolution 1526 (2004). The views and recommendations expressed in its reports do not necessarily reflect the views of the Security Council or the Sanctions Committee.

As mentioned by the Monitoring Team “the sanctions do not impose a criminal punishment or procedure, such as detention, arrest or extradition, but instead apply administrative measures such as freezing assets, prohibiting international travel and precluding arms sales” (para. 41, Third Report of the Monitoring Team, UN doc.S/2005/572). The Security Council has reiterated that the sanctions measures are preventative in nature and are not reliant upon criminal standards set out under national law (Security Council resolution 1822 (2008), preambular para. 13).

The Monitoring Team has also reminded “States (and their courts) that a criminal conviction or indictment is not a prerequisite for inclusion on the Consolidated List; the actions of an individual or entity in support of Al-Qaida or the Taliban — whether or not criminalized or admissible as evidence in a particular State — will continue to provide the basis for inclusion on the List” (para. 42, Third Report of the Monitoring Team, UN doc.S/2005/572).

National authorities might wish to extend (with the appropriate modifications) all or some of the provisions

contained in this section to cover other Security Council sanction regimes that often contain similar provisions in terms of types of sanctions imposed and implementation mechanisms.

The regime outlined in the Section is without prejudice to and may coexist with other sanctions based on "lists" compiled by regional organizations and individual States. A duty to comply with those other foreign lists exists to the extent that the State adopting these Model Provisions has acquired such obligations/ commitments vis-à-vis those other States/ regional organizations, but does not stem from Security Council resolution 1267 (1999) and following.

Article 40

Adoption and dissemination of domestic decree/other decision

- 1) The [competent authority] shall adopt a [decree/other decision] reproducing the Consolidated List of the Sanctions Committee, and ordering the measures referred to in articles 43 [Freezing of funds and other financial assets or economic resources], 47 [Arms embargo], and 48 [Travel ban].
- 2) Such [decree/other decision] shall be issued in [relevant official publication].
- 3) The [competent authority] shall in a timely manner modify the [decree/other decision] to the extent that the Sanctions Committee adopts any change to the Consolidated List referred to in para. 1.

This model article sets out a mechanism to ensure that the Consolidated List is incorporated as soon as possible into domestic law and given full force. Once the above-provision enters into force, the adoption of a Decree or other decision, with the scope of disseminating the Consolidated List and ordering the measures against the specific individuals and entities targeted, is immediately required as a condition for the application of the sanctions foreseen in this Section.

It is up to each adopting State to identify the authority responsible for issuing the above-mentioned decree/ other decision. In most cases, the domestic decision would be an administrative one. In this regard, some countries have designated the Ministry of Foreign Affairs, or other Governmental/ executive agencies. It has to be noted that the implementation of the updated list by the responsible authority has to take place as soon as possible, considering that the sanctions apply from the moment the Sanctions Committee has added an individual or entity to the Consolidated List.

Amongst other possibilities, it is worth taking into account that the Monitoring Team supports the view that States should "vest the administration of the sanctions within a designated agency, with the authority to investigate and impose penalties for non-compliance, thereby ensuring that a national entity was overseeing implementation of the sanctions within the country. This could also alleviate certain due process concerns, because the agency could be charged with receiving and evaluating petitions from residents for de-listing or exceptions pursuant to resolution 1452 (2002) [see article 42 of this Section], thus providing listed parties with a national mechanism in which to be heard. This agency also could be the one that provides the requisite notification to listed individuals and entities" [see article 50, Notification to listed persons and entities]. (cf. UN doc S/2006/154)

Information on the updated list of persons and entities is forwarded by the Sanctions Committee to each Government through the diplomatic channel (i.e. the Permanent Missions to the UN in New York, which have a corresponding responsibility to swiftly transmit that information to the capital of their respective country).

*The updated list is also publicly available online at:
<http://www.un.org/sc/committees/1267/consolist.shtml>*

Publication in the relevant official journal is recommended as a means to ensure the widest possible circulation of the decree/ other decision adopted by each State's competent authority. States may opt to use additional/ different channels to make the above decree/other decision widely known. In this context, the Security Council "[r]equests States to ensure that the most up to date version of the Consolidated List is promptly made available to relevant Government offices and other relevant bodies, in particular, those offices responsible for the assets freeze and border control"(SC resolution 1735 (2006), para.22).

According to the Sanctions Committee's Guidelines, "States are encouraged to circulate [the list] widely, such as to banks and other financial institutions, border points, airports, seaports, consulates, customs agents, intelligence agencies, alternative remittance systems and charities". (cf. Guidelines of the Committee for the Conduct of its Work, para. 5 (c)).

Article 41

Lifting of restrictive measures on grounds of mistake of identity

Any individual or entity, against whom measures have been implemented, claiming not to be the one against whom the sanctions have been imposed, may submit a request for review to the [competent authority].

The scope of the review under the proposed article is limited to establishing that the person/ entity who has been affected by the sanctions is not in reality the person/ entity whose name appears in the list drawn up by the Sanctions Committee. As a result, the review of the competent authority cannot extend to evaluate the merits of the inclusion in the list. National authorities could not, for example, assess whether there were enough evidentiary elements for the listing of such person or entity by the Security Council's sanctions Committee.

Should any doubt arise regarding this procedure, the competent authorities are encouraged to contact the Committee for further information.

The procedure for obtaining a substantive review of the grounds for the listing can be triggered under the "de-listing" process outlined in article 42 (De-listing procedure).

Article 42

De-listing procedure

1) De-listing procedure through the focal point

Individuals, groups, undertakings and entities placed on the Consolidated List may submit a petition directly to the focal point established within the UN Secretariat [whose contact details are reproduced hereinafter], to take measures conducive to the removal of their names from the Consolidated List.

2) De-listing procedure through diplomatic channels

Without prejudice to the procedure described above, individuals, groups, undertakings and entities placed on the Consolidated List who are nationals of [name of the State], or have residence in [name of the State], or are incorporated/located in [name of the State], may submit a petition to the [competent authority] to take measures conducive to the removal of their names from the Consolidated List.

This model article sets out an alternative process to the "traditional" de-listing procedure (i.e. through diplomatic channel). The "focal point" procedure established under Security Council resolution 1730 (2006) maintains a diplomatic nature. The focal point does not decide on the merits of the de-listing request, but its only role is to streamline contacts between the designating Government(s) and those of the nationality/ residence of the individuals, groups, undertakings and entities placed on the Consolidated List. The decision-making process remains entirely within the Sanctions Committee.

The contact details of the focal point are the following:

Focal Point for De-listing, Security Council Subsidiary Organs Branch, Room S-3055-E, United Nations, New York, N.Y. 10017, United States of America, Tel. +1 917 367 9448, Fax. +1 212 963 1300/3778, Email: delisting@un.org

States are encouraged to include the full contact details of the focal point either in the text of their main

counter-terrorism law, or in an Annex, or in any other piece of relevant implementing legislation.

States are also expected to forward the same information to those persons and entities that receive a notification according to article 50 of these Model Provisions.

Security Council resolution 1730 (2006) also notes that States may adopt legislation whereby, as a rule, its citizens or residents should address their de-listing requests directly to the focal point. States will do so by way of a declaration addressed to the Chairmen of the Sanctions Committee that will be published on the Committee's website. If this is done, article 42(2) would not be necessary.

The de-listing procedure through diplomatic channels spelled out in this article aims at the incorporation into domestic law of para.8 of the Guidelines of the Sanctions Committee for the conduct of its work. These guidelines are reproduced in Annex III of these Model Legislative Provisions

States should be aware of the fact that the current "de-listing" procedure is the object of an intense legal debate within Governments and international institutions. The bulk of the criticism concerns the lack of a proper judicial review mechanism which individuals, groups, undertakings and entities placed on the Consolidated List could rely on. In addition, a number of judicial cases are currently pending before national and international courts challenging some of its features, particularly in the area of due process guarantees. The "de-listing process" is anyway spelled out in these Model Provisions since it represents, nowadays, the only United Nations level channel for designated persons and entities to challenge their inclusion into the list. Any change to the current system will be promptly reflected in future versions of this document.

Problems may arise as to the determination of the nationality of legal entities for the purpose of identifying entities eligible to submit requests for review, particularly multinational companies, which might be incorporated in one State, have their headquarters in another, and do most of their business in other States. Initial guidance on issues relating to the nationality of legal corporations may be found in the ICJ Barcelona Traction (Second Phase) (<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=bt2&case=50&k=1a>) case. Further guidance can also be found on the International Law Commission website.

Article 43

Freezing of funds and other financial assets or economic resources

- 1) Any person or entity shall freeze without undue delay funds and other financial assets or economic resources of individuals, groups, undertakings and entities placed on the Consolidated List. For the purpose of this article, "funds and other financial assets or economic resources" shall mean funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds, derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction.
- 2) Any person or entity, in particular financial institutions, shall in no way deal with funds and other financial assets or economic resources subjected to the measures in para. 1, nor make them or any other funds, financial assets or economic resources available, directly or indirectly, to or for the benefit of individuals, groups, undertakings and entities placed on the Consolidated List.
- 3) Measures taken in accordance with para. 1 shall be reported to the [competent authority].
- 4) Whoever fails to comply with the provisions of paras. 1), 2) and 3) shall be punishable with [appropriate and proportional sanctions of a criminal or administrative nature], without prejudice to article 14 [Financing of offences].

This article implements the requirement set forth in various Security Council resolutions, the latest one being resolution 1822 (2008), to freeze funds and other financial assets or economic resources of individuals, groups, undertakings and entities placed on the Consolidated List.

The term "freezing" is the one used in the resolution, it refers to action initiated by a competent authority or

a court prohibiting the transfer, conversion, disposition or movement of funds and other financial assets or economic resources. States are however welcome to use other wording which, within their legal system, has the same effect.

The expression “funds and other financial assets or economic resources” has the same meaning as in Section 2 of this Chapter, with the only addition of the words “including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction”, which have been included after para. 1(a) of Security Council resolution 1617 (2005).

States are expected to have in place a system whereby the competent authority can order the freezing based on the only condition that the concerned person or entity is included in the Consolidated List. No other conditions are required. In particular, given the specific nature of the freezing action under the sanctions regime, there is no need for criminal offences or criminal standards of evidence to be demonstrated.

With regard to those States which, for imperative reasons, cannot use any mechanism different from the freezing under traditional criminal procedure (i.e. they have to present to a judge or enforcement authority sufficient evidence of a party’s commission of a specific criminal offence as a condition for the freezing of assets), it is suggested to introduce a clause whereby the “reasonable grounds” test normally required to establish that the funds and other financial assets or economic resources are connected to terrorist activities, is considered to be fulfilled if the subject has been included in the Consolidated List.

For failing to comply with freezing orders, para. 4 provides for the application of a sanction which might be of penal or administrative nature depending on what is considered more appropriate by each State.

The application of sanctions under para. 4 is without prejudice to the enforcement of different/ more serious measures, whenever the conduct matches the elements of other offences of a penal nature. For example, if a person makes funds and other financial assets or economic resources available to an individual placed on the Consolidated List with knowledge that those funds and other financial assets or economic resources are to be used to commit a terrorist act, that person might be found responsible for an offence of terrorist financing under article 16 of the Model Provisions.

Article 44

Exemptions for basic expenses

- 1) Individuals, groups, undertakings and entities placed on the Consolidated List may petition the [competent authority] to exclude from the freezing order funds and other financial assets or economic resources that are:
 - a) necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurances premiums, and public utility charges;
 - b) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services;
 - c) intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources.

- 2) Having determined that the funds and other financial assets or economic resources are to be used for the purposes listed in para. 1 of this article, the [competent authority] will notify the Sanctions Committee of its intention to authorize, where appropriate, the exemptions mentioned in para.1.

- 3) In the absence of a negative decision from the Sanctions Committee within 3 working days of the notification, the [competent authority] orders the exclusion of the funds and other financial assets or economic resources mentioned in para.1 from the freezing order.

This article sets out the procedure for the implementation of para.1 (a) of Security Council resolution 1452 (2002) (as modified by para. 15 of resolution 1735 (2006)), which aims at mitigating some of the harshest effects of the freezing action taken pursuant to the Al Qaida/ Taliban sanctions regime. A very similar provision is contained in article 33 of these Model Provisions in relation to action initiated on the basis of resolution 1373 (2001). The only difference lies in the fact that the authorization procedure through the Sanctions Committee is not applicable in the context of resolution 1373 (2001).

The implementation of this provision might require that the applicant fully disclose to the competent authority all of his or her financial situation.

Article 45 **Exemptions for extraordinary expenses**

- 1) Individuals, groups, undertakings and entities placed on the Consolidated List may petition the [competent authority] to exclude from the freezing order funds and other financial assets or economic resources that are necessary for extraordinary expenses.
- 2) Having determined that the funds and other financial assets or economic resources are necessary for extraordinary expenses, the competent authority] shall request that the Sanctions Committee authorize the exclusion mentioned in para.1.
- 3) Once the authorization is given by the Sanctions Committee, the [competent authority] shall order the exclusion of the funds and other financial assets or economic resources mentioned in para.1 from the freezing order.

This article sets out the procedure for the implementation of para.1 (b) of Security Council resolution 1452 (2002), along the same lines as article 44 (Exemptions for basic expenses). The main difference with article 44 (Exemptions for basic expenses) is that in article 45 (Exemptions for extraordinary expenses) the lifting of the freezing order can only be executed upon receiving specific authorization by the Sanctions Committee, and not simply in the absence of a negative decision.

There is no specification of what constitutes "extraordinary expenses". States have the choice between leaving the identification of "extraordinary expenses" to the discretion of the petitioned national competent authority, or listing the grounds that would constitute "extraordinary expenses" in national legislation.

An example of such expenses is the performance of religious duties, covering the costs of travel and other expenses in relation to it. Also certain operating costs of listed entities would be considered extraordinary rather than basic expenses. Such exemptions have in the past been admitted as valid by the Sanctions Committee.

Article 46 **Management of funds and other financial assets or economic resources**

- 1) Upon issuing a freezing order, the [competent authority] may give directions as to the administration and management of the frozen funds and other financial assets or economic resources.
- 2) The [person or entity, in particular financial institution, holding the funds and other financial assets or economic resources] shall allow the addition to accounts subject to freezing of interest or other earnings due on those accounts,

or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to this restrictive measure, provided that any such interest, other earnings and payments continue to be subject to the provisions of article 43 [Freezing of funds and other financial assets or economic resources].

Para. 1 of this article is identical to the one proposed in Section 2-3 of this Chapter (Common provisions to Sections 2-1 and 2-2). It provides for a broad framework for the management of funds and other financial assets or economic resources that are subject to a freezing action.

Detailed provisions relating to the administration and management of targeted funds and other financial assets or economic resources are beyond the scope of this Model Law. Special rules may be introduced concerning, inter alia, the management of perishable or rapidly depreciating objects, including the power to sell them, the management of possible interests produced by the frozen funds and other financial assets or economic resources, the regime of responsibility of the administrator, etc.

Para.2 is specifically drafted after para.2 of resolution 1452 (2002).

In many instances, the freezing order will affect complex business transactions, with delicate choices to be taken as to the management of funds and other financial assets or economic resources. In this regard, the Monitoring Team suggests a flexible and cautious approach at the same time: "In January 2006, the Committee approved, for the first time, a resolution 1452 (2002) request for an entity, a case that could serve as a model for countries implementing the assets freeze on businesses. The Italian Government made the request on behalf of a listed entity (a hotel) owned by a listed individual. To avoid the loss of the jobs of innocent hotel workers, as well as the revenue stream generated by the business, Italy proposed that a Government agency assume custody and management of the hotel, [...]. This mechanism would ensure that the listed party did not control the corporate assets and could not divert income to support terrorism. The income generated by the business will pay running expenses, under Government oversight, and any profits will be placed in a frozen account. Although resolution 1452 (2002) makes no distinction between individuals and entities, the Team believes that, as a general rule, the Committee may wish to tread cautiously when asked to approve expenses to allow entities to continue to operate. The Italian plan described above depends on legislation that allows the Government to take custody and manage a business in place of a listed person or his appointees. But while this approach may work well for entities that provide services in a discrete area over which a national government can exercise oversight and control, it may not apply so readily to other types of entities, such as international charitable and/or financial organizations, where money may regularly flow to or from individuals or groups outside the jurisdiction of the Member State". (para. 66, Fifth Report of the Monitoring Team, UN doc. S/2006/750).

Article 47

Arms embargo

Whoever supplies, sells, or transfers, directly or indirectly, to individuals placed on the Consolidated List, arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned as well as technical advice, assistance, or training related to military activities, whether this conduct is carried out from the territories of [name of the State] or by nationals of [name of the State] abroad, or by anyone using flag vessels or aircraft from [name of the State],

shall be punishable with [appropriate and proportional sanctions of a criminal or administrative nature], without prejudice to article 17 [Supply of weapons].

This Model Provision implements the second type of sanctions forming part of the Al Qaida/ Taliban sanctions regime.

The particularly broad scope of application of the provision is emphasized, which imposes the prohibition to supply weapons, etc., not only upon people acting from the territory of the State adopting this law. As highlighted by the Sanctions Committee: "The Security Council did not therefore limit the Al-Qaida/Taliban arms embargo to the geographical delimitation of the territories of Member States, but rather broadened the

obligation of Member States with respect to implementation of the embargo based on their legal authority over their nationals abroad and their flag vessels and aircrafts in accordance with international law “ (see document produced by the Sanctions Committee – Arms Embargo, Explanation of terms, available at http://www.un.org/sc/committees/1267/pdf/EOT%20Arms%20embargo_ENGLISH.pdf)

The sanctions for failing to comply with the arms embargo against the individuals and entities placed on the Consolidated List are without prejudice to the application of different/more serious sanctions, whenever the conduct matches the elements of other offences of a penal nature. For example, if a person supplies weapons to a listed individual with the knowledge that those weapons are to be used to commit a terrorist act, that person might be found responsible for an offence of “supply of weapons” under article 17 of this Model Law.

Article 48

Travel ban

Individuals placed on the Consolidated List shall not be allowed entry into, or transit through, the territory of [name of the State], unless such individuals are nationals of [name of the State].

This Model Provisions implements the third type of sanctions forming part of the Al Qaida/ Taliban regime.

Article 49

Exemptions to the travel ban

- 1) Notwithstanding the provision of article 48 [Travel ban], if there are reasonable grounds for suspecting that an individual placed on the Consolidated List has committed any of the offences set forth in [these Model Provisions], the [competent authority] shall take the appropriate measures to allow that individual entry into or transit through [name of the State] and to ensure his/ her presence for purposes of prosecution or extradition, when necessary requesting that the person be placed under judicial control or in custody.
- 2) Notwithstanding the provision of article 48 [Travel ban], the [competent authority] may allow an individual placed on the Consolidated List to enter in or transit through the territory of the State in relation to judicial proceedings other than those related to the offences set forth in [these Model Provisions], including when it is necessary for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of any other offence.
- 3) When the presence of the individual placed on the Consolidated List is no longer required under paras. 1 and 2, the [competent authority] shall adopt the measures necessary for enforcing the travel ban under article 48.
- 4) The [competent authority] may submit to the Sanctions Committee a request for authorization to grant entry or transit of individuals placed on the Consolidated List for reasons different from those mentioned in the previous para.

This article implements the provision of resolution 1822 (2008) and previous relevant resolutions whereby a person is allowed to remain in the territory of the State “where entry or transit is necessary for the fulfillment of a judicial process”. As the Security Council does not specify what is to be meant by “fulfillment of judicial process”, this Model Provision suggests ways to regulate a number of typical cases in which States might have an interest/ obligation in delaying the enforcement of the travel ban measure.

Para. 1 deals with the event of an individual placed on the Consolidated List being suspected/ accused of having committed one of the offences set forth in the present Model Provisions. In such case, the “travel

ban” has to be reconciled with the obligation, incumbent upon all States Parties to the International treaties, to investigate the facts, and keep the person in the territory of the State for possible extradition or prosecution (the duty “aut dedere aut judicare” is also dealt with in article 55). Resolution 1373 (2001) also poses a similar requirement that terrorists shall be brought to justice (para.2.e).

Para. 2 deals with the situation in which the presence of the individual placed on the Consolidated List would be required in the context of judicial processes other than those enumerated in para. 1, be they criminal, civil, or administrative. In this regard, the competent authority would be able to allow entry for the purpose of prosecution if the individual is suspected of having committed criminal offences other than those set forth in these Model Provisions; in cases of participation in criminal or civil proceedings as a witness, if the individual placed on the Consolidated List agrees, the competent authority would have the discretion to grant a temporary entry permit.

Para. 3 re-gives immediate effect to the “travel ban” when the purposes for which the individual placed on the Consolidated List was granted temporary entry have been fulfilled.

Para. 4 takes into consideration the possibility that grounds different from the fulfillment of a judicial process exist for granting entry to the individual placed on the Consolidated List. In such cases, however, entry is subordinated to a specific authorization given by the Sanctions Committee. The “Fact sheet on the travel ban and its exemptions” produced by the Sanctions Committee (available at http://www.un.org/sc/committees/1267/fact_sheet_travel_ban.shtml) mentions travel needs, including medical treatment abroad and the performance of religious obligations, as grounds upon which the Sanctions Committee may grant an exception on a case by case basis.

In some instances, a request for authorization under para. 4 may be submitted to the Sanctions Committee together with a request for exemptions to the asset freezing measures under article 45 (Exemptions for extraordinary expenses), as the travel exemption may require extraordinary expenses in connection with the travel. Requests for authorization should be submitted by the adopting State to the Committee’s Chairmen through the Committee’s Secretariat (email: SC-1267-Committee@un.org; or fax: + 1 212 963 1300).

Article 50

Notification to individuals, groups, undertakings and entities placed on the Consolidated List

- 1) The [competent authority] shall take all possible measures to notify or inform in a timely manner the individuals, groups, undertakings and entities placed on the Consolidated List of the designation and to include with this notification a copy of the publicly releasable portion of the statement of case, any information on reasons for listing available on the Committee’s website, a description of the effects of designation, as provided in the relevant resolutions, the Committee’s procedures for considering delisting requests, and the provisions of resolution 1452 (2002) regarding available exemptions.
- 2) The [competent authority] receiving notification that a name is removed from the Consolidated List, shall take measures to notify or inform the concerned individual, group, undertaking or entity of the delisting in a timely manner.

The notification provisions embodied in this model article are taken from paras. 17 and 23 of resolution 1822 (2008).

Given that the documents/ texts to be forwarded to concerned individuals and entities are only available in the six UN official languages, if necessary, it might be appropriate to have them translated into a local language in advance.

Chapter 5

INTERNATIONAL COOPERATION

This purpose of this Chapter is not to lay out a comprehensive legal framework governing extradition and mutual assistance, but rather to complement provisions that are supposed to exist already at the national level dealing with foreign authorities in criminal matters.

States that have not yet implemented adequate provisions in this area are recommended to adopt them. For this purpose, they are advised to take into consideration the UNODC Model laws on Extradition and Mutual Assistance in Criminal Matters. An electronic version of the Model Law on extradition can be found at:

www.unodc.org/pdf/model_law_extradition.pdf

The Model Law on mutual assistance in criminal matters can be found at:

www.unodc.org/pdf/model_law_on_mutual_assistance.pdf

The UNODC Model Treaties on extradition and mutual assistance in criminal matters (with their accompanying manuals) may also represent useful tools for the development of related domestic legislation. Available upon request to UNODC and electronically:

UNODC Model Treaty on extradition (GA doc: A/RES/45/116)

www.un.org/documents/ga/res/45/a45r116.htm

Model Treaty on Mutual Assistance in Criminal Matters (GA Doc.A/RES/45/117 and A/RES/53/112)

[/www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf](http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf)

It is worth noting that this Chapter addresses a specific form of international cooperation in criminal matters, i.e. assistance that States are expected to give each other for the purpose of the investigation and prosecution of specific criminal offences (in particular, the offences set forth in the counter-terrorism conventions). This does not include other forms of cooperation in the criminal area, such as exchange of information for the identification of criminal routes and patterns, criminal methods, the extension and nature of criminal/ terrorist organizations, and what is understood as general "law enforcement cooperation".

States that need guidance in matters of international police cooperation can consult the Interpol website, which offers, among others, the text of a "Model bilateral police cooperation agreement":

www.interpol.int/Public/ICPO/LegalMaterials/cooperation/Model.asp

Section 1

Extradition

Extradition is the only channel envisaged in these Model Provisions for the surrender of individuals to a foreign country for the purpose of trial or servicing a sentence.

Other forms of surrender are not dealt with or encouraged. In any case, it is submitted that the use by States of alternative forms of transfer will have to be carried out in full conformity with due process requirements, and in accordance with relevant international human rights law

Article 51

Offences set forth in International treaties to be treated as extraditable offences

Subject to the conditions provided in the [Extradition Act / other relevant law], where [name of the State] is a Party, or becomes a Party to, an International treaty [listed in the Definitions Part], the offences falling within the scope of that treaty are recognized as extraditable offences in respect of another State which is also a Party to the same treaty.

This provision may be usefully adopted by those States that are able to execute an extradition request even in the absence of an extradition arrangement between them and the requesting State.

The provision ensures that domestic extradition laws have a sufficiently broad scope of application to include the offences set forth in the International treaties as extraditable offences, at least vis-à-vis other States Parties to the same instruments.

Some States may not need to adopt this provision, particularly when their extradition law refers to international treaties as being a directly applicable legal source regulating extradition matters.

The granting of extradition remains subject to the various conditions and procedures set by domestic extradition laws, such as double criminality, grounds for refusal, review mechanisms, etc.

Within these Model Provisions, the various International treaties are listed in the Definitions Part, although States have the option of listing them through any other drafting technique.

It is further suggested that the list of conventions also include those that the [name of the State] have not yet ratified, so as to avoid amending the law any time a new relevant convention is ratified.

Article 52

Existing extradition treaties deemed to include treaty offences as extraditable offences

Where [name of the State] is a Party, or becomes a Party to, an International treaty [listed in the Definitions Part] , and an extradition treaty exists between the [name of the State] and another State which is also a Party to the same International treaty [listed in the Definitions Part] , the extradition treaty shall be deemed, for the purposes of the [Extradition Act / other relevant law], to include provision for extradition in respect of offences falling within the scope of the International treaty [listed in the Definitions Part].

This provision aims to ensure that the scope of application of existing extradition treaties between States parties to the International treaties is automatically extended with the inclusion of the offences set forth in the conventions themselves.

As a result of this provision, treaties based on the “list-of-offences” approach, which did not contain terrorist-related offences at the time when they were adopted, would be considered as modified to this effect.

Article 53

International treaties to be used as extradition treaty

Where [name of the State] is a Party, or becomes a Party to, an International treaty [listed in the Definitions Part], and there is no extradition arrangement between [name of the State] and another State which is also a Party to that treaty, the [competent authority] may, by order published in the [official publication], treat the International treaty, for the purposes of the [Extradition Act / other relevant law], as an extradition arrangement between [name of the State] and that State, in respect of offences falling within the scope of that International treaty.

This provision may be usefully employed by those States that can only execute an extradition request based on an existing treaty in force between them and the requesting States (typically, “common law” countries). Lacking such treaty, the competent authorities of the requested State would normally not be in a position to grant extradition. However, the adoption of this Model Provision would give authorities of the requested State the possibility to make an order whereby the counter-terrorism convention is considered to be an extradition treaty.

Article 54

Extradition request for acts committed outside the territory of the requesting State

If an extradition request is received for an offence that was not committed on the territory of the requesting State, that offence shall be treated by the [competent authorities] as if it had been committed on the territory of the requesting State as long as:

- 1) the offence falls within the scope of an International treaty [listed in the Definitions Part]; and
- 2) the [name of the State] and the requesting State are both Parties to that treaty; and
- 3) the requesting State has established its jurisdiction based on any of the grounds mentioned in article 26 [Jurisdiction].

This provision may be usefully employed by those States in which an extradition request is to be rejected if the offence in question was not committed on the territory of the requesting State. The proposed article establishes an exception to this rule between States Parties to the same International treaty, by creating a legal fiction whereby the offence is considered to have been committed on the territory of the requesting State if certain conditions are fulfilled.

For drafting purposes, States might find it convenient to integrate such provisions within the section of their law dealing with grounds for refusal.

Article 55

Obligation to submit for prosecution or extradite

If a decision is taken not to extradite the alleged perpetrator for any of the offences set forth in [these Model Provisions], the case shall be submitted to the [competent authority] for the purpose of prosecution without exception whatsoever or undue delay, whenever the alleged perpetrator is present on the territory of the State and irrespective of whether he or she is a national of [name of the State] or a stateless person, and whether or not the offence was committed on its territory.

By including the "aut dedere aut judicare" principle, this article incorporates one of the main requirements of SC resolution 1373 and SC res 1566....in the context of the obligation to bring terrorists to justice and deny them safe haven. The same principle also appears in these Model Provisions under article 26(Jurisdiction)

The "aut dedere aut judicare" principle is spelled out by using the terminology of the International treaties.

This principle is potentially effective in various instances. A classical example is where extradition is refused because the alleged offender is a national of the requested State. In this case, domestic prosecution ensure that nationality issues, while protecting the person against trials abroad, do not serve as a ground to entirely shield the accused from justice.

To conduct a successful domestic prosecution in place of extradition, however, it is often crucial that the prosecuting State can avail itself of the necessary evidentiary material often only available abroad. It is consequently essential that the adopting State ensures that the principle "aut dedere aut judicare" is complemented by an effective system of inter-State evidence exchange in the framework of mutual assistance in criminal matters.

A decision not to extradite the alleged offender, with a consequent obligation to submit for prosecution, does not automatically imply that the alleged offender will have to be tried by a domestic court. In particular, domestic rules and principles regulating the use of prosecutorial discretion remain applicable. Such discretionary powers, however, will have to be exercised in a particularly restrained manner, as the International treaties require that the case involving any of the offences set forth therein be handled "in the same manner as in the case of any other offences of a grave nature under the law of [the] State".

Section 2

Mutual Assistance in Criminal Matters

Article 56

Applicability of general provisions of laws and treaties in force

The conditions and procedures relating to mutual assistance with regard to the offences set forth in [these Model Provisions] are regulated by the relevant applicable laws and treaties in force in [name of the State].

This article reaffirms the basic concept whereby this Section is not intended to replace a general scheme for mutual assistance in criminal matters, but only to complement one that is already supposed to be in force in the adopting State.

Such general scheme would make provision for the contents of incoming request, identification of procedures (and, possibly, a central authority as a national focal point for mutual assistance), grounds for refusal, etc.

States are reminded of their obligation, under Resolution 1373 and the International treaties, to provide foreign authorities with the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of any of the offences set forth in this Law, and assistance in obtaining evidence necessary for the proceedings.

Article 57

Transfer of detained persons for purposes of identification, testimony, etc., to a foreign State

- 1) Upon the request of a foreign State, a person who is being detained or is serving a sentence in [name of the State], and whose presence is required for purposes of identification, testimony or otherwise providing in obtaining evidence for the investigation or prosecution of offences set forth in the present law may be transferred subject to such conditions to be agreed upon with the requesting State and provided that the person to be transferred agrees.
- 2) The person transferred shall receive credit in (name of the State) for service of the sentence for time spent in custody of the requesting State

The possibility of transferring detained witnesses across jurisdictions is specifically envisaged in all of the recent International treaties [listed in the Definitions Part]. This model article provides for the broad legal framework, covering the case when the presence of the witness is required abroad.

Article 58

Transfer of detained persons for purposes of identification, testimony, etc., to [name of the State]

- 1) The [competent authority] may address a request to a foreign State for the transfer of a person who is being detained or is serving a sentence in such State whose presence is required for purposes of identification, testimony or otherwise providing in obtaining evidence for the investigation or prosecution of offences set forth in [these Model Provisions].
- 2) Unless the competent authorities of the foreign State so agrees, the person being transferred, whatever his or her nationality:

- a) shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in respects of acts or convictions anterior to his or her departure from the territory of the foreign State;
 - b) shall be kept in custody, unless otherwise requested or authorized by the requested State;
 - c) shall be returned without delay to the custody of the requested State as agreed.
- 1) The [competent authority] shall not require the initiation of extradition proceedings for the return of the person to the requested State

This article covers the case opposite to the one taken into consideration in the previous article, by providing for the basic legal framework to be adhered by the State to which the witness (detained abroad) has been temporarily transferred.

Article 59

Prohibition to refuse a request for assistance on the ground of bank secrecy

For the purpose of providing assistance to a foreign State, bank secrecy shall not be invoked as grounds to refuse a request with respect to the offence set forth in article 16 [Financing of terrorist acts and terrorism-related offences].

The requirement expressed in this proposed provision stems from article 12(2) of the Financing Convention

Section 3

Common Provisions and Duties of Information

Article 60

Offences not to be regarded as political or fiscal in nature

- 1) For the purpose of extradition and mutual assistance, the offences set forth in [these Model Provisions] shall not be regarded as political offences, or as offences connected with a political offence or offences inspired by political motives.
- 2) The offence set forth in article 14 [Financing of offences] shall not be regarded as a fiscal offence.

Paragraph a) of the proposed article implements Article 11 of the 1997 Bombings Convention, Article 14 of the Financing Convention, Article 11 A of the 2005 Amendments to the Physical Protection Convention, and Article 15 of the 2005 Nuclear Terrorism Convention.

The other International treaties do not specifically contain the same provision. However, it is highly recommended that the prohibition to invoke the "political offence exception" be extended to all the offences described in this Model Law. This is based, notably, on paragraph 3(g) of Resolution 1373 (2001) which calls on 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".

Para.2 implements the specific requirement to be found in article 13 of the 1999 Convention for the Suppression of the Financing of Terrorism.

Article 61

Non-discrimination clause

Nothing imposes an obligation to extradite or provide assistance in relation to a person for any of the offences set forth in [these Model Provisions], if there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing that person on account of his or her gender, race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

The proposed article implements a common provision of the International treaties, which takes into account the need to protect basic human rights in the handling of international cooperation in criminal matters.

The International treaties simply allow States Parties to refuse the provision of assistance or grant extradition when they ascertain the risk that behind the request is a discriminatory purpose by the requesting State.

At the same time, State should take into account their obligation under international human rights treaties, which, unlike the International treaties, might be interpreted as imposing an obligation not to extradite. See, for example, General Comment 31 of the Human Rights Committee, adopted in 2004, stating that the principle of "non refoulement" is applicable to all rights provided for in ICCPR where there is "a real risk of irreparable harm". The Committee has derived this principle from article 2(1) of the ICCPR that requires States to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Reference to "gender" has been added after a provision, virtually identical to that of the International treaties, contained in the TOC Convention.

Article 62

Notification to other competent/ interested States

- 1) When the person who is the subject of an investigation for an offence set forth in [these Model Provisions] has been placed into custody, the [competent authority] immediately notifies the States mentioned in article 26 [Jurisdiction]:
 - a) of the fact that such person is in custody;
 - b) of the circumstances that warrant that person's detention.
- 2) The [competent authority] promptly informs the States mentioned in para.1 of the conclusions of the investigation, and indicates to them whether it intends to exercise jurisdiction.
- 3) If deemed appropriate, the [competent authority] may notify any other interested States.

Under this provision, all States which might have an interest in prosecuting the person under custody, or which are entitled to exercise protection under international law over that person, are to be notified of a number of facts.

The aim of this article is to facilitate inter-State coordination, including by avoiding parallel prosecutions of the same person in different jurisdictions, and ensuring that foreign authorities can exercise other rights provided for by the International treaties, such as the right to invite the Red Cross to communicate with the detained person (see article 29, Right of communication and visit).

Technically, legislative drafters have an option to limit the notification obligation to competent States which are Parties to the International treaties. However, they are encouraged to broaden such obligation to

include in the notification action all States (whether Parties or not) that might be interested. This would promote international cooperation beyond strict treaty requirements.

With respect to an offence within the scope of an International treaty deposited with the Secretariat of the United Nations, the above States may also be informed through notification given to the Secretary-General. Legislative drafters may wish to include this possibility in the body of the article.

Article 63

Notification to relevant international organizations

- 1) The [competent authority] shall communicate the outcome of proceedings concerning an offence set forth in Chapter 2, Section 1 [Offence related to International treaties] to the following international bodies [authorities]:
 - a) the Secretary-General of the United Nations for the offences set forth in article 8 [Offences against internationally protected persons], article 9 [Taking of hostages], article 10 [Offence with explosives or other lethal devices], and article 14 [Financing of offences];
 - b) the Secretary-General of the International Maritime Organization for the offences set forth in Sub-section 2 [Offences related to maritime navigation and fixed platforms];
 - c) the Council of the International Civil Aviation Organization for the offences set forth in Sub-section 1 [Offences related to civil aviation];
 - d) the Secretary-General of the United Nations and The Director General of the IAEA for the offences contained in Sub-section 5 [Offences related to radioactive/ nuclear material and nuclear facilities].

This provision adds the requirement to notify the outcome of proceedings to the various international bodies that act as depositaries for the International treaties [listed in the Definitions Part].

ANNEX

Annex I

Excerpt from the 1969 Vienna Convention on the Law of Treaties

article 31 (General rule of interpretation)

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

- (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
- (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

3. *There shall be taken into account, together with the context:*

- (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
- (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
- (c) *any relevant rules of international law applicable in the relations between the parties.*

4. *A special meaning shall be given to a term if it is established that the parties so intended.*

article 32 (Supplementary means of interpretation)

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) *leaves the meaning ambiguous or obscure; or*
- (b) *leads to a result which is manifestly absurd or unreasonable.*

Article 33 (Interpretation of treaties authenticated in two or more languages)

1. *When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.*

2. *A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.*

3. *The terms of the treaty are presumed to have the same meaning in each authentic text.*

4. *Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.*

Annex II

Complementary Legal Tools and Information available online

Model laws and treaties

UNODC Model Witness Protection Bill

www.unodc.org/pdf/lap_witness-protection_2000.pdf

Commentary to the Model Witness Protection Bill

www.unodc.org/pdf/lap_witness-protection_commentary.pdf

UNODC Model Law on Extradition

www.unodc.org/pdf/model_law_extradition.pdf

UNODC Model Law on Mutual Assistance in Criminal Matters

www.unodc.org/pdf/model_law_on_mutual_assistance.pdf

(Interpol) Model Bilateral Police Cooperation Agreement

www.interpol.int/Public/ICPO/LegalMaterials/cooperation/Model.asp

(Commonwealth Secretariat) Model Legislative Provisions on Measures to Combat Terrorism

www.unodc.org/tldb/pdf/Commonwealth_modellaw_terr.pdf

UNODC Model Treaty on extradition (General Assembly doc.A/RES/45/116)

www.un.org/documents/ga/res/45/a45r116.htm

Model Treaty on Mutual Assistance in Criminal Matters (General Assembly Doc.A/RES/45/117 and A/RES/53/112)

www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf

Legislative guides

Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols

www.unodc.org/pdf/Legislative%20Guide%20Mike%2006-56981_E_Ebook.pdf

A guide for the legislative incorporation of the provisions of the universal legal instruments against terrorism

www.unodc.org/images/Legislative%20Incorporation%20Guide%2005-85508_260406%20Ebook_E.pdf

Preventing Terrorist Acts: a Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments

www.unodc.org/images/Strategy%20Paper%20Mike%2006-52890_ebook.pdf

International Monetary Fund, Suppressing the Financing of Terrorism - A handbook for Legislative Drafting

www.imf.org/external/pubs/nft/2003/SFTH/index.htm

Fact Sheet on de-listing (Security Council Committee established pursuant to SC 1267 (1999) concerning Al Qaida and the Taliban)

www.un.org/sc/committees/1267/fact_sheet_delisting.shtml

Useful Websites

UNODC/Terrorism Prevention Branch

www.unodc.org/unodc/en/terrorism/index.html

UN Action to Counter Terrorism

www.un.org/terrorism/

Security Council Counter-Terrorism Committee

www.un.org/sc/ctc/

Security Council Committee established pursuant to SC 1267 (1999) concerning Al Qaida and the Taliban

www.un.org/sc/committees/1267/index.shtml

Security Council Committee established pursuant to Resolution 1540 (2004)

www.un.org/sc/1540/

Annex III

Guidelines of the 1267 Sanctions Committee for the conduct of its work

(Adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, and 9 December 2008¹)

Excerpts

7. De-listing

- (a) Without prejudice to available procedures, a petitioner (individual(s), groups, undertakings, and/or entities on the Consolidated List) may submit a petition to request review of the case.
- (b) A petitioner seeking to submit a request for de-listing can do so either directly to the Focal Point as outlined in paragraph (g) below, or through his/her State of residence or nationality as outlined in paragraph (h) below.
- (c) A State can decide, that as a rule, its nationals or residents should address their de-listing requests directly to the Focal Point. The State will do so by a declaration addressed to the Chairman that will be published on the Committee's website.
- (d) The petitioner should provide justification for the de-listing request by describing the basis for this request, including by explaining why he/she no longer meets the criteria described in paragraph 2 of resolution 1617 (2005) as reaffirmed in paragraph 2 of resolution 1822 (2008). Any documentation supporting the request can be referred to and/or attached together with the explanation of its relevance, where appropriate.
- (e) A standard form for de-listing, available on the Committee's website², may be used by a petitioner to submit his/her request to the Focal Point as well as by a State of residence or nationality to submit a request on behalf of a petitioner.
- (f) For a deceased individual, the petition shall be submitted either directly to the Committee by a State, or through the Focal Point by his/her legal beneficiary, together with an official documentation certifying that status. The statement of case supporting the delisting request shall include a death certificate or similar official documentation confirming the death. The submitting State or the petitioner should also ascertain and inform the Committee whether or not any legal beneficiary of the deceased's estate, or any joint owner of his/her assets is on the Consolidated List.
- (g) If a petitioner chooses to submit a petition to the Focal Point, the latter would perform the following tasks:
 - i. Receive de-listing requests from a petitioner (individual(s), groups, undertakings and/or entities on the Consolidated List);
 - ii. Verify if the request is new or is a repeated request;

¹ Following the adoption of resolution 1822 (2008), several sections were restructured and redrafted, and Sections 9 and 11 were added.

² <http://www.un.org/sc/committees/1267/delisting.shtml>

- iii. If it is a repeated request and if it does not contain any additional information, return it to the petitioner;
- iv. Acknowledge receipt of the request to the petitioner and inform the petitioner on the general procedure for processing that request;
- v. Forward the request, for their information and possible comments to the designating State(s) and to the State(s) of nationality and residence. These States are urged to review de-listing petitions in a timely manner and indicate whether they support or oppose the request in order to facilitate the Committee's review. The State(s) of nationality and residence are encouraged to consult with the designating State(s) before recommending de-listing. To this end, they may approach the Focal Point, which, if the designating State(s) so agree(s), will put them in contact with the designating State(s);
- vi.
 - a. If, after these consultations, any of these States recommend de-listing, that State will forward its recommendation, either through the Focal Point or directly to the Chairman, accompanied by that State's explanation. The Chairman will then place the de-listing request on the Committee's agenda;
 - b. If any of the States, which were consulted on the de-listing request under subparagraph v. above oppose the request, the Focal Point will so inform the Committee and provide copies of the de-listing request. Any member of the Committee, which possesses information in support of the de-listing request, is encouraged to share such information with the States that reviewed the delisting request under subparagraph v. above;
 - c. If, after a reasonable time (3 months), none of the States which reviewed the de-listing request under subparagraph v. above comment, or indicate that they are working on the de-listing request to the Committee and require an additional definite period of time, the Focal Point will so notify all members of the Committee and provide copies of the de-listing request. Any member of the Committee may, after consultation with the designating State(s), recommend de-listing by forwarding the request to the Chairman, accompanied by an explanation. (Only one member of the Committee needs to recommend delisting in order to place the issue on the Committee's agenda.) If after one month, no Committee member recommends de-listing, then it shall be deemed rejected and the Chairman shall inform the Focal Point accordingly;
- vii. The Focal Point shall convey all communications, which it receives from Member States, to the Committee for its information;
- viii. Inform the petitioner:
 - a. of the decision of the Committee to grant the de-listing petition; or
 - b. that the process of consideration of the de-listing request within the Committee has been completed and that the petitioner remains on the list of the Committee.

- (h) If the petitioner submits the petition to the State of residence or nationality, the procedure outlined in the subparagraphs below shall apply:
- i. The State to which a petition is submitted (the petitioned State) should review all relevant information and then approach bilaterally the designating State(s) to seek additional information and to hold consultations on the de-listing request;
 - ii. The designating State(s) may also request additional information from the petitioner's State of nationality or residence. The petitioned and the designating State(s) may, as appropriate, consult with the Chairman during the course of any such bilateral consultations;
 - iii. If, after reviewing any additional information, the petitioned State wishes to pursue a de-listing request, it should seek to persuade the designating State(s) to submit jointly or separately a request for de-listing to the Committee. The petitioned State may, without an accompanying request from the designating State(s), submit a request for de-listing to the Committee, pursuant to the no-objection procedure;
- (i) The Secretariat shall, within one week after a name is removed from the Consolidated List, notify the Permanent Mission of the country or countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national (to the extent this information is known). The letter shall remind States receiving such notification that they are required to take measures, in accordance with their domestic laws and practices, to notify or inform the concerned individual or entity of the de-listing in a timely manner. The Secretariat will also concurrently, if a UNSC-INTERPOL Special Notice exists for the relevant name, request INTERPOL to cancel that notice as well as provide confirmation when the cancellation is in effect.

10. Exemptions to the Assets Freeze

- (a) Pursuant to resolution 1452 (2002), as amended by paragraph 15 of resolution 1735 (2006), the Committee shall receive notifications from Member States of their intention to authorize, where appropriate, access to frozen funds or other financial assets or economic resources to cover basic expenses, as provided for in paragraph 1(a) of resolution 1452 (2002). The Committee, through the Secretariat, will immediately acknowledge receipt of the notification. Should no negative decision be taken by the Committee within the requisite 3 working day period, the Committee, through its Chairman, will inform the notifying Member State thereof. The Committee will also inform the notifying Member State if a negative decision has been taken regarding the notification.
- (b) The Committee shall consider and approve, if appropriate, requests by Member States for extraordinary expenses, as provided for in paragraph 1(b) of resolution 1452 (2002). Member States are encouraged, when submitting requests to the Committee pursuant to paragraph 1 (b) of resolution 1452 (2002), to report in a timely way on the use of such funds, with a view to preventing such funds from being used to finance terrorism.

(c) Notifications under paragraph 1(a) of resolution 1452 (2002) and requests under paragraph 1(b) of resolution 1452 (2002) should, as appropriate, include the following information:

- i. recipient (name and address)
- ii. recipient's permanent reference number on the Consolidated List
- iii. recipient's bank information (name and address of bank, account number)
- iv. purpose of payment and justification of the determination of the expenses falling under paragraph 1(a) or under paragraph 1(b):
 - under paragraph 1(a):
 - basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;
 - payment of reasonable professional fees and reimbursement of incurred expenses associated with the provisions of legal services;
 - fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources.
 - under paragraph 1(b):
 - extraordinary expenses (other categories than the ones mentioned under paragraph 1 (a)).
- v. amount of installment
- vi. number of installments
- vii. payment starting date
- viii. bank transfer or direct debit
- ix. interests
- x. specific funds being unfrozen
- xi. other information.

(d) Pursuant to paragraph 2 of resolution 1452 (2002) and paragraph 6 of resolution 1822 (2008), States may allow for the addition to accounts subject to the assets freeze of:

- i. interest or other earnings due on those accounts, or
- ii. payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the assets freeze, or
- iii. any payment in favour of listed individuals, groups, undertakings or entities, provided that any such interest, other earnings and payments continue to be subject to the assets freeze.

11. Exemptions from the Travel Ban

In paragraph 2 (b) of resolution 1390 (2002), as reaffirmed by subsequent relevant resolutions, including paragraph 1 (b) of resolution 1822 (2008), the Security Council decided that the travel ban imposed under the Al-Qaida/Taliban sanctions regime shall not apply where the Committee determines, on a case by case basis only, that entry or transit is justified.³

- (a) Each request for exemption must be submitted in writing, on behalf of the listed individual, to the Chairman. The States that may submit a request through their Permanent Mission to the United Nations are the State(s) of destination, the State(s) of transit, the State of nationality, and the State of residence. If no effective central government exists in the country in which the listed individual is located, a United Nations office or agency in that country may submit the request for exemption on the listed individual's behalf.
- (b) Each request for exemption shall be received by the Chairman as early as possible but not less than five working days before the date of the proposed travel.
- (c) Each request for exemption should include the following information:
 - i. the permanent reference number, full name, nationality, passport number or travel document number of the listed individual;
 - ii. the purpose of and justification for the proposed travel, with copies of supporting documents, including specific details of meetings or appointments;
 - iii. the proposed dates and times of departure and return;
 - iv. the complete itinerary and timetable, including for all transit stops;
 - v. details of the mode of transport to be used, including where applicable, record locator, flight numbers and names of vessels;
 - vi. all proposed uses of funds or other financial assets or economic resources in connection with the travel. Such funds may only be provided in accordance with paragraph 1 of resolution 1452 (2002), as modified by paragraph 15 of resolution 1735 (2006). The procedures for making a request under resolution 1452 (2002) can be found in Section 10 of these guidelines.
- (d) Once the Committee has approved a request for exemption from the travel ban, the Secretariat shall notify in writing the Permanent Missions to the United Nations of: the State in which the listed individual is resident, the State of nationality, the State(s) to which the listed individual will be traveling, and any transit State, as well as any UN office/agency involved as provided for in paragraph (a) above, to inform them of the approved travel, itinerary and timetable.
- (e) Written confirmation of the completion of the travel by the listed individual shall be provided to the Chairman within five working days following the expiry of the

³ The Security Council also decided that the travel ban shall not oblige any State to deny entry into or require the departure from its territories of its own nationals and shall not apply where entry or transit is necessary for the fulfillment of a judicial process.

exemption by the State (or United Nations office/agency as in paragraph (a) above) in which the listed individual has stated he will be resident after completion of the exempted travel.

- (f) Notwithstanding any exemption from the travel ban, listed individuals remain subject to the other measures outlined in paragraph 1 of resolution 1822 (2008).
- (g) Any changes to the information provided under paragraph (c) above, including with regard to points of transit, shall require further consideration by the Committee and shall be received by the Chairman no less than three working days prior to the commencement of the travel.
- (h) Any request for an extension of the exemption shall be subject to the procedures set out above and shall be received by the Chairman in writing, with a revised itinerary, no less than five working days before the expiry of the approved exemption.
- (i) The submitting State (or United Nations office/agency as in paragraph (a) above) shall inform the Chairman immediately and in writing of any change to the departure date for any travel for which the Committee has already issued an exemption. Written notification will be sufficient in cases where the time of departure is advanced or postponed no more than 48 hours and the itinerary remains otherwise unchanged. If travel is to be advanced or postponed by more than 48 hours, or the itinerary is changed, then a new exemption request shall be submitted in conformity with paragraphs (a), (b) and (c) above.
- (j) In cases of emergency evacuation to the nearest appropriate State, including for medical or humanitarian needs or through force majeure, the Committee will determine whether the travel is justified within the provisions of paragraph 1 (b) of resolution 1822 (2008), within 24 hours once notified of the name of the listed individual traveler, the reason for travel, the date and time of evacuation, along with transportation details, including transit points and destination. The notifying authority shall also provide, as soon as possible, a doctor's or other relevant national official's note containing as many details as possible of the nature of the emergency and the facility where treatment or other necessary assistance was received by the listed individual without prejudice to respect of medical confidentiality, as well as information regarding the date, time, and mode of travel by which the listed individual returned to his/her country of residence or nationality, and complete details on all expenses in connection with the emergency evacuation.
- (k) Unless the Committee otherwise decides, all requests for exemptions and extensions thereto which have been approved by the Committee in accordance with the above procedures, shall be posted in the "Exemptions" section of the Committee's website until expiry of the exemption.

¹ S/RES/1617 (2005), para. 2.

² S/RES/1617 (2005), para. 3.

Annex IV

International treaties: Depositaries and Contact Details

| Instruments | List of the depositaries and contact details |
|---|--|
| <p>Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963)</p> <p>Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)</p> | <p>Secretary General of the International Civil Aviation Organization ICAO 999 University Street, Montreal, Quebec H3C 5H7, Canada Tel.: + 1 514 954 8219 Fax: + 1 514 954 6077 E-mail: icaohq@icao.int Web site: www.icao.int</p> |
| <p>Convention for the Suppression of Unlawful Seizure of Aircraft (1970)</p> <p>Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)</p> | <p>Russian Federation, United Kingdom of Great Britain and Northern Ireland, United States of America</p> |
| <p>Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)</p> <p>International Convention against the Taking of Hostages (1979)</p> <p>International Convention for the Suppression of Terrorist Bombings (1997)</p> <p>International Convention for the Suppression of the Financing of Terrorism (1999)</p> <p>International Convention for the Suppression of Acts of Nuclear Terrorism (2005)</p> | <p>Secretary General of the United Nations CONTACT: Treaty Section Office of Legal Affairs United Nations New York, NY 10017 United States Fax : +1 212 963 3693 Email: treaty@un.org Web site : http://untreaty.un.org</p> |
| <p>Convention on the Physical Protection of Nuclear Material (1979) and its Amendment 2005</p> | <p>Director General of the International Atomic Energy Agency IAEA P.O. Box 100, Wagramer Strasse 5 A-1400 Vienna, Austria Tel. : +43 1 2600 0 Fax : +43 1 2600 7 E-mail: Official.Mail@iaea.org Web site : www.iaea.org</p> |

| | |
|--|--|
| <p>Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988)</p> | <p>Russian Federation, United Kingdom of Great Britain and Northern Ireland, United States of America Secretary General of the International Civil Aviation Organization ICAO 999 University Street, Montreal, Quebec H3C 5H7, Canada Tél.: + 1 514 954 8219 Fax: + 1 514 954 6077 E-mail: icaohq@icao.int Web site: www.icao.int</p> |
| <p>Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) and its Protocol 2005</p> <p>Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988) and its Protocol 2005</p> | <p>Secretary General of the de International Maritime Organisation IMO 4 Albert Embankment London SE1 7SR United Kingdom Tel.: + 44 (0)20 7735 7611 Fax : + 44 (0)20 7587 3210 E-mail: info@imo.org Web site : www.imo.org</p> |