



UNITED NATIONS
Office on Drugs and Crime

**PREVENTING TERRORIST ACTS:
A CRIMINAL JUSTICE STRATEGY
INTEGRATING RULE OF LAW STANDARDS IN
IMPLEMENTATION OF UNITED NATIONS
ANTI-TERRORISM INSTRUMENTS**

Technical Assistance Working Paper

Terrorism Prevention Branch

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

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Foreword

The most recent statement of the anti-terrorism mandate of the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC) is found in General Assembly resolution 60-175 (2006), which:

6. *Requests* the United Nations Office on Drugs and Crime to continue its efforts to provide Member States with technical assistance, upon request, to strengthen international cooperation in preventing and combating terrorism through the facilitation of the ratification and implementation of the universal conventions and protocols related to terrorism, including the International Convention for the Suppression of Acts of Nuclear Terrorism, in particular through training in the judicial and prosecutorial fields in their proper implementation, taking into account, in its programmes, the elements necessary for building national capacity in order to strengthen fair and effective criminal justice systems and the rule of law as an integral component of any strategy to counter terrorism;

Logic dictates and experience demonstrates that the universal anti-terrorism conventions and protocols cannot be implemented in a vacuum. Every country must integrate the substantive and procedural requirements of those agreements in its existing criminal justice system with due regard to relevant Security Council resolutions and human rights treaties. This inescapably requires discussion of personal and group liability, how logically related offences should be treated, what preparatory or auxiliary conduct should be punished as part of a convention offence or separately, what evidentiary techniques and rules should be provided for investigation and prosecution, and what safeguards and international cooperation mechanisms are necessary.

In order to provide credible legal advisory services, representatives of UNODC's Terrorism Prevention Branch must be prepared for the utmost benefit of Member States to discuss how anti-terrorism conventions and protocols can be integrated and harmonized with domestic law and other international standards. At the same time, it is TPB's institutional responsibility to recognize the implications of all of these inextricably related measures in the overall context of the rule of law. The following working paper has been designed to facilitate the task of advising national authorities, who bear the heavy responsibility of preventing terrorism by integrating mandatory rule of law standards in the implementation of universal anti-terrorism instruments.

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7 April 2006
United Nations Office on Drugs and Crime
United Nations Office at Vienna

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

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Part A. State Responsibility to Protect Against Terrorism (paragraphs 1-17)

a. The obligation to protect life, not merely punish its deprivation (ICCPR, Art. 6)

1. Over 150 of the 191 Member States of the United Nations have accepted the obligations of the International Covenant on Civil and Political Rights (ICCPR) to ensure certain rights to all individuals within their territory. Article 6 of the Covenant, from which no derogation is permitted, provides that:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

To the average person, protecting the right to life means preventing its loss, not punishing those responsible for a successful or attempted deprivation. Protection by law thus demands legal measures to interrupt and interdict preparations for terrorist violence, not merely the identification and punishment of the perpetrators after a fatal event.

2. Instinctive, uncoordinated reactions to atrocities may confuse counter-productive severity with effectiveness. Paragraph 24 of the working paper *Specific Human Rights Issues: New Priorities, in particular Terrorism and Counter-terrorism* urges that:

International action to combat terrorism should focus heavily on prevention of terrorism or terrorist acts. To the degree possible, international action should focus on the development and implementation of forward-looking strategies rather than being responsive or reflective of individual acts or series of terrorist acts.¹

A forward-looking, preventive criminal justice strategy against terrorist violence requires a comprehensive system of substantive offences, investigative powers and techniques, evidentiary rules, and inter-State cooperation mechanisms. Such an integrated system is necessary to implement the right to life guaranteed by the ICCPR.

3. “Proactive law enforcement” is a phrase used to convey a contrast with “reactive law enforcement”. The proper grammatical usage may simply be “active” or “activist”, but the adjective “proactive” has become accepted in both popular and criminological writing. Proactive law enforcement emphasizes preventing and interrupting crime, rather than reacting to crimes already committed, and its novelty is often overstated. Public safety authorities have always attempted both to prevent crime and to solve offences already committed, although the two functions have

¹ Preliminary framework draft of principles and guidelines concerning human rights and terrorism, expanded working paper by the Special Rapporteur on Terrorism and Human Rights of the Sub-Commission on the Promotion and Protection of Human Rights, GE.05-14597, 22 June 2005, <http://daccessdds.un.org/doc/UNODC/GEN/G05/145/97/PDF/G0514597.pdf?OpenElement>

sometimes been inefficiently separated and characterized by a lack of communication. Nevertheless, the label “proactive” is now used for almost every initiative to reduce crime, having been expanded far beyond its original reference to police patrolling. In this paper the terms proactive or preventive will be used interchangeably. They will describe a strategy to permit intervention against terrorist planning and preparations before they mature into action. The goal is to proactively integrate substantive and procedural mechanisms to reduce the incidence and severity of terrorist violence, and to do so within the strict constraints and protections of the civilian criminal justice system and the rule of law.

4. Fidelity to rule of law principles demands that all of the mechanisms assembled as part of an integrated anti-terrorism strategy be uncompromisingly protective of the civil and political rights found in the ICCPR and in other universal human rights and anti-terrorism instruments. Among the ICCPR guarantees that are not subject to derogation, even in an emergency threatening the life of the nation, are:

Art. 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ...

Art. 15: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed ...

Art. 18 1. Everyone shall have the right to freedom of thought, conscience and religion ...

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Art. 19 Everyone shall have the right to hold opinions without interference.

The ICCPR also protects freedoms of expression and association (Arts. 19 and 22), though these may be limited to protect social or individual interests, or may be subject to derogation in emergency situations according to established procedures. A number of the ICCPR guarantees will be implicated by anti-terrorism legislation, as will be discussed.

5. The rule of law concepts of legislative sovereignty, equality under the law, and judicial ability to enforce constitutional rights were popularized by English Prof. A. V. Dicey in his 1885 publication, *The Law of the Constitution*. Respect for those concepts is now so prevalent that compliance with the rule of law is regularly cited as a standard for judging the appropriateness of criminal justice mechanisms. In truth, the rule of law concept has become very broad, even amorphous, as pointed out in the publication *The Rule of Law-Concept: Significance in Development Cooperation*, by the Swiss Agency for Development and Cooperation/Federal Department of Foreign Affairs. As stated therein:

There is no uniform international definition of the rule of law. The content and priorities of the concept are shaped by historical change, national differences and

the influence of different social interests. It is nevertheless possible to expect some common threads that are often given different weighting:

- The primacy of the legitimacy of the administration
- An independent, functioning judiciary
- Equality of all citizens in legislation and the application of law
- The primacy of the constitution, and a corresponding hierarchy of norms—from the abstract constitutional principle to specific administrative rulings. The universal anti-terrorism agreements were ad hoc responses to violent manifestations or perceived threats of terrorist activity
- The separation of powers between the legislative, the executive and the judiciary
- The respect of human rights, at least civil and political rights.

To the extent that they are not enshrined in international obligations in the field of human rights, the principles of the rule of law have no firm basis in international law. The form of the legal system and government organization remains an important part of the *domaine réservé* of each sovereign state, which has shrunk as a result of globalization. This demands restraint when exerting international influence on the design of internal political systems. The principle of non-interference under international law forbids individual states to exercise substantial pressure to force other states to take particular decisions in their *domaine réservé*. Positive action in support of rule of law concerns that fall short of coercing state authorities do not however fall under the interference prohibition.

6. Article 2-7 of the United Nations Charter makes this rule of non-interference applicable to the United Nations Organization itself. “Nothing in this Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ...” With full respect for this principle, the following discussion provides resources for discussion of preventive anti-terrorism measures that incorporate protections established by binding international agreements, such as the Charter of the United Nations, the ICCPR, the universal anti-terrorism instruments, the Convention Against Torture, and the Convention Relating to the Status of Refugees. Non-binding sources, such as the general comments and reports of the Committee of Experts established by the ICCPR and Special Rapporteurs of the Human Rights Commission, are cited for the increased understanding of the rule of law that they provide.

b. Protecting civilians—the common imperative of United Nations anti-terrorism agreements

7. Two United Nations publications, the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*² and *Guide for the Legislative Incorporation and Implementation of the Universal Instruments against Terrorism* analyse the requirements of twelve anti-terrorism agreements negotiated between 1963 and

² United Nations Office on Drugs and Crime, V.03-85663 (E), New York, 2003, http://www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf.

1999.³ Beginning in 1972 the General Assembly repeatedly called for adoption of the then-existing agreements, as well as development of more comprehensive instruments.⁴ A thirteenth instrument, the International Convention for the Suppression of Acts of Nuclear Terrorism, was negotiated and opened for signature in 2005. In addition, amendments or amending protocols were adopted to three of the original instruments in the same year.⁵

8. Those thirteen agreements were ad hoc responses to violent manifestations or perceived threats of terrorist activity. Aircraft hijackings resulted in three conventions for the suppression of unlawful acts against the safety of civil aviation (1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft; 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; and 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation). Assassination of the Jordanian Prime Minister and the murder of diplomats in Sudan preceded the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and multiple hostage-takings produced the 1979 International Convention against the Taking of Hostages. Attacks in international airports gave rise to the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation. In the same year the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was concluded in reaction to the seizure of the cruise ship *Achille Lauro* and the murder of a passenger, as well as a Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf. The 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection regulated manufacture and controls over the type of explosives used to destroy a number of civilian aircraft with great loss of life. Multiple bombing incidents led to adoption of the International Convention for the Suppression of Terrorist Bombings in 1997 (hereafter referred to as the Terrorist Bombings Convention), which despite its name covers nearly all attacks with weapons of mass destruction. The 1999 International Convention for the Suppression of the Financing of Terrorism (the Financing Convention) reflected concerns over the flow of funds to support violent terrorist organizations. The 1979 Convention on the Physical Protection of Nuclear Material and the International Convention for the Suppression of Acts of Nuclear Terrorism of 2005 reflect concern about the risk of catastrophic misuse of those dangerous instrumentalities. While dealing with different forms of terrorism, a common imperative unites these instruments. Every convention or protocol reflects the humanitarian principle that civilians and other non-combatants should be protected against violence. These agreements create obligations in civilian criminal justice systems comparable to the obligation in the law of armed conflicts to protect persons taking no active part in hostilities.⁶

³ See <http://www.unodc.org>, Terrorism, Technical assistance tools.

⁴ See resolutions 30/34 (1972), 31/102 (1976), 32/147 (1977), 34/145 (1979), 36/109 (1981), 38/130 (1983), 42/159 (1987), 44/29 (1989), 46/51 (1991), 49/60 (1994), 50/53 (1995), 51/210 (1996), 52/165 (1997), 53/108 (1998), 54/110 (1999), 55/158 (2000).

⁵ Amendment to the Convention on the Physical Protection of Nuclear Material, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 2005 Protocol to the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

⁶ See common Article 3 and other articles of the four Geneva Conventions of 1949, and the

9. This emphasis on protecting civilians characterizes all of the anti-terrorism agreements. The three aircraft safety conventions and the maritime convention expressly exclude aircraft and vessels used in military, customs or police services, and apply only to civilian crews and passengers, typically innocent tourists and business travellers. The 1988 Airport Protocol, negotiated after attacks on religious pilgrims and other travellers in the mid-1980s, is limited to airports serving international civil aviation, meaning civilian flights. The 1973 Convention requiring the criminalization of attacks on diplomatic agents reflects the vulnerability of such persons and their families as targets for terrorists. The 1979 Hostage Convention excludes hostage takings that are punishable under the Geneva Conventions and Protocols in armed conflict, and focuses on the protection of civilians from persons who do not qualify as armed forces. The various conventions involving dangerous instrumentalities, such as plastic explosives (1991), nuclear materials (1979 and 2005) and terrorist bombs and other lethal devices involving toxic chemicals, biological agents or toxins, or radiation or radioactive materials (1997) all involve weapons that by their very nature tend to cause indiscriminate casualties. The Terrorist Bombings and Nuclear Terrorism Conventions also specify that their provisions do not apply to activities of armed forces during an armed conflict, or to activities by military forces in the exercise of their official duties, as the Geneva Conventions and Protocols already prohibit violence by such forces directed at civilians and non-combatants. Those conventions focus on protecting the members of the public who would be endangered by attacks on “places of public use, a State or government facility, a public transportation system or an infrastructure facility” or by the unlawful use of radioactive materials. The same type of language excluding the activities of armed forces and the activities of military forces of a State was incorporated in the 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and in the 2005 Amendment creating the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities.

10. The focus upon protection of civilians is most explicit in Article 2-1 of the 1999 Financing Convention. That agreement defines an act of terrorism, for which the provision or collection of funds is forbidden, as either a violation of one of the other previously negotiated conventions or protocols that established criminal offences or as:

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.

c. Criminalizing terrorist attacks: punishment, not prevention

11. The universal anti-terrorism agreements are dedicated to the safety of civilians, but only three have significant preventive aspects. Two emphasize regulatory safeguards that may help prevent misuse of dangerous instrumentalities. The 1979 Convention on the Physical Protection of Nuclear Material, amended in 2005 to become the Convention on the Physical Protection of Nuclear Material and

Additional Protocols to those Conventions.

Nuclear Facilities criminalizes dangerous acts involving nuclear materials, but also imposes regulatory obligations concerning the movement of such materials. The 1991 Convention for the Marking of Plastic Explosives for the Purposes of Detection requires inventory controls on plastic explosives and the incorporation of volatile elements susceptible to vapour detection devices. The other preventive convention is the Financing Convention, which permits authorities to interrupt financial preparations for future violent acts.⁷

12. The eight anti-terrorism conventions and protocols negotiated between 1970 and 1988 create predominantly reactive criminal offences. They require that criminal liability be imposed, assuming the existence of the necessary guilty intent, in only three circumstances:

- (1) The physical commission of conduct defined as an offence, usually called liability as a principal. A principal would be the person who personally unlawfully seizes an aircraft or maritime vessel, takes hostages, attacks diplomats or passengers at an international airport, steals or unlawfully uses nuclear material, or makes threats prohibited by certain conventions;
- (2) An attempt to commit a prohibited offence, which fails for reasons beyond the person's control, such as the arrest of a group when they have assembled with their weapons and are moving toward their target;
- (3) Intentional participation as an accomplice in the commission or attempted commission of an offence, such as that of an embassy employee who leaves a gate unlocked and allows entry by assassins who murder diplomats.

13 The 1997 Terrorist Bombings Convention introduced two additional means by which criminal responsibility might be incurred. Like preceding instruments, the Terrorist Bombings Convention requires States Parties to punish the principal who detonates a bomb, whoever attempts to do so but is frustrated by circumstances beyond his control, and the accomplice who drives the bomber to the target area. (Art. 2.3.a). The Bombings Convention also introduced two additional means of incurring criminal liability:

- (4) organizing/directing others to commit an offence, such as the issuance of a religious opinion approving the morality of a bomb attack by a religious leader who advises on how to make it more devastating (Art. 2.3.b);
- (5) intentionally contributing to the offence's commission by a group, such as by concealing a group so that they can carry out a planned bombing (Art. 2.3c).

14. None of these five forms of criminal liability allow prosecution unless an offence is completed or attempted. Prosecution would not even be possible based on

⁷ The International Convention for the Suppression of Acts of Nuclear Terrorism, not yet in force, has preventive language in its international cooperation article. That article requires States to cooperate by taking all practicable measures to prevent and counter preparations in their territories for the commission within or outside their borders of convention offences. The cooperation article does not explicitly require criminalization and preparation is not included in the criminalization article, but should be read in conjunction with the similar mandatory language in resolution 1373, paragraph 2 (d).

overwhelming evidence of an agreement to commit a bombing, accompanied by proof of purchase of the components for a detonating device and nails intended to serve as shrapnel. Yet it is rarely possible for authorities to control a tactical situation so completely that they can be sure of intervening precisely when the plotters have begun to attempt the offence, and so would be subject to prosecution, but before violence is accomplished. A surveillance agent may suddenly be incapacitated by illness or a traffic accident. A torrential rainstorm may obscure visibility, or a power failure may interrupt audio-visual coverage. The inability to guarantee control of a situation threatening catastrophic consequences compels authorities to interrupt dangerous plots before they are attempted, thereby compromising the abilities to prosecute and to conduct further covert investigation. Moreover, a regime for international cooperation against terrorism is hardly satisfactory if a legal prerequisite is the actual or attempted commission of an attack intended to inflict scores or hundreds of deaths. Finally, the phenomena of fanaticism and suicide bombings make the deterrent effect of the criminal justice process virtually irrelevant. If terrorist violence is to be reduced, authorities must re-focus their attention upon proactive intervention at the planning and preparation stage.

d. Intervening against terrorist planning and preparations

15. The offences of conspiracy and criminal association are obvious models for preventive intervention against the planning and preparation of criminal acts. The United Nations Convention against Transnational Organized Crime (2000) incorporates these concepts as alternative offences in Article 5, requiring States Parties to criminalize at least one such offence as distinct from the attempted or completed criminal activity. Perhaps because of fear of misuse in the politically charged context of terrorism, these offences have never been adopted in the United Nations anti-terrorism instruments. However, by the late 1990s the necessity for effective intervention and cooperation against terrorist attacks in their planning and preparatory stages had become apparent and urgent. If not by the concepts of conspiracy or criminal association, how could this be done? What legal approach would adequately define the elements of illegal preparation for a terrorist attack with sufficient precision to give fair notice to the public, and yet not be so broad or vague as to create a risk of punishing acts that do not pose a significant social threat?

16. In 1999 the Financing Convention provided a solution to the above questions that is similar in format to the Terrorist Bombings Convention. Article 2 of the Financing Convention enumerates the same five means of incurring criminal liability as Article 2 of the Bombings Convention. States Parties are required to provide for the punishment of principals, accomplices, and whoever attempts, organizes or contributes to the commission of the offence of providing or collecting funds for terrorist purposes. Although the Financing Convention parallels the Terrorist Bombings Convention in language and organization, this similarity conceals a strategic departure from the approach of previous anti-terrorism instruments. Instead of defining a violent offence that can be punished only if it succeeds or is attempted, Article 2 of the Financing Convention criminalizes the non-violent financial preparations that precede nearly every terrorist attack:

Any person commits an offence within the meaning of this Convention if that person, by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out ... (one of the subsequently listed violent acts). Moreover, paragraph 3 of that same article specifies that:

For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence ...

17. Criminalizing financial preparations for violence introduces a deliberate strategy to permit intervention before a terrorist atrocity has been committed or attempted. The Financing Convention expresses a fundamental strategic choice—that interdicting and interrupting terrorist planning and preparation before innocent civilians become victims is infinitely preferable to conducting autopsies and crime scene investigations after a tragedy has occurred. This interventionist approach retains the ability to prosecute while obeying the mandate of Article 6.1 of the ICCPR to ensure that:

This right (to life) shall be protected by law. No one shall be arbitrarily deprived of his life.

Part B. Scope and Elements of a Preventive Criminal Justice Strategy Against Terrorism

B. 1. Offences

a. Offences established by the universal anti-terrorism conventions and protocols

18. In response to the impact of international terrorism upon peace and security, the Security Council has called upon every country to adopt and fully implement, as soon as possible, the universal anti-terrorism conventions and protocols.⁸ These agreements provide common offence definitions and international cooperation mechanisms covering almost all foreseeable acts of terrorism. They function as the armature around which an international criminal justice strategy against terrorism must be moulded, but are only partial elements of a comprehensive strategy against terrorism. Security Council resolutions under mandatory Chapter VII of the United Nations Charter also require that countries implement broader statutory schemes to prevent the movement and activities of terrorists and to ensure that they are brought to justice.⁹ Domestic offences, procedures and cooperation mechanisms must be designed and implemented to protect the rule of law and internationally recognized human rights, while allowing terrorist actions to be interdicted in the planning and preparation stages.

b. Criminalization in accordance with rule of law principles and the ICCPR

19. A preventive strategy must focus on the formation and activities of terrorist groups before they can attempt or accomplish a violent offence. A proactive

⁸ Security Council resolutions 1368, 1373, 1456 and 1566.

⁹ Resolution 1373, ... (and successor resolutions).

approach requires the definition of appropriate offences in compliance with the rule of law principle of no crime and no punishment without a law. As stated in paragraph 33 of the Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, submitted to the Commission on Human Rights under date of 7 February 2005:

Whatever their approach, States should be guided by the principle of legality or *nullum crimen sine lege* when drafting anti-terrorism laws and treaties. This principle of general international law is enshrined and made expressly non-derogable in Article 15 of the Covenant (ICCPR) and the provisions of regional human rights treaties. It prohibits not only the application of *ex post facto* laws, but also requires that the criminalized conduct be described in precise and unambiguous language that narrowly defines the punishable offence and distinguishes it from conduct that is either not punishable or is punishable by other penalties. Defining crimes without precision can also lead to a broadening of the proscribed conduct by judicial interpretation. Accordingly, the principle of legality also entails the principle of certainty, i.e. that the law is reasonably foreseeable in its application and consequences.¹⁰

c. Mandatory criminalization of terrorist financing

20. Parties to the Financing Convention are required to criminalize the acts described in its Article 2.

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

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

21. Combating terrorist financing is also an obligation under resolutions of the Security Council adopted pursuant to Chapter VII of the United Nations Charter. When States become Members of the United Nations they designate the Security Council to act on their behalf with regard to threats to peace and security (Art. 24); to determine when those threats exist (Art. 39); and to decide what measures to take to maintain or restore peace and security (Chapter VII, and specifically Art. 41). Member States also commit themselves under Article 25 to carry out those decisions in accordance with the United Nations Charter. Pursuant to Chapter VII the Council has adopted resolution 1373 of 28 September 2001, which requires Member States to:

Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention

¹⁰ <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDCOI&id=42d66e700>.

*that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts (para. 1 (b)).*¹¹

22. Accomplishing the proactive goal of the Convention and the similar imperative of resolution 1373 requires criminalization of the provision or collection of funds with either of two mental states, described in substantially identical language in both instruments:

Financing Convention: “... by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out (a terrorist act as defined in the convention).”

Resolution 1373 “... the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.”

23. These references to providing or collecting funds “with the intention” “or in the knowledge” provoke the question of how a person could know that funds are to be used for terrorism without intending that use. The factual context is that organizations engaged in terrorism may be dual use organizations, raising money not only for legitimate humanitarian or political purposes but also to support terrorist activities. In the event of prosecution a provider or collector of funds may claim to have personally desired and intended that the money be used to support medical clinics or political education. The evidence at trial may show that the defendant knew that the organization used such contributions both for humanitarian purposes and to buy explosives for attacks on civilians. Effective interdiction of resources usable for terrorist attacks requires the criminalization of both the intentional and the knowing provision or collection of funds for terrorist purposes. To distinguish lawful from unlawful purposes, Section 17 of South Africa’s Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004 makes it explicit that the law’s prohibition does not apply to funds provided or collected with the intention or in the knowledge that they are to be used for the purpose of “... advocating democratic government or the protection of human rights”.

24. Some national laws define the mental element of a financing offence more broadly than required by the intent and knowledge language of the Convention. Under these approaches, a person commits an offence if he or she provides or collects funds knowing, intending, acting with reckless disregard for the possibility, or having reasonable cause to suspect, that they will or may be used for terrorism. Such provisions simplify the burden of proof by focusing on what a reasonable person would have known or intended in like circumstances, similar to the evidentiary rule found in Article 3-3 of the United Nations Vienna Drug Convention of 1988; Article 5-2 of the Transnational Organized Crime Convention of 2000; or Article 28 of the United Nations Convention Against Corruption of 2003, which all contain the provision that:

¹¹ See also Security Council resolutions 1267 (1999), 1390 (2002), 1455 and 1456 (2003), 1526 and 1566 (2004), and 1617 and 1624 (2005).

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

25. Mental elements expressed as “reckless disregard” or “reasonable cause to suspect” permit conviction when the defendant did not know or personally suspect the terrorist purpose of the funds. This is a lower standard than proof of subjective knowledge or of “wilful blindness”, which is a deliberate effort to avoid learning facts that might confirm suspicions of illegality. A standard of mental culpability different than that established in the Financing Convention may have consequences for international cooperation. A country from which cooperation is requested may require personal knowledge or intent as an element of the offence of financing terrorism, and not punish provision or collection of funds that is reckless or negligent. Accordingly, a country applying a “reckless disregard” or “reasonable cause” standard may find that other countries refuse to grant a request for extradition or mutual legal assistance due to a lack of “double criminality”, a concept discussed in Part B-3, International Cooperation.

d. Association de malfaiteurs and conspiracy

26. One set of mechanisms for establishing criminal responsibility at a time preceding actual violence includes the Continental law concept of *association de malfaiteurs* and common law conspiracy, both of which prohibit agreements to commit crime. For these offences to be complete, the intended harmful act need not be attempted or accomplished, although some laws require the commission of a preparatory step to carry out the group’s purposes. This is expressed in the offence of *association de malfaiteurs* found in the French *Code Pénal*, Article 450-1, and has been reproduced in a specific article defining as an act of terrorism:

The participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles. (Code Pénal, Art. 421-2-1)

Some common law jurisdictions require an element similar to the material action contained in the French definition of *association de malfaiteurs*. Division 11.5 of the Australian 1995 Criminal Code Act provides that:

(2) *For the person to be guilty [of conspiracy]:*

(a) *The person must have entered into an agreement with one or more other persons; and*

(b) *The person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and*

(c) *The person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.*

An overt act need not itself be criminal but must be intended to further the criminal plan, such as buying an airline ticket for travel to the place of the intended attack. Some jurisdictions do not require an overt act, leaving the judiciary to decide whether the proof shows an irresponsible but harmless discussion or a dangerous plot that never matured.

27. As mentioned, except for the 1999 Financing Convention, the universal anti-terrorism agreements define forms of criminal liability that do not apply unless a violent terrorist act is completed or attempted. The agreements' cooperation provisions would therefore not be available with respect to an association or conspiracy that did not progress to an attempted or completed offence. Nevertheless, a criminal association or conspiracy law may save lives and permits prosecution of preparations to commit terrorist offences before those acts would be punishable according to the convention definitions. Even though the universal anti-terrorism agreements do not establish association or conspiracy offences, international cooperation with respect to such offences may be available through regional agreements, bilateral extradition or legal assistance treaties, or under statutes allowing cooperation based upon reciprocity.

28. By January 2006 116 States had become parties to the United Nations Transnational Organized Crime Convention of 2000. As those parties implement the Convention provisions they are required to establish an offence of participation in an organized crime group, which may be defined either as a conspiracy or criminal association:

Art. 5-1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity;

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim or general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized crime group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above described criminal aim.

If conspiracy laws adopted to comply with this Convention include the requirement for a financial motive referred to in its Article 5-1 (a)(i), they will not apply to all terrorist offences, but could apply to the type of hostage taking for ransom practiced by the Abu Sayyaf organization. If a country adopts a conspiracy law that does not require a profit motive, the law could be generally applicable to agreements to commit terrorist acts.

e. Support for terrorism offences (the principle of legality; res. 1373)

29. Title 18, United States Code, Section 2339A provides:

(a) Offence.—Whoever, within the United States, provides material support or resources or conceals or disguises the nature, location, source or ownership

of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out a violation of (statutory offences listed) ... shall be fined under this title, imprisoned for not more than 10 years, or both.

Although the Financing Convention speaks only of funds, meaning tangible or intangible assets or legal evidence of ownership, many national laws and Security Council resolutions address additional forms of support, such as training or shelter. As will be discussed in Section B-3, international cooperation may not be available when national laws differ in the conduct they criminalize. Nevertheless, a prohibition criminalizing forms of non-financial support not specified in the 1999 Convention may better protect national interests, just as it may be useful to have a criminal association or conspiracy law even though those offences do not appear in United Nations anti-terrorism instruments.

30. A law that prohibits supporting or encouraging terrorism, without further specification, would risk violating the rule of law principles of legality and certainty referenced in paragraph 19. Even persons skilled in the legal culture of a country would have difficulty knowing in advance what conduct would be considered supporting or encouraging terrorism, even assuming that the term “terrorism” were clearly defined as preparation for or the commission or attempted commission of specified violent offences. If a statutory prohibition is expressed in general language, or lists several activities with no common characteristics, there is no basis to apply the limiting principle of *ejusdem generis*. That Latin phrase, meaning things of the same kind, may be familiar only to persons with a legal education, but its effect in statutory interpretation is easily recognizable even by non-lawyers. Ambiguity in a general prohibition can be greatly reduced if the law lists factual examples identifying common characteristics of the prohibited conduct. In the abstract, the phrase in the American law about providing “material support” could be taken to mean “material” in the sense of physical. It could also be thought to mean “material” in the legal sense of important or influential, even though of an intangible nature, such as editorial support by a widely read publication. That ambiguity is avoided by the listing of examples that only involve financial, physical or other tangible support, by implication excluding support of an intangible, intellectual nature.

(b) Definitions.—In this section, the term “material support or resources” means currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation and other physical assets, except medicine or religious materials. (Section 2339A (b), Title 18, United States Code).

31. Some legislation applicable to support for terrorism contains exceptions, e.g. for family members, for physicians providing medical services, or for medicine. Section 270-ter of the Italian Penal Code establishes that whoever provides food, refuge, hospitality, transportation, or means of communication to anyone involved in a subversive association may be punished, except for whoever does such an act in favour of an immediate family member. A similar disposition can be found in Article 295 bis of the Chilean Criminal Code. Such exceptions may have precedents in a country’s general criminal law, but they must be evaluated in the light of the mandatory obligation, under Chapter VII of the United Nations Charter, to comply

with the decision of the Security Council in resolution 1373, paragraph 2 (e), that States must:

Ensure that any person who participates in ... supporting terrorist acts is brought to justice ...

32. If legislative exceptions allow family members to agree to harbour a relative known to have committed violent terrorist acts, and even to do so in advance of a violent attack, or permit the provision of medical supplies in anticipation of casualties in violent terrorist operations, it could be questioned whether those laws conform to the obligation under resolution 1373 to ensure that persons involved in terrorist acts are brought to justice and are denied safe haven. A compromise solution might be to accommodate family loyalties by possible mitigation of any penalty, or its discretionary application, rather than by legitimizing such actions.

33. As for the desirability of providing medical treatment to any person needing medical assistance, there are differing views on whether that humanitarian obligation is inconsistent with a duty to report specified injuries, such as gunshot wounds, to law enforcement authorities. In the case of *De La Cruz Flores v. Peru* of 18 November 2004, the Inter-American Court of Human Rights relied upon a World Medical Association International Code of Ethics, which provides that “a physician shall preserve absolute confidentiality on all he knows about his patient even after the patient has died” and found (para. 102) that:

... by imposing to the physician the obligation to denounce possible criminal conduct by his or her patient on the basis of the information obtained while exerting their activity [...] the State, in the sentence of 21 November 1996, has violated the principle of legality.¹²

Exceptions to medical secrecy are found in many domestic violence laws requiring the reporting of injuries without regard to the consent of the victim. This perspective seems to be similar to that found in Vol. 1, page 88, of the publication by the International Committee of the Red Cross, entitled *Customary International Humanitarian Law*, which reviews the history of the issue of reporting wounds caused by firearms during armed conflicts and determines that:

... there is no rule in international law which prohibits a State from adopting legislation making it compulsory to provide information, including, for example, concerning communicable diseases, and a number of States have done so.

Article 22 of the Tunisian 2003 Anti-Terrorism and Money-Laundering law punishes whoever does not immediately report knowledge relating to terrorist offences. This obligation does not extend to family members of a suspect, but applies to persons bound by medical secrecy.

f. Punishing preparation of terrorist acts

34. Article 27-3 of the 2003 United Nations Convention Against Corruption refers to adoption of such legislative measures as may be necessary to establish as a criminal offence, “... the preparation for an offence established in accordance with this Convention”. With the exception of the Financing Convention, the universal

¹² http://www.corteidh.or.cr/seriecpdf/seriec_115_esp.pdf.

anti-terrorism agreements do not criminalize preparation independently of the commission or attempted commission of the ultimate violent act.¹³ This limitation is common,¹⁴ but now must be considered in light of the duty imposed by paragraph 2 (e) of Security Council resolution 1373, which obliges States to:

Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences ... (emphasis supplied).

An example of legislation punishing preparations for crime is found in Article 22 of the Criminal Code of the Republic of China:

Preparation for a crime is preparation of the instruments or creation of the conditions for the commission of a crime.

One who prepares for a crime may, in comparison with one who consummates the crime, be given a lesser punishment or a mitigated punishment or be exempted from punishment.

35. Some countries have reported to the Counter-Terrorism Committee of the Security Council that the absence of a law criminalizing financing of or non-financial preparations for terrorism would not prevent the punishment of such conduct as a form of participation in the ultimate terrorist attack.¹⁵ Criminalization that depends upon the attack being attempted or completed cannot satisfy Article 2, paragraph 3 of the Financing Convention), which provides that:

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

As will be seen in connection with extra-territorial issues in Part B-3, the preventive potential of the Financing Convention can best be realized by a separate, substantive financing offence applicable without regard to where the violent act is to be carried out or to whether it is attempted or accomplished.

36. If a country has not given statutory notice that financing or otherwise preparing foreign terrorist acts is a domestic crime, the principle of legality would prevent its courts from imposing punishment for domestic participation in or connection with an act that is criminalized only by the law of a foreign country. Such concerns are resolved by a legislative scheme such as that in South Africa. Section 1 (xxiii) of the Protection of Constitutional Democracy Act defines a “specified offence” under various sections, including Section 14, as including:

¹³ However, see Footnote 7 concerning the provisions of the Nuclear Terrorism Convention. Its Article 7 calls upon States Parties to cooperate by taking measures to prohibit preparation, encouragement, instigation, organization and provision of assistance or information to those who prepare convention offences, but does not require criminalization of those acts.

¹⁴ See Article 25.3 (b) of the Statute of the International Criminal Court, providing that whoever orders, solicits or induces an offence is criminally responsible only if the crime in fact occurs or is attempted.

¹⁵ See Reports from Member States at http://www.un.org/Docs/sc/committees/1373/submitted_reports.html).

(b) Any activity outside the Republic which constitutes an offence under the law of another state and which would have constituted an offence referred to in paragraph (a) had that activity taken place in the Republic;

Section 14 then provides that:

Any persons who:

(a) *threatens;*

(b) *attempts;*

(c) *conspires with any other person; or*

(d) *aids, abets, induces, incites, instigates, instructs or commands, counsels or procures another person,*

to commit an offence in terms of this Chapter, is guilty of an offence.

g. Incitement to terrorism (ICCPR Art. 20; Security Council resolution 1373 and 1624)

37. One might initially assume that forming an agreement to commit a terrorist related crime is the earliest stage at which intervention is appropriate under rule of law principles. The ICCPR is one of the few binding international instruments defining the substantive and procedural criminal justice elements of international human rights law, and it teaches otherwise. Article 20, paragraph 2, of the ICCPR requires that:

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

General Comment 11 (1983) of the independent experts making up the Human Rights Committee created pursuant to the ICCPR emphasizes that:

For art. 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described there are contrary to public policy and providing for an appropriate sanction in case of violation.

38. While neither ICCPR Article 20 nor General Comment 11 specifies that the prohibition or sanction against advocacy of discrimination, hostility or violence must be criminal in nature, it is difficult to imagine non-penal sanctions being effective against dedicated terrorists. The rule of law as expressed in international instruments recognizes that incitement to crime and violence may be prohibited by criminal sanctions. Article 3-1 (c) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, dating from 1988, called upon States Parties to consider establishing as a criminal offence, when committed intentionally:

(iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly:

The 1998 Statute of the International Criminal Court, Article 25-3 (e), also contemplates criminal responsibility for incitement by any person who:

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

As mentioned previously in footnotes 7 and 13, the International Convention for the Suppression of Acts of Nuclear Terrorism addresses but does not explicitly require the criminalization of conduct recognizable as incitement in its Article 7.

(1) The States Parties shall cooperate by:

(b) Taking 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 illegal activities of persons, groups and organizations that encourage, instigate, organize ... those offences.

39. Because terrorist propaganda incites discrimination, hostility and violence by advocating hatred on national, racial or religious grounds, penalizing such incitement would be a direct means of implementing the ICCPR even when the harm being incited does not occur. Prohibiting such incitement based upon the additional grounds of cultural differences would seem to be an entirely consistent extension of the proactive, preventive approach represented by Article 20. Much current terrorist rhetoric, such as the statement on *Jihad Against Jews and Crusaders* issued by the World Islamic Front in February 1998,¹⁶ incites hostility and violence with appeals to an intermingled array of national, racial, religious and cultural hatreds. Osama bin Laden's *Letter to the American people*¹⁷ of September, 2002, promised a death struggle if that country does not adopt a particular religious orientation; reject fornication, homosexuality, the use of intoxicants, gambling and the charging of interest; admit to being a nation without principles or manners; cease support of Israel, India, Russia, and the Philippine Governments; withdraw from Islamic countries; and cease supporting those countries' governments.

40. The United Nations Security Council expressly addressed incitement to terrorism in two of its resolutions. Paragraph 5 of Article 3 of resolution 1373 (2001):

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

The Security Council returned to the incitement issue in resolution 1624 (2005), which:

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

- (a) Prohibit by law incitement to commit a terrorist act or acts;*
- (b) Prevent such conduct;*

¹⁶ <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>.

¹⁷ In *Guardian Unlimited, Observer Worldview Extra*, <http://observer.guardian.co.uk/worldview/story/0,11581,845725,00.html>.

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

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

4. Stresses that States must ensure that any measures taken to implement paragraphs 1, 2 and 3 of this resolution comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law:

h. Civil and political rights impacted by incitement offences (ICCPR Art. 18-19)

41. While mandated by Article 20, prohibitions against incitement must be crafted with care to comply with other articles of the ICCPR. According to Article 19:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. Fortunately, guidance on the limits of an anti-incitement law is found in Article 19 (3).

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

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

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

Simultaneously implementing both Article 19 and Article 20 to safeguard the right of every person to be free from the threat of violence, while protecting freedom of opinion and expression, necessitates careful choices of statutory policy and language. As dictated by paragraphs 1, 2 and 3 of Article 19, criminal laws may not restrict the right to hold opinions, but may restrict expressions of opinion threatening the rights of others, national security, public order or morals.

42. Additionally, paragraph 1 of Article 18 of the ICCPR guarantees that:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The experts of the Human Rights Committee have made it clear that restrictions analogous to those allowed on expression of opinion under Article 19, paragraph 3, may be imposed on manifestations of belief under Article 18.

In accordance with Article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (General Comment 22, 1993, emphasis supplied).

Despite the fact that Article 18 is designated as one of the non-derogable articles of the Covenant, restrictions may legally be imposed under paragraph 3 of the Article.

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

43. The ICCPR and the rule of law values that it represents thus permit restrictions on the advocacy of national, racial or religious (and presumably cultural) hatred that incites discrimination, hostility or violence. Acts of counselling, persuading or inflaming a listener, reader, or viewer to commit immediate physical violence are the most easily recognizable cases of punishable incitement. But what conduct should be considered as harmless, or at least protected, manifestations of religious belief or expressions of opinion, and what constitutes punishable incitement? What of the appeals to hatred broadcast by Radio Television Libre des Mille Collines in Rwanda in 1994, directing the audience to identify targets and prepare for the day when violence would come? Must a State wait until the signal to kill is given before punishing hate propaganda? That is a rhetorical question, the answer to which seems self-evident. Not all situations are so easily answered by an intuitive response. What of instructing teenagers for years that it is their religious or historical duty to use violence against a hated nationality, cultural or religious group? Can instruction be punished even though it seeks to cause violence at some undefined date and place, and not today or tomorrow? How does the prosecution prove that inflammatory rhetoric creates a danger of violent offences, when only a few students may be inspired to commit such offences and will not do so until years later?

i. The Council of Europe definition of provocation/incitement

44. The Council of Europe (COE) Convention on the Prevention of Terrorism provides one model for analysing the above questions. Its Article 5 is entitled "Public provocation to commit a terrorist offence", and provides that:

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

45. This language addresses four questions concerning the interaction of a provocation/incitement offence with freedom of expression. First, only public messages are criminalized, leaving non-public incitement to be dealt with under the general concepts of criminal responsibility, which may include complicity, criminal association, conspiracy, aiding and abetting, counselling, preparing, organizing, directing or contributing to offences. Second, making a subjective intent to incite

the commission of a terrorist offence an element of the offence eliminates many possible objections concerning freedom of expression and the value of intellectual discourse concerning unpopular ideas. This is not inconsistent with the evidentiary principles, referenced in paragraph 24, that the necessary subjective intent can be inferred from objective factual circumstances. Third, no legislative or executive authority is given power to declare that any particular message, slogan, symbol or philosophy is dangerous or prohibited per se. The offence element that the message being publicized will cause the danger of the commission of a terrorist offence must be proved to the satisfaction of an independent judiciary in a specific factual context. Fourth, conduct provably causing a danger of the commission of terrorist offences is punishable whether or not it involves direct advocacy of particular offences. This provision is important with respect to ideological, religious and intellectual indoctrination justifying violence, but without an explicit appeal to commit a specific attack on an identified target.

46. The last element of the definition, that the message “causes” a danger that an offence may be committed, uses a word of common meaning often used in legislation without explanation or definition. However, in most laws, the grammatical object of the verb “causes” is an observable physical consequence, a death, injury or property loss. The COE Convention uses the word “causes” in a less tangible way, which may create rule of law issues in application. A danger that a terrorist offence will be committed is a potential rather than actual consequence, calling for a judicial forecast of a future event rather than a declaration that an observable event or condition has occurred or exists. Until an act of terrorism is attempted, there can be different views about the possibility or probability that a demagogue’s efforts to influence an audience will ultimately be successful. A subjective intent requirement ensures that no innocent speaker risks being punished for unpredictable reactions by members of an audience. Nevertheless, national legislation or jurisprudence will have to define what probability of harm constitutes the “danger that one or more such offences may be committed”. The rule of law demands that those words have sufficient certainty that they not be subject to application in an arbitrary and unpredictable manner. The Commissioner for Human Rights of the COE has suggested that praising the perpetrator of an attack, denigrating its victims or calling for funding of terrorist organizations could constitute forms of indirect provocation to violence.¹⁸

j. Existing laws on incitement to violence

47. Virtually every country punishes one who causes another to commit a crime, either by defining that person as a participant in the crime or by defining a specific offence of incitement. Section 2 of Title 18 of the United States Code provides that

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. wilfully causes an act to be done which if done directly

(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

¹⁸ http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/CommDH%282005%291_E.doc.

An informative collection of the laws of member and observer states of the COE appears in the publication, “Apologie du terrorisme” and “incitement to terrorism”, Council of Europe (2004). 41 members and 4 observer States of the Council of Europe reported on their legislation. The COE publication focused on how many countries had laws specifically prohibiting apology for or incitement to terrorism, but the country responses revealed that many had statutes prohibiting incitement to commit crimes or acts of violence generally. Section 259 of the Swiss Penal Code is a clear and succinct example of a law criminalizing incitement separately from the ultimate offence.

1. *Anyone who publicly incites the commission of a felony shall be punished with a maximum of three years' imprisonment.*

2. *Anyone who publicly incites the commission of a crime involving violence against persons or goods shall be punished with imprisonment or a fine.*

48. Some laws focus on immediacy in defining incitement. The statutes of the International Criminal Court, Article 25.3 (e) and of the International Criminal Tribunal for Rwanda, Article 2.3, refer to persons who “directly and publicly” incite genocide. When a charismatic speaker harangues an audience to hunt down and kill members of a target group, in a country where ethnic tension has within recent memory resulted in mass murders, the direct and unacceptable threat of violence is apparent. More difficult cases are presented when legislation prohibits incitement that is neither public nor immediate, or does so by prohibiting the circulation or possession of inflammatory materials. A practical obstacle to prohibiting incitement by printed, recorded or electronic propaganda is that the inflammatory materials may come from an unknown author or publisher, or from outside the country, and the only subjects within reach of the law may be distributors or possessors of inflammatory materials. A complicating factor in drafting a statute against possession of such materials will be the difficulty in distinguishing possession of hate-crime propaganda for innocent purposes and possession for the purpose of provoking hostility and violence. A person with 50 copies of a video inciting hatred and violence and depicting decapitation of hostages presumably intends to distribute the material. The possessor of a single copy may intend to view it privately to devise religious arguments against such cruelty, or may plan to use it to recruit volunteers for terrorist actions.

k. Existing laws on incitement to discrimination and hostility

49. Every legal system must ensure that even the most inflammatory agitator is protected by the principles of legality and certainty and the guarantees of the ICCPR. Arriving at a determination that a communication causes a future danger that a violent terrorist offence will be committed involves a speculative evaluation of the understanding, maturity and receptiveness of the audience, the persuasiveness of the speaker, and the influence of external variables. However, an anti-incitement law need not involve the uncertainty of predicting future violent consequences. Article 20 of the ICCPR does not require only the prohibition of incitement to violence, but also of incitement to more common consequences:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence ... (emphasis supplied)

50. A number of countries have enacted legislation, often grounded in historical experience, to prohibit acts that currently may pose a greater risk of inciting discrimination and hostility than of immediate violence. Such laws sometimes prohibit the attempted justification or denial of past or present discrimination, hostility or violence (so-called *apologie* offences). Section 130 (3) of the German Criminal Code, punishes approval, denial or the representation as harmless of certain acts committed during the National Socialist Party rule. Article 151a of the Criminal Code of Croatia provides that:

(1) Whoever produces, sells, imports or exports through a computer network or in any other way makes available to the public promotional materials glorifying fascist, Nazi and other totalitarian states, organizations and ideologies which advocate, promote or incite to hatred, discrimination or violence against any individual or group on the basis of race, colour, gender, sexual preference, national or ethnic origin, religion, political or other beliefs, or for such purposes possesses large quantities of these promotional materials, shall be punished by a fine or by imprisonment not exceeding one year.

(2) A criminal offence does not exist if the material referred to in paragraph 1 of this Article is prepared or made available to the public for research, artistic or scientific purposes or with the aim of reporting about present or past events.

Other laws prohibit the display or distribution of specified symbols, again subject to exceptions for research, artistic or other innocent purposes.¹⁹

51. In applying these laws, ICCPR Article 19-2 must be considered. It provides that

Everyone shall have the right to freedom of expression: this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Electronic communications have tested this “regardless of frontiers” language. European courts have upheld restrictions imposed on prohibited expressions in international commerce, including Internet access and transactions. In *UEJF and Licra v. Yahoo! Inc. and Yahoo France*, the Tribunal de Grande Instance de Paris awarded damages and ordered the search engine Yahoo to make impossible Internet access from France to its auction sites that sold Nazi paraphernalia that would violate Article R. 645-2 of the Penal Code.²⁰ The German Federal Court of Justice has found an Australian resident subject to prosecution for maintaining a website in Australia, accessible through the Internet. The site publicized opinions denying the existence of the Holocaust, in violation of Section 130 of the German Criminal Code.²¹

¹⁹ Article 86a, German Penal Code; Article 269/B of the Hungarian Criminal Code, amended 1993.

²⁰ Tribunal de Grande Instance de Paris, Ordonnance de référé, 22 mai 2000, UEJF et Licra c. Yahoo France, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm>.

²¹ Bundesgerichtshof, 12 December 2000, Strafkammer AZ/S R 184 (2000). See also *Scharsach and News Verlagsgesellschaft v. Austria* No. 39394/98, § 30, ECHR 2003-XI).

I. Recruitment and procedural options concerning terrorist groups

52. Operative paragraph 2 (a) of Security Council resolution 1373 requires States to suppress the recruitment of members of terrorist groups:

Paragraph 2: Decides also that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

Some countries have laws that include recruitment for terrorism within their definition of “terrorist activities”. Countries with legal dispositions specifically aimed at such recruitment include Canada (Art. 83.18 (3) of the Criminal Code), Uganda (Anti-terrorism act, Part III, Art. 9), Tunisia (Loi contre le terrorisme et le blanchiment d’argent, art. 14) and Cyprus (Federal Law on Terrorism, Art. 11). The Cyprus law punishes: Any person, who knowingly agrees to recruit or recruits another person -

(a) To be a member of a terrorist group or a proscribed organization; or

(b) To participate in the commission of an act of terrorism.

The Tanzanian Prevention of Terrorism Act, 2002, uses virtually identical wording in its Article 21. Article 6 of the Council of Europe Convention on the Prevention of Terrorism (2005) establishes recruitment as an offence, together with public provocation to commit a terrorist offence and training for terrorism, and define recruitment as:

“to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences (under the listed universal conventions and protocols) by the association or the group” (Art. 6).

53. Some countries do not have laws specifically prohibiting recruitment for or membership in terrorist organizations, and rely upon general laws prohibiting criminal association, conspiracy, and support to terrorism.²² Other countries have legislative schemes allowing executive or judicial proscription of groups as illegal terrorist organizations, and punishing subsequent recruitment for or participation therein as an offence. Such laws must take into account the principle of legality and Article 22 of the ICCPR, which guarantees that:

1. *Everyone shall have the right to freedom of association with others ...*

2. *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interest of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights or freedoms of others ...*

54. Accordingly, clear procedures should be established by law for designation by an appropriate authority. Definitional and evidentiary standards should be fixed for

²² See Reports from Member States at http://www.un.org/Docs/sc/committees/1373/submitted_reports.html.

the determination of social dangerousness that justifies banning a group. An independent review mechanism should be provided to allow determinations to be challenged and corrected. A legal determination must be made as to the consequences under national law of a United Nations or regional designation of a group as terrorist in nature, and how those consequences will be implemented. The practical eventuality must be anticipated that a designated group will change name or formal structure, yet continue to be substantially the same dangerous entity.²³ A common feature of such laws is that membership in the organization is not punishable if the person joined the organization prior to its proscription or did not actively participate in its activities after the proscription.

55. In deciding what authority is competent to declare an organization a terrorist entity, Russia, Uzbekistan and Turkmenistan assign that responsibility to the judiciary.

An organization is deemed to be terrorist and is wound up on the basis of a court decision (Art. 25, Russian Federation Law No. 130-FZ on the Fight Against Terrorism as amended in 2002).

In India, the Unlawful Activities (Prevention) Act of 1967, amended in 2004, provides for designation by the Central Government. A review committee, chaired by a past or current Judge of a High Court, exercises an exclusive power of review. Once a group has been proscribed under this procedure as a terrorist organization, it becomes an offence to be associated or profess to be associated with the organization, to invite support or financing for it, or to arrange a meeting to further its activity.

m. Possession of articles or knowledge related to terrorism

56. One type of preparatory act that has long been criminalized to facilitate crime prevention is unauthorized or unexplained possession of articles typically associated with the intended commission of an offence, such as equipment to counterfeit currency or weapons. Intentional unauthorized possession of dangerous articles is traditionally punishable without proof of a separate attempted or completed offence in which those implements are actually put to an illegal use. *The Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*²⁴ gives examples in its Section B, paragraph 27, of air travel safety laws that not only criminalize violent attacks in international airports, but seek to prevent such attacks by prohibiting the introduction of weapons and other dangerous articles into airport premises.

57. Article 3 (2)(f) of South Africa's Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004 prohibits possession of anything connected with engagement in a terrorist activity if the possessor knows or ought reasonably to have known or suspected that connection. Section 101.4 of Australia's Security Legislation Amendment (Terrorism) Act 2002 prohibits possession of anything connected with preparation for, engagement in or assistance in a terrorist

²³ India deals with this problem in Section 41 of the Unlawful Activities (Prevention) Ordinance, 2004, amending the Unlawful Activities (Prevention) Act of 1967. "An association shall not be deemed to have ceased to exist by reason only of any formal act of its dissolution or change of name, but shall be deemed to continue so long as any actual combination for the purposes of such association continues between any members thereof."

²⁴ http://www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf.

act, either knowing of or being reckless as to such connection. Such laws do not necessarily implicate the rule of law principle of certainty at the charging or trial stage, because a deliberate intent or provable recklessness concerning the object's use is an essential element to be proved before the possessor can be convicted. However, the application of such a law by patrol and investigative agencies must be very carefully supervised and controlled to avoid its arbitrary application. The experience with airport passenger screening after the attacks of September 2001 demonstrated how broadly security personnel have interpreted the category of dangerous or suspicious items, including fingernail clippers.

58. Because the intended purpose for the possession of an object may be difficult to determine at the time of an initial police encounter, a law making the legality of possession of an object depend upon its possible use confers wide discretion upon public safety authorities. That margin of discretion imposes affirmative responsibilities upon the executives of public safety agencies to guard against arbitrariness in the law's application. This includes careful attention to procedures ensuring there is a defensible reason or policy behind any intrusion. The risk of perceived or actual racial, ethnic or cultural profiling is a danger to be acknowledged and held to the lowest possible level. Articles 9 and 26 of the ICCPR address some of the guarantees particularly applicable to enforcement of a broad instrumentalities law:

Article 9. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention [...]

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release ...

Article 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

59. A number of national laws require persons to inform authorities if they come into possession of knowledge about terrorist activity. paragraph 8 of Article 261 of the Hungarian Criminal Code punishes a person who has reliable knowledge of the preparation of a terrorist act but fails to report it to the authorities as soon as possible. Article 14-3 of the ICCPR provides that in the determination of any criminal charge, a person is entitled:

(g) Not to be compelled to testify against himself or to confess guilt;

Accordingly, national laws making it an offence to intentionally conceal knowledge of terrorist offences or preparations must be interpreted as not requiring a person involved in an offence to furnish evidence against himself or herself. An appropriate immunity provision can allow a person who has concealed knowledge of terrorism to be forced to testify under penalty of imprisonment, if the provision ensures that the testimony may not be used as evidence against the witness except in a prosecution for testifying falsely.

n. Training and other forms of association with terrorist groups

60. Section 22 of the Tanzanian Prevention of Terrorism Act, 2002 punishes recruitment for or association with a terrorist group and training in the Tanzania for acts prohibited by paragraph (a) of the Section. The prohibition in paragraph (a) extends to acts in Tanzania intended to promote or facilitate violent acts in a foreign state and whether or not their objective is achieved. This law is an example of legislation designed to prevent a country's territory from being used as a safe haven from which attacks can be launched against other States.

61. Some laws prohibit repeated intentional association with known members, promoters or directors of a publicly proscribed terrorist organization, when that association lends support to the organization. Such a prohibition implicates the freedom of association protected found in Article 22 of the ICCPR and quoted above in paragraph 53, as well as the freedom of expression protected by ICCPR Article 19. Section 102.8 (1) of the Australian Criminal Code punishes "Associating with terrorist organizations", but does not apply in family situations, in the context of public religious worship and practice, to association for humanitarian purposes or to provide legal advice or representation, or if the section's application would infringe any constitutional doctrine of implied freedom of political communication.

B.2. Procedural improvements

a. Need for integrating substantive and procedural mechanisms within the rule of law

62. Once the principles of legality and certainty have been satisfied by clearly defining what forms of planning, preparation, incitement and support for violent terrorism may permissibly be considered as criminal offences, a corresponding review should be made of procedural mechanisms. A preventive strategy demands that lawful investigative and evidentiary mechanisms facilitate prosecutorial intervention before terrorist tragedies occur, while respecting the procedural protections embedded in the rule of law. It would be an exercise in frustration to criminalize planning and preparation for terrorist attacks, and then not to permit the covert investigative techniques necessary to produce evidence of such plans and preparations. So, what mechanisms are consistent with international standards that will allow police, domestic security agencies, prosecutors and investigating magistrates to gain reliable, lawful evidence of terrorist preparations before they mature into violence? Before examining procedural mechanisms designed to facilitate the application of substantive offences in preventing terrorism, it is essential to stress one overriding imperative. No procedural measure may be allowed to undermine rule of law guarantees. This means that the procedures provided in ICCPR Article 4 must be observed in any public emergency when a State wishes to derogate from those ICCPR articles that permit departures from their guarantees. No such departures are permitted from the articles pertaining to the right to life (Art. 6), torture (Art. 7), slavery and servitude (Art. 8), imprisonment for an inability to fulfil a contract (Art. 11), ex post facto offences (Art. 15), the right to recognition before the law (Art. 16), and freedom of thought, conscience and religion (Art. 18, subject to necessary limitations on dangerous manifestations of belief under Art. 18-3). Absent a proper derogation under Article 4 means that the procedural guarantees of Article 9 to be informed of the reasons for arrest and of

any charges, to be brought promptly before a judicial authority, and to trial within a reasonable time, and to contest the lawfulness of detention and to be compensated for unlawful arrest or detention, must be scrupulously respected. Similarly, the presumption of innocence and the rights to a fair trial, to equality before the law, to counsel of one's choice, to examine and call witnesses, to interpretation if necessary, and not to testify against one's self or to confess guilt are protected by Article 14, absent a proper derogation according to Article 4. As provided in Article 4, such officially proclaimed derogations are permissible only to the extent strictly required by the exigencies of a threat to the life of the nation and must not be discriminatory.

b. Acquiring information through community cooperation

63. The obvious foundation for successful prosecution of terrorism is the ability to acquire information about plotters and their activities. There is a consensus that an impermissible approach was that represented by a Ministry for State Security in a former government, which has become a stereotype of an overly invasive domestic security agency. According to popular information sources, in a country of approximately 17 million inhabitants, a civilian network of 300,000 informants, called unofficial employees, cooperated with approximately 100,000 fulltime intelligence and security officials.²⁵ Such a massive penetration of society by a state surveillance organization is unhealthy for a multitude of reasons; not least among them being the resulting public morality of betrayal and mistrust. But even though carried to an extreme, this example conveys an important reality. Public security depends upon information that can come only from the individual and neighbourhood levels. Enlightened security forces recognize that public cooperation should come as a result of the police having earned the confidence of the communities in which terrorists may be formed or found, not as a result of fear or oppression. Public authorities must strive to create an atmosphere in which community members identify with the interests of public safety, and do not ignore dangerous groups or incitement to violence because of a sense of alienation. In Spain, authorities have elaborated a "Decalogue of citizen cooperation"²⁶ in which they give practical advice as well as stress the necessity and effectiveness of citizen collaboration in the fight against terrorism. Lord Toby Harris, former chair of the Metropolitan Police Authority (London) declared that:

*The special relationship between police and the diverse communities they serve is fundamental to the maintenance of an effective and transparent criminal justice system. Without a high level of cooperation, openness, support and trust on all sides, our courts, judiciary and police lack the credibility to do their jobs*²⁷.

64. But even if credible community information is received and combined with physical surveillance of suspects, public record information and intelligence from foreign governments, those sources will rarely provide proof sufficient for a

²⁵ See Wikipedia Encyclopedia, <http://en.wikipedia.org/wiki/Stasi>. See also John O. Koehler, Stasi, The Untold Story of the East German Secret Police, <http://www.nytimes.com/books/first/k/koehler-stasi.html>.

²⁶ Decálogo de colaboración ciudadana, <http://www.guardiacivil.org/terrorismo/decalogo/index.jsp>.

²⁷ <http://www.mpa.gov.uk/about/speeches/2003/030430.htm>.

criminal conviction. Human source information, even from cooperative persons close to suspected terrorists, may not permit prosecution because not based upon direct personal observations, or because the reporting source has access to only partial information or is being misled by the person of interest. When the activities of suspect persons are potentially dangerous, but insufficient evidence exists to permit a successful prosecution, the authorities must either wait passively or adopt proactive measures. Passively watching poses the risk that a plot exists and will progress to a violent conclusion without the knowledge of the watchers. It also is unlikely to be cost-effective. Continuous physical surveillance is resource intensive and difficult to maintain for any extended period, both for budgetary reasons and because of the probability of discovery. Intermittent surveillance is reliable only as an alarm to obvious changes in circumstances after they occur, such as a person changing employment or their routine activities. Consequently, innovative and proactive measures to develop evidence must be considered.

c. Controls permitting development of national security intelligence into evidence

65. National security intelligence agencies will frequently have access to technical and foreign sources of information not available to domestic agencies working within the criminal justice system. To protect sensitive covert sources, these agencies may be unwilling to share any information. In some circumstances they may provide a sanitized version, available for investigative purposes only, and not for evidentiary use or attribution. ICCPR Article 14-3 (e) guarantees that in the determination of a criminal charge, the accused is entitled:

To examine, or have examined, the witnesses against him ...

In observing this guarantee, authorities must frequently make difficult choices between protecting the anonymity of a covert source of information or using that information as evidence and subjecting the technical or human source to exposure in the examination required by the ICCPR. Some countries have experimented with procedures that allow a limited degree of anonymity, at least with respect to the public and the accused, although the Court and defence counsel may be aware of the true identity of the witness or source.

66. The European Court on Human Rights has considered with the use of anonymous witness in connection with Article 6 of the European Convention on Human Rights. The Court has held that the Convention does not preclude reliance, at the investigative stage, on sources such as anonymous informants, but has identified difficulties inherent in the use of such sources at trial:

If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable.²⁸

The Court has identified a number of safeguards that can permit withholding the identity of a witness from an accused consistently with rule of law and human rights principles. It must be established that use of the measure was strictly necessary, and that “the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities”²⁹ (such as

²⁸ Kotovski v. the Netherlands, 20 November 1989, para .42.

²⁹ Doorson v. the Netherlands, 26 March 1996, para. 72.

allowing defence counsel to question the witness, with knowledge of his or her identity, in the presence of the judge). The Court also advised that such evidence should be treated with extreme care and should not be relied upon solely or to a decisive extent as the basis for a finding of guilt.³⁰

67. When intelligence services are willing or have been compelled to allow their information to be used for evidentiary purposes or for investigative leads, the essential values of truth seeking and integrity in the criminal justice system must not be compromised. When criminal law procedures protect the confidentiality of information not itself relied upon as evidence, intelligence sources may become more readily available to generate independent evidence without compromising sensitive sources and methods. This is unobjectionable if the reliability of all evidence can be verified through independent witnesses available for examination at trial. An example might be information from a protected technical or human source that permits law enforcement authorities to be in position to observe and seize a shipment of illegal weapons, and to testify to all of their actions except the source of the information that brought them to the scene. In the United Kingdom, Article 17 of the Regulation of Investigatory Powers Act of 2000 prohibits governmental disclosure of the existence or evidence from intercepted communications in judicial proceedings. This rule would encourage and protect development of technical surveillance, but would not permit its product to enjoy evidentiary value. Countries of the Commonwealth of Independent States typically have detailed laws controlling operational investigation activities, establishing the authorizations needed from a court or prosecutor, and specifying the permissible use and degree of confidentiality to be observed with respect to the investigative product.

68. When criminal procedure laws create an unacceptable or unpredictable risk of disclosure of intelligence sources and methods, intelligence agencies will seek to protect their sources and not share information even for non-evidentiary purposes. The right recognized in ICCPR Article 14 to examine witnesses against an accused does not resolve whether a defendant is entitled to explore the sources that led to development of those witnesses. A variety of different approaches to that issue are found in national jurisprudence. However, whatever protections of the rights of an accused are embodied in national law must be observed, and the integrity of the judicial process protected. Authorities must be vigilant against any camouflage or concealment of an intelligence source that would involve fraud and misrepresentation in the judicial process. Canada's anti-terrorism Bill C-36, enacted 18 December 2001, recognized the need to anticipate these issues. Article 83.05 provided for the listing of terrorist entities by the Solicitor General subject to judicial review, and established a procedure whereby evidence endangering national security or human life could be summarized for the defence. Article 83.06 made special provision for information from international organizations and foreign governments. Sensitive materials from those sources may be submitted to the court for a determination whether their use as evidence would require that they be summarized for the defence. If the court finds that summarization would be required, the Solicitor General may decide to withdraw the materials without jeopardizing their confidentiality, thus protecting the sources and methods of the international organization or foreign government.

³⁰ *Idem*, para. 76.

d. Undercover operations and public policy considerations

69. Undercover operations permit information and evidence to be developed without alerting the targets that they are subjects of inquiry. In some legal systems the recourse to covert operations is within the discretion of the police and not subject to formal legal procedures, although there may be internal approval processes to ensure prudential supervision. In other systems, an undercover operation or controlled delivery requires approval by a prosecutor or judge, based on satisfaction of statutory criteria. In Germany, the rule is that the use of an undercover investigator has to be approved by the office of the public prosecutor.³¹ If imminent danger compels immediate action without such approval, it must be obtained within three days or the undercover operation must be terminated. In France, for offences including terrorist acts, it is the public prosecutor, or, after advice of this magistrate, the investigating judge, who can authorize an infiltration operation.³²

70. An accompanying protection found in most legal systems is a defence to criminal liability, or the rejection of evidence at trial, if the undercover agent or informant entrapped the defendant by acting as an *agent provocateur* who overcame the reluctance of an innocent person who would not otherwise have committed that type of offence:

Under penalty of nullity, these acts [of the undercover agent] cannot constitute an incitement to commit offence.³³

71. The years of apprenticeship and the selection process required of a candidate for membership in a professional criminal institution like the Sicilian or American Mafia tend to preclude in-depth infiltration, for both policy and practical reasons. A government cannot allow its officers to participate in or witness the violence that characterizes a Mafia apprenticeship, nor can it put an undercover officer at risk in a criminal environment for an extended period without protection and supervision. Limited penetration of a criminal organization may be feasible when it ventures into the marketplace to sell illegal products or services, or to buy air transport, communications services, the construction of concealed compartments for contraband in vehicles, money-laundering services, or in the case of terrorists, falsified documents, explosives or travel services. In such business exchanges the credibility and attractiveness of the undercover operation can be carefully established, while the amount of contact with the targets can be controlled, and security and supervision maintained. Most terrorist organizations do not have as structured and lengthy an apprenticeship period as a Mafia family. When terrorists deal in drugs or seek explosives, as was the case with the Madrid March 2004 bombers, or seek counterfeit documents, recruits or financing, they may be more

³¹ Der Einsatz eines Verdeckten Ermittlers ist erst nach Zustimmung der Staatsanwaltschaft zulässig. Besteht Gefahr im Verzug und kann die Entscheidung der Staatsanwaltschaft nicht rechtzeitig eingeholt werden, so ist sie unverzüglich herbeizuführen; die Maßnahme ist zu beenden, wenn nicht die Staatsanwaltschaft binnen drei Tagen zustimmt. StPO para. 110b (1).

³² Lorsque les nécessités de l'enquête ou de l'instruction concernant l'un des crimes ou délits entrant dans le champ d'application de l'article 706-73 le justifient, le procureur de la République ou, après avis de ce magistrat, le juge d'instruction saisi peuvent autoriser qu'il soit procédé, sous leur contrôle respectif, à une opération d'infiltration dans les conditions prévues par la présente section. Law of 9 March 2004, Article 706-81.

³³ Article 706-81, Code Penal.

vulnerable to penetration than professional criminal organizations. Before exploiting that vulnerability, however, governmental authorities need to have clear legal authorization for their actions. They also should seek as broad a political consensus as is possible on the extent to which undercover penetration is acceptable to the community. Infiltration of terrorist organizations will inevitably require lies, deceptions and personal betrayals. Penetrating terrorist circles in depth may involve deceptive financial contributions, feigned beliefs, and intrusion into religious premises. Those tactics may be criticized as sacrilegious or as involving racial intolerance, ethnic or cultural profiling, or other forms of discrimination.

e. Technical surveillance and judicial controls

72. But even a self-contained and well-disciplined terrorist group, which is resistant to undercover approaches, may be susceptible to other special investigative techniques. Information from contacts with neighbours, associates, and former romantic interests of a suspected terrorist may yield indications, but not proof, of the terrorist's criminal plans. Physical surveillance of the suspect may establish associates who have documented histories of travel to terrorist training camps, or criminal records for violent or terrorist activities. One of the suspected group may be observed videotaping targets of logical interest to potential terrorists, such as a water filtration plant, a house of worship of a hated religion, or an auditorium or other venue in which a significant political event is scheduled. At some point a combination of circumstances may satisfy the standard required for the utilization of technical surveillance in accordance with applicable privacy protections specified by national law.

73. When the level of information permitting use of special investigative techniques is achieved, the need of a criminal group to communicate to plan its activities presents obvious evidentiary opportunities. Interception of terrorist communications may require complex authorization procedures. Substantial resources often must be budgeted, particularly when foreign languages requiring interpretation or encryption techniques or other electronic complexities are encountered. Nevertheless, there are few techniques that yield more convincing evidence than a suspect's voice or other communication captured in the course of planning the details of a violent offence or boasting of past atrocities. Well-coordinated surveillance of communications can serve to monitor the degree of acceptance and enhance the security of an undercover operative or informer's dealings with the terrorist cell. Overt law enforcement contacts with the suspects can be used to generate conversations over the intercepted facility or in the monitored space about other participants or activities, or about the location of dangerous or evidentiary materials.

74. The utility and necessity of special investigative techniques, such as electronic surveillance, are widely recognized. GAFISUD, the Financial Action Task Force-style regional body for Latin America, found that most of its members allowed for a variety of electronic surveillance techniques, the most common being telephone tapping. The only exception was Bolivia, due to a constitutional prohibition.³⁴ Among the 37 countries responding to a Council of Europe survey, only Cyprus and

³⁴ Directivas Sobre Tecnicas Especiales de Investigacion, Julio de 2005, English translation furnished by the Executive Secretary, GAFISUD.

Sweden replied that their legal systems did not permit bugging, presumably meaning non-consensual microphone surveillance, as opposed to interception of electronic communications, which Sweden does allow.³⁵

f. Duration of detention (Art. 9-3 ICCPR, General Comment 8, Human Rights Committee)

75. There is no precise or universally authoritative answer to how many hours or days the rule of law permits a person to be detained in a terrorism case before being charged or released.³⁶ Article 9 of the ICCPR, cited previously, simply 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. The Statute of the International Criminal Court is no more definite as a source of guidance. Its Article 59 simply provides that an arrested person “... *shall be brought promptly before the competent judicial authority*” for a determination of the regularity of the detention. National legislation varies widely, and many systems allow extended investigative detention under judicial supervision once a preliminary determination has been made by a neutral magistrate that grounds for investigation or trial exist. The Human Rights Committee established to monitor compliance with the ICCPR has the power to issue General Comments on its implementation. General Comment 8, issued in 1982, states that:

“Paragraph 3 of art. 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”.

A number of countries allow preventive detention based upon dangerousness rather than upon a finding of past criminal conduct. Malaysia and Singapore utilize an executive determination of dangerousness, whereas Italy and Canada allow it based upon judicial findings. The allowable period ranges from 3 days for Canada, followed by restrictive conditions, to a year or more for the other countries.

g. Interrogation (ICCPR Art. 7; Convention Against Torture Art. 1)

76. Article 1-1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1985) recognizes that its definition of torture does not include pain or suffering incident to lawful custody, but requires the prohibition of other severe and unnecessary pain.

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining a confession, punishing for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official

³⁵ *Terrorism: special investigation techniques.*

³⁶ The European Court of Human Rights has found a police detention of four days and six hours for investigation of terrorism to violate the European Convention on Human Rights, Article 5. *Brogan and others v. U.K.*, 29 November 1988, Series A, No. 145-B.

capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

An issue of concern with respect to interrogation of detained terrorists is the fear that impermissibly coercive measures will be used, even if they do not reach the level of “severe pain or suffering” prohibited by the Torture Convention. Measures creating pain or discomfort may be unavoidable for custodial purposes and to ensure the safety of the guarding or interrogating personnel. Conversely, if the discomfort is not justified by legitimate custodial and safety needs, and its purpose is to overbear the will of the person being interrogated to secure information, it is impermissible under Article 14-3 (g) of the ICCPR. That article declares that everyone is entitled “Not to be compelled to testify against himself or to confess guilt”.

77. Some countries prohibit *incommunicado* detention. The Filipino Constitution provides in Article 3, section 12 (2), that “secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited”. A 1992 Act further punishes

“Any person who obstructs persons, or prohibits any lawyer, any member of the immediate family of a person arrested, detained or under custodial investigation, or any medical doctor or priest or religious minister chosen by him or by any member of his immediate family or by his counsel, from visiting and conferring privately with him, or from examining and treating him, or from ministering to his spiritual needs, at any hour of the day or, in urgent cases, of the night”.³⁷

The new Political Constitution of Ecuador similarly establishes that “No one will be held *incommunicado*”³⁸ (Art. 24-6), and the Penal Code reiterates “in no case and under no circumstances will anyone be held *incommunicado*, not even for the purposes of investigating”³⁹ (Art. 72).

78. Other systems permit a limited period of *incommunicado* detention to deal with the danger that a suspect may warn other members of a terrorist cell or arrange the concealment or destruction of evidence. Article 520 of the Spanish Code of Criminal Procedure permits a judge to order a person to be held for up to five days without outside contact except with a defence counsel appointed by the Court to protect the person’s rights. An extension of five days may be granted, and in certain circumstances an additional three days.

h. Witness incentives

79. Live witnesses can be crucial both as independent sources of evidence and as a means of enhancing the evidentiary value of intercepted communications. Microphone interceptions often suffer from unintelligibility because of background noise. Even a perfectly audible telephone conversation or an intercepted e-mail message may be meaningless because of the use of code or simply because the persons communicating do not explain the context of their references. The most knowledgeable resource to explain such conversations, or to describe terrorist plans

³⁷ Republic Act No. 7438 April 27, 1992, Section 4 (b).

³⁸ “Nadie podrá ser *incomunicado*”.

³⁹ “En ningún caso y bajo ninguna circunstancia, nadie podrá ser *incomunicado*, ni aún con fines de investigación.”

in the absence of any communication intercepts, would be a participant in the conversation or group. Securing such a participant's cooperation normally requires the combination of legal vulnerability on the part of the individual and the ability of the criminal justice system to provide incentives. Such motivating premiums may be an immunity provision or plea or sentence bargaining reductions, achieved through prosecutive discretion, statutory discounts, clemency, pardon, or a witness protection programme. Common law systems almost universally allow discretionary prosecution, and a decision not to charge is not subject to judicial review or supervision. In the Italian system of mandatory prosecution, statutory incentives were found necessary to motivate disassociation from the Red Brigades during the terrorist emergency of the late 1970s and early 1980s. Legislation adopted in 1981 encouraged so-called pentiti to renounce their terrorist activity and cooperate with the authorities in exchange for protection and other incentives. The legislation was later adapted to encourage defections from the Mafia and other organized crime groups.

80. A useful tool for developing cases that involve a high potential for violence is a witness protection programme. Guarding witnesses in their home environment can be prohibitively expensive. Housing in a military camp or police installation is only a temporary solution. Relocation with a new identity is often the most permanent form of protection, but re-documentation is difficult. The new identity must be supported by a life history, often for an entire family, that will survive routine verification, so records must be created and harmonized. The old identity may need to be legally suppressed, so that a re-documented person would not be civilly or criminally liable for denying or concealing information inconsistent with the new identity. Particularly for witnesses previously involved in crimes for profit, the possibility of financial fraud and abuse must be anticipated, dictating that the new credit and life history should not unduly facilitate such misconduct. Statutory immunity from liability for good faith re-documentation and case management by government authorities, in the absence of reckless or intentional misconduct, may be desirable. It may be advisable that authorities using the witness in investigations and trials not have responsibility for determining the terms of that person's protection/relocation, or for decisions revoking protection and/or re-incarcerating the witness. Tensions will arise between preserving the secrecy of the relocated person's identity and the safety of the community into which the person is located. In a federal system one can foresee the need for policy determinations and liaison arrangements between national and state authorities, and protocols governing the management of information that could jeopardize a protected person's security. In the international context, it would be helpful if domestic laws permit protection to be provided for foreign witnesses on a reciprocal basis, which would implicate legal authority for immigration procedures, identity documents, and legal recognition of a new identity.

i. Evidentiary rules

81. Procedural protections must also correspond to the types of evidence that will be generated while investigating offences preparatory to terrorism. Can a conviction be based solely upon the testimony of an accomplice, co-principal, co-conspirator, accessory or other associate in crime? If corroboration is required, can it be general in nature or must it be specific as to each element of the crime dependent upon the testimony of the cooperating witness? Specific anti-terrorism statutes will require

decisions about what statutory inferences or presumptions may be appropriate for their implementation, such as whether the possession of multiple copies of hate-crime provoking material permits an inference of the intent to distribute those materials? In paragraph 50, it was mentioned that some countries criminalize the public display of certain symbols. Other countries do not criminalize the display itself, but Article 83.18 (4) of the Canadian Criminal Code provides the evidentiary consequence that:

In determining whether an accused participates in or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused

- (a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group.

j. Reinforcement of anti-financing measures by regulatory means

82. The present discussion deals primarily with criminal justice measures, but the need for civil and regulatory mechanisms to discourage and disrupt terrorist preparations cannot be overlooked. The most articulated measures are those dealing with the financing of terrorism. Article 18 of the Financing Convention requires States Parties to adapt their domestic legislation “... to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories ...”. The article then specifies measures that should be taken, corresponding to many of the Recommendations of the Financial Action Task Force Recommendations (FATF). Those measures include customer identification, due diligence procedures, and record keeping and reporting of suspicious transactions. Since 2001, the FATF has developed nine Special Recommendations on Terrorist Financing, including controls to prevent abuse of charitable organizations for terrorist financing and on cross-border movement of cash. The major global financial institutions, the World Bank and the International Monetary Fund, have joined the FATF in adopting a joint methodology for assessing a country’s ability to combat both money-laundering and the financing of terrorism.

That methodology provides a detailed checklist for a country desiring to conduct a self-evaluation of its mechanisms for preventing money laundering and the financing of terrorism.⁴⁰

83. One of the more problematic areas of anti-terrorism cooperation involves the freezing and confiscation of terrorist funds. Article 8 of the Financing Convention requires States Parties to take measures for identification, detection, freezing, seizure and forfeiture of funds intended for terrorist offences and proceeds of such offences. Because Chapter VII Security Council resolutions are intended only to restore peace and security, their nature is coercive and not punitive. Consistently with this coercive purpose, resolutions 1267, 1333, 1373, 1390 and 1617 require only freezing (but not forfeiture) to prevent the use of assets for terrorist violence and to dissuade the persons who are deprived of their use from further involvement with terrorist acts. The individuals and entities whose assets are subject to freezing

⁴⁰ For the FATF, see *Methodology for Assessing Compliance with the FATF 40 Recommendations and FATF 9 Special Recommendations*, <http://www.fatf-gafi.org/dataoecd/45/15/34864111.pdf>, in French at <http://www.fatf-gafi.org/dataoecd/42/28/35650516.pdf>.

are designated either directly by specific Council resolutions or by a Committee process governed by resolution 1267 and successor resolutions. Both processes are accomplished through diplomatic interaction under Chapter VII of the Charter, rather than by judicial process.

84. The Financing Convention contemplates that implementing laws will permit the freezing, seizing and forfeiture of the proceeds and intended instrumentalities of terrorist acts. The Security Council resolutions apply more broadly to property held for innocent purposes and of innocent origin, except for its association with a person designated as a terrorist by the United Nations or a Member State. In complying with the resolutions, a country may seize funds but find itself without grounds for forfeiture, other than the doctrines of abandonment or escheat if the funds are not claimed. Rule of law principles would prohibit forfeiture of property without a legislative authorization. Similarly, the freezing state could not act without its finding or being provided evidence to satisfy the legal criteria for forfeiture. In response to these problems countries are increasingly adopting laws providing a domestic legal procedure for implementing United Nations resolutions adopted pursuant to Chapter VII. In addition, the Security Council has responded to humanitarian and procedural concerns. Its resolution 1452 permits national authorities to release seized funds for basic living costs and extraordinary expenses. Resolution 1617 establishes standards clarifying when an individual or entity is “associated with” a specified terrorist or terrorist entity. The resolution also requires a factual statement in support of a proposed designation by a Member State, which may be used by the Counter-Terrorism Committee in responding to inquiries and may be released, with the consent of the designating State, to aid the implementation of a freezing action.

k. Misuse of non-governmental organizations

85. The 1999 Financing Convention criminalized the provision or collection of funds when done either with the intent or in the knowledge that those funds are to be used for terrorist acts. As explained in paragraph 23, the Convention could thereby impede the support of terrorism by “dual use” organizations, which support both laudable humanitarian activities and armed struggle through attacks on civilians. Effective administrative constraints on non-profit and non-governmental organizations could greatly reduce the misuse of humanitarian funds and the necessity for criminal investigations and prosecutions. However, depending upon the needs of a situation, both administrative and criminal remedies would appear to be consistent with the provisions of the ICCPR, which guarantees freedom of association in Article 22.1, but in Article 22.2 permits whatever controls are:

... necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

86. Concern over the misuse of non-profit, non-governmental organizations has been voiced repeatedly. In its Special Recommendations on Terrorist Financing adopted in October 2001 the FATF included Special Recommendation VIII on Non-profit Organizations:

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organizations are particularly vulnerable, and countries should ensure that they cannot be misused:

- (i) by terrorist organizations posing as legitimate entities:
- (ii) to exploit legitimate entities for terrorist financing, including for the of escaping asset freezing measures: and
- (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organizations.

The FATF-World Bank-IMF methodology for assessing compliance with anti-money-laundering and combating the financing of terrorism standards includes as essential criteria the three subparagraphs of Special Recommendation VIII. It offers possible measures drawn from a FATF Best Practices Paper on Recommendation VII. Those measures emphasize regulatory safeguards rather than punitive repression, including risk-based oversight of the non-profit sector, record-keeping and reporting requirements to enhance non-profit organization transparency, the ability to verify that funds are spent as advertised, documentation of management of funds and operations, which is a particular problem if organizational funds are held only in the name of trustees, coordination of oversight with other relevant agencies and regulators, and guidance for the financial sector in dealing with the non-profit sector and in reporting suspicious transactions. (www.fatf-gafi.org, then Methodology).

87. In resolution 1526 (2004) the Security Council called upon States to cut the flow of funds to Al-Qaida, Osama bin Laden and the Taliban, “taking into account, as appropriate, international codes and standards for combating the financing of terrorism, including those designed to prevent the abuse of non-profit organizations and alternative remittance systems”. In resolution 1617 (2005) the Council:

Strongly urges all Member States to implement the comprehensive, international standards embodied in the Financial Action Task Force’s (FATF) Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing.

In resolution 1624 (2005) the Council also called upon States “... to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters”.

B. 3. International cooperation mechanisms

a. Legal bases for international cooperation

88. The foundation of a successful global anti-terrorism strategy is ratification and implementation of the existing universal instruments to permit investigative, evidentiary and extradition cooperation among states. While the criminalization provisions of these instruments are offence-specific and largely reactive, they are nevertheless the only common global language for legal cooperation against terrorism. Any additional measures must build upon this essential framework, because no effective alternative foundation currently exists. It is also necessary to recognize that a comprehensive network for mutual assistance and extradition based

solely upon the universal anti-terrorism agreements is simply not a realistic possibility in the foreseeable future. The universal instruments do not apply to criminal associations or terrorist conspiracies in their planning stages, although the Financing Convention does reach an important form of preparation. Some countries do not permit reliance upon the international cooperation provisions of universal instruments, and require bilateral treaties for that purpose. There is no realistic possibility that all of the 191 Member States of the United Nations will have comprehensive bilateral treaties covering all forms of international cooperation with all of the other 190 countries. Regional conventions can cover neighbouring countries with which interaction is most frequent, but are of no utility outside the region or grouping. One solution to many of these limitations is furnished by the legislation found in countries that allow extradition and evidence gathering assistance without a treaty, subject to anti-discrimination and other safeguards established in national legislation. Whether based upon international agreements or domestic law, however, international cooperation currently encounters many obstacles that can be overcome with a proactive willingness to innovate.

b. Double criminality

89. The principle of double criminality has been mentioned as applying when one country criminalizes conduct that is not an offence in a country from which international cooperation is requested. Traditionally, a requested country would not assist another sovereign in investigating, prosecuting or punishing a type of conduct that it did not consider sufficiently harmful to be treated as criminal under its domestic law. This principle is sometimes thought of as dictating that countries should limit their anti-terrorism offence definitions to those elements found in the universal anti-terrorism instruments. That approach might avoid refusals of cooperation based upon the dual criminality issue. Nevertheless, it is not a conclusive argument against penalizing offences preparatory to terrorism that are not defined in United Nations anti-terrorism conventions and protocols. Although terrorism is increasingly international in nature, a domestic law may permit many important prosecutions without the need for formal types of international cooperation that depend upon double criminality. Domestic definitions of criminal liability that include and are broader than the offences defined in international instruments do not prevent compliance with a cooperation request from a country with a narrower definition. They only create a double criminality problem when cooperation is requested concerning conduct that is an offence in the requesting country but not in the country from which assistance is requested. Accordingly, while it is necessary to criminalize at least the conduct defined as offences in the universal conventions and protocols, it does not logically follow that international cooperation will be diminished if domestic law also prohibits conduct not defined in the universal instruments.

90. Double criminality issues arise when criminal laws enacted to deal with similar forms of anti-social conduct have slightly different factual requirements, such as the possibility that two persons can be punished for conspiracy, but three participants may be required to constitute a criminal association or for participation in an organized crime group. Countries are increasingly rejecting historical restrictions upon international cooperation by developing proactive substitutes that emphasize discretion rather than rigidity. In recent years countries with comparable criminal justice value systems have increasingly restricted the dual criminality

requirement. An illustration is the European Arrest Warrant established by the Framework Decision of the Council of the European Union.⁴¹ Article 2 of the Decision provides a list of offences which, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, must give rise to surrender without verification of the double criminality of the act.

91. Even where the dual criminality principle has not been eliminated, proactive provisions and interpretations are lessening its restrictive effects. Former interpretations requiring an identity of offence classification and of elements are being replaced with the approach adopted in the United Nations Convention Against Corruption, Article 43-2:

In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

92. It is erroneous to assume that double criminality will be lacking because of the stereotype that conspiracy laws exist only in common law systems and criminal association laws represent the exclusive Continental law approach to group criminality. Bastions of the Continental system such as Germany (Section 30. II, Penal Code); Spain (Art. 17 and 516, Penal Code), and France (Art. 323-4 Penal Code) have conspiracy laws, as does Chile (Art. 8, Penal Code). The offences created by the American Racketeer Influenced and Corrupt Organization law, designed to combat organized crime at the federal level and also applied to profit-oriented terrorist activity, and the Continued Criminal Enterprise drug law more closely resemble an *association de malfaiteurs* than common law conspiracies, and demonstrate the increasing convergence of criminal justice approaches.⁴²

c. Reducing other formalities of interstate cooperation

93. Traditional formalities are being dispensed with as national authorities increasingly interact directly at the operational level. The European Arrest Warrant not only removes double criminality issues as to most offences, it also provides for direct rendition of suspects from one country to another without the formalities of traditional extradition practice:

When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority (Art. 9-1).

All difficulties concerning the transmission or the authenticity of any document needed for the execution of the European arrest warrant shall be dealt with by direct contacts between the judicial authorities involved, or, where appropriate, with the involvement of the central authorities of the Member States (Art. 10-5).

⁴¹ Decision 2002/584/JHA, OJ L 190 of 18.07.2002.

⁴² Section 1962 of Title 18 and Section 848 of Title 21, of the United States Code.

94. Mini-trials to demonstrate the evidentiary basis for extradition persist in some common-law jurisdictions, but even obstacles involving constitutional provisions can be dealt with in a proactive, asymmetrical way that does not insist upon strict reciprocity. The United Kingdom-United States extradition treaty still requires United Kingdom requests to be supported by a showing of probable cause to satisfy the United States interpretation of its constitutional standards, but allows United States requests to be executed by British courts without an evidentiary showing, as would be the case with a European arrest warrant.

Article 8-3, UK-US Extradition Treaty

In addition to the requirement in paragraph 2 of this article, a request for extradition of a person who is sought for prosecution shall be supported by:

(a) A copy of the warrant or order of arrest issued by a judge or other competent authority;

(b) A copy of the charging documents, if any; and

(c) For requests to the United States, such information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested

d. Fiscal and political offence exceptions

95. The Terrorist Financing Convention, which had been adopted by 149 States by January 2006, provides in its Article 13, that:

None of the offences set forth in Article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence.

96. Increased attention has been focused upon the political offence exception by the language of resolution 1373, calling upon States to ensure that

... claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.

The Terrorist Bombings Convention, with 145 Parties as of January 2006, and the Financing Convention both eliminate this obstacle to anti-terrorism cooperation, in virtually identical language:

None of the offences set forth in Article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or as an offence inspired by political motives.

97. Examination of regional anti-terrorism conventions and bilateral agreements reveals a trend toward abolishing the political offence exception. Articles declaring that the terrorism offences referenced in those agreements are not political offences are found in the anti-terrorism conventions of the Arab League, Organization of African Unity, Organization of American States, Organization of the Islamic

Conference, the South Asian Association for Regional Cooperation, the Convention of the Cooperation Council for the Arab States of the Gulf, and the European Convention on the Suppression of Terrorism, although the last agreement expressly permits the exception's survival by reservations to the treaty. Article 4-1 of the Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism provides that:

In cooperating in combating acts of terrorism, including in relation to the extradition of persons committing them, the Parties shall not regard the acts involved as other than criminal.

98. Bilateral agreements increasingly specify that certain violent offences not be considered as political. The UK-US Extradition Treaty excludes categories of offences from its definition of political offences, including the following, which are typical of terrorism:

- Art 4-2
- (c) murder, manslaughter, malicious wounding, or inflicting grievous bodily harm;*
 - (d) an offence involving kidnapping, abduction, or any form of unlawful detention, including the taking of a hostage;*
 - (e) placing or using, or threatening the placement or use of, an explosive, incendiary, or firearm capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage;*
 - (f) possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage.*

e. Proactive development of human rights

99. One possible factor contributing to the international willingness to abolish the political offence exception in recent anti-terrorism instruments is the progressive development of less confusing but equally effective protections. The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft provided an exception to its coverage applicable to penal laws of a political nature or those based on racial or religious discrimination. That reference was not incorporated in subsequent conventions. In the first universal convention establishing a criminal offence, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the only protection enumerated for suspected persons was the obligation of the custodial State to assist the detainee to communicate immediately with a representative of the State of nationality. By comparison, those protections have progressively evolved so that the Financing Convention of 1999 guarantees a detained person the following rights and protections:

- Art. 9
- (a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights ...*
 - (b) Be visited by a representative of that State;*
 - (c) Be informed of that person's rights under subparagraphs (a) and (b)*

Art. 15 *Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request ... has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.*

Art. 17 *Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.*

100. Countries that do not observe the protections embodied in the universal instruments and prevailing human rights standards face the possibility that other States will interpret those deficiencies as torture, compulsion to confess, or violations of other rule of law principles, and may fail to extradite or to furnish investigative or evidentiary assistance. Refusal or inaction may be expressly based upon Article 7 or 14.3 (g) of the ICCPR, upon Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; or upon the guarantees of fair treatment and non-discrimination found in the universal anti-terrorism conventions and bilateral or regional agreements. Non-cooperation may also be manifested through delays, evasions, highly technical obstacles, and other manoeuvres. Whatever diplomatic device may be employed, the ultimate result of a lack of confidence that the rule of law prevails in a country requesting assistance is likely to be non-cooperation.

f. Refugee and asylum issues

101. Subparagraphs 9 (f) and (g) of paragraph 3 of Security Council resolution 1373 calls upon Member States to:

(f) Take appropriate action in conformity with the relevant provision of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts;

102. International human rights and refugee law standards may be derived from a number of instruments, including the Convention Relating to the Status of Refugees and its 1967 Protocol.

Art. 31. *Refugees unlawfully in the country of refuge*

1. *The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization,*

provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Art. 32. *Expulsion*

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

103. The ICCPR spells out procedural guarantees applicable to lawful entrants in its Article 13.

An alien lawfully in the territory of a State Party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law, and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority (emphasis supplied).

104. Expulsions may be subject to other international obligations under applicable human rights conventions. Article 3 of the Torture Convention provides that:

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. The protections of the Convention relating to the Status of Refugees and its 1966 Protocol are not limited to torture, and reach discriminatory threats to life or freedom.

2. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

3. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

105. The Secretary General of the United Nations has presented a report on “Protecting human rights and fundamental freedoms while countering terrorism” to the General Assembly, dated 22 September 2005, reference A/60/374. This report described an expert seminar organized by the Office of the High Commissioner on Human Rights held in Geneva in June 2005. In its section entitled the “Principle of non-refoulement and preventing torture in the counter-terrorism context”, the experts expressed their belief in the need for a “ ... a formal and binding international instrument for the transfer of persons across borders due to the risk of torture or mistreatment”. The report also expressed the view “that diplomatic

assurances (that a suspected terrorist would not be subject to torture) are not sufficient and should not be given weight when a refugee is returned". At the same time, some States are emphasizing a differing perspective on how to evaluate the risk of torture or mistreatment. A European Court of Human Rights press release dated 20 October 2005 announced that in the case of Ramzy v. the Netherlands, Application No. 25424/05, the Governments of Lithuania, Portugal, Slovakia and the United Kingdom intervened in support of the Netherlands. The intervenors' objected to the asserted rule that the exclusive issue in an expulsion hearing is whether a person faces a threat of torture or mistreatment. They urged that a danger of imminent involvement in terrorist acts should be considered in relation to a risk of conditions that marginally and temporarily violate the minimum threshold of degrading treatment under the European Convention on Human Rights.

g. Denial of safe haven

106. Respect for sovereignty and recognition of the responsibility of each state to control public security within its borders are fundamental values. Unfortunately, the geographic compartmentalization of criminal justice systems can be exploited to permit terrorists and other criminals to find a safe haven in one country while inflicting harm elsewhere. Proactive steps to overcome this danger are found in the Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, beginning with Article 12-1:

The Parties may, at the request or with the consent of the Party concerned, send representatives of their competent authorities, including special anti-terrorist units, to provide procedural, advisory or practical aid in accordance with this treaty.

A law providing for detailed arrangements for operational integration of criminal justice joint task forces can be found in the Hungarian Act LIV of 2002 on the International Cooperation of the Law Enforcement Agencies. This legislation permits the operation of joint international criminal detection teams in Hungary and allows seconded foreign members of such teams to carry and use weapons in case of necessity under the supervision of Hungarian authorities.

107. Paragraph 2 (d) of resolution 1373 requires that States:

Prevent those who finance, plan, facilitate, or commit terrorist acts from using their respective territories for those purposes (the commission of terrorist acts) against other States or their citizens.

Paragraph 61 references a Tanzanian law designed to accomplish that effect by punishing recruitment for terrorist acts regardless of where they are to take place. Many gaps in the ability to suppress terrorist activity would be reduced if all States were to implement paragraph 2 (d) of resolution 1373 by establishing judicial competence regardless of where the ultimate attack is intended to take place and without regard to whether it is attempted or accomplished.

108. Security Council resolution 1373, in its second mandatory paragraph, also specifically requires Member States to:

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

Denial of safe haven can be accomplished through substantive criminal law definitions criminalizing domestic preparatory conduct regardless of where or whether the intended violence takes place. A more expansive approach is to define acts of terrorism as offences regardless of the place of commission, making them subject to prosecution without a geographical connection to the charging jurisdiction or the presence of the accused in the charging jurisdiction. National assertions of universal jurisdiction over crimes against humanity, genocide and war crimes are not unknown, but do not often extend to the offences defined in the universal anti-terrorism covenants and protocols.

109. In addition to a proactive duty to prevent the preparation of terrorist acts within a country's territory against the interests of another country, denial of safe haven includes the procedural duty expressed in Latin as *aut dedere aut judicare*. That principle means that a country from which extradition is requested must either give up the fugitive or refer the alleged offence for prosecution in its own courts. This mechanism is found in all of the universal anti-terrorism conventions and protocols. Article 8-1 of the International Convention for the Suppression of Terrorist Bombings contains wording typical of recent conventions:

The State Party in the territory of which the alleged offender is present shall, in cases to which Article 6 (the Convention's jurisdictional article) applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

110. The *aut dedere* alternative of extradition is limited by some countries' policy of extraditing only pursuant to bilateral treaty obligations, not in reliance upon the option appearing in the anti-terrorism conventions and protocols to consider the universal agreement as the basis for extradition.⁴³ Other countries allow extradition based upon the extradition articles in the universal conventions and protocols. This may be done either on the theory that adoption of an international instrument automatically incorporates its provisions into national law, or by express implementing legislation. Even more flexible means of allowing extradition are found in legislation that permit extradition based upon ad hoc agreements, upon reciprocity, or upon a determination that the national interest would be served by extradition. The Republic of Japan has only two extradition treaties in force. All other extradition matters are processed under the Law on Extradition No. 68 of 1953, based upon reciprocity.

111. The *aut judicare* alternative of judging a foreign fugitive requires competence by domestic courts to judge an act committed elsewhere. Traditionally such a power has been recognized with regard to nationals of a country, who are often protected from extradition by constitutional or legislative provisions. A matter of concern, however, is that some countries only apply this obligation to nationals. If extradition were to be denied, and national law does not allow domestic prosecution of a non-national against whom there is convincing evidence of guilt, a country may find itself involuntarily furnishing safe haven to a terrorist fugitive, contrary to the

⁴³ Convention for the Unlawful Seizure of Aircraft, Article 8-2, 1970.

imperative of resolution 1373. Such potential problems are overcome by adoption of the anti-terrorism conventions and protocols, which establish a duty to judge persons whose extradition is refused. In some legal systems the necessary competence of national courts can be automatically implied from adoption of the agreement containing an *aut dedere aut judicare* obligation. Other systems require the adoption of legislation, which may define the *aut judicare* power as requiring the presence of the person sought, or refusal of extradition, or some combination of conditions. As mentioned previously, development of comprehensive extradition cooperation agreements between all 191 Member States of the United Nations is simply not a realistic possibility, so national legislation establishing *aut judicare* competence to judge a person who is not extradited may be very useful. Article 5 of the Maltese Criminal Code provides that a criminal action may be prosecuted:

(e) Against any person who being in Malta

(ii) Shall have committed any act which if committed in Malta would constitute an offence and such act involved the use of a bomb, grenade, rocket, automatic firearm, letter bomb or parcel bomb which endangered persons, although the offences referred to in this paragraph shall have been committed outside Malta:

* * *

(h) Against any person in respect of whom an authority to proceed, or an order for his return, following a request by a country for his extradition from Malta, is not issued or made by the Minister responsible for justice on the ground that the said person is a Maltese citizen or that the offence for which his return was requested is subject to the death penalty in the country which made the request, even if there is no provision according to the laws of Malta other than the present provision in virtue of which the criminal action may be prosecuted in Malta against that person;

Conclusion

112. A preventive criminal justice strategy has far more potential to truly implement the ICCPR, to protect the right to life against arbitrary deprivation, and to improve respect for the rule of law, than does prosecution of the surviving attackers after a tragedy. An effective anti-terrorism strategy that integrates rule of law standards and human rights obligations can convey to all that it represents moral values superior to those of terrorists who attack civilians. Policy makers and practitioners must embrace and communicate an important message to civil society—that the struggle against terrorism is not a zero sum game. The misconception that effective anti-terrorism prevention and enforcement automatically diminish human rights protections under the rule of law should be avoided. A preventive, even aggressively proactive, anti-terrorism strategy can be based upon scrupulous observance of human rights, and can simultaneously enhance both the rule of law and the protective abilities of Member States.



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