



UNODC

United Nations Office on Drugs and Crime



2

Universal Legal Framework Against Terrorism

**COUNTER-TERRORISM
LEGAL TRAINING CURRICULUM**

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

Counter-Terrorism Legal Training
Curriculum

MODULE 2

**Universal Legal
Framework Against
Terrorism**



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Background and justification

The United Nations Office on Drugs and Crime Terrorism Prevention Branch (UNODC/TPB) is mandated to provide assistance to requesting Member States on the legal and criminal justice aspects of countering terrorism. UNODC/TPB leads this assistance delivery, primarily by supporting Member States in their efforts to ratify the international legal instruments against terrorism, incorporate their provisions in national legislation and build the capacity of the national criminal justice system in order to implement those provisions effectively, in accordance with the rule of law and with due respect for human rights.

The Counter-Terrorism Legal Training Curriculum is one of the tools developed by UNODC/TPB for transferring the knowledge and expertise needed to strengthen the capacity of national criminal justice officials to put the universal legal framework against terrorism into practice. The Curriculum harmonizes and systematizes legal concepts and related training materials and information to maximize the impact of training activities delivered by UNODC/TPB.

Structure and contents

The Curriculum consists of several modules, each dealing with specific thematic areas of the legal and criminal justice aspects of countering terrorism. Its first six modules are:

- Module 1. Counter-terrorism in the international legal context
- Module 2. Universal legal framework against terrorism
- Module 3. International cooperation in criminal matters: counter-terrorism
- Module 4. Human rights and criminal justice responses to terrorism
- Module 5. Transport-related (civil aviation and maritime) terrorism offences
- Module 6: International legal framework against chemical, biological, radiological and nuclear terrorism

The need to promote specialized counter-terrorism legal expertise among practitioners, in addition to developing their knowledge of basic concepts, is based on two main premises. The first one is the increasing sophistication of the terrorist threat. That threat takes multiple forms, including transnational groups targeting means of transport, planning attacks with weapons of mass destruction, using the Internet to plan attacks or resorting to new channels to finance their acts. In view of these realities, the Curriculum responds to the growing need to address the modern manifestations of terrorism that require the development of specific legal competences and skills on the part of the law enforcement community.

The second premise is the recognition that no solid counter-terrorism legal expertise can be developed in isolation from other legal disciplines. Instead, an all-encompassing approach must be promoted, one which takes into account the complex and often problematic interplay between the criminal justice element of counter-terrorism and other key branches of international law, in particular human rights, refugee and humanitarian law.

Index of training tools

Tools: This section provides Internet links to the full text of publications, manuals, models and databases developed by the United Nations and other international organizations. It also includes practical materials designed to assist criminal justice officers.



Case studies: Real and fictitious scenarios are included to facilitate the understanding and stimulate discussion of the legal issues addressed in each section and to inject a practical perspective.



Case studies are typically distributed as a backup to one or more theoretical presentations. During the case study sessions, trainers should limit their role to that of moderators, encouraging the exchange of points of view rather than teaching. It is normally recommended that participants be invited to handle the various scenarios with the help of relevant legal texts.

Some case studies are accompanied by answers. Whenever this is the case, trainers should avoid making the answers available to trainees before the exercise is completed.

Activities: This section allows participants to explore how the various topics dealt within the Curriculum are handled or reflected in the legal system and practice of their own countries. In this way, participants are also encouraged to apply their expertise to a given theme and share their experience of legal issues.



As part of a workshop or seminar, trainers can propose that participants complete an activity as a means of stimulating initial discussion, or they can give a theoretical presentation, complemented by an exercise with a practical focus.

Activities can also be used by self-learners as tools to examine the practical application of the acquired knowledge of a certain subject.

Assessment questions: These are tests covering the topics dealt with in each section. Unlike the activities, the assessment questions tend to require straightforward answers, which makes them a useful tool for trainers who need to quickly evaluate the degree of knowledge acquired by participants.



Assessment questions are typically submitted at the end of a training session, but they can also be used as preliminary tools to identify training needs, delivery methods and the level of competence of participants.

Further reading: A list of selected bibliographical references for trainees wishing to obtain in-depth knowledge of relevant legal topics is provided.




Reference documents: This is a list of key documents and legal instruments discussed in each module section.



There is inevitably a degree of overlap between the modules because the topics under consideration are often interrelated. In some cases, the same topic is examined from different angles in two or more modules. In other words, there are many ways of looking at the same subject. This should not be seen as a drawback, but rather as an asset enabling trainers to arrange tailor-made activities depending on specific training needs. For example, in preparation for a training workshop, the need may arise to cover certain issues more in depth,

to analyse them from multiple perspectives, or to examine their connection with others.

Throughout the Curriculum, the symbol  is used to inform trainers of the location of information covering the same or connected topics.

In addition, the division of modules into several sections and subsections is designed to give trainers the flexibility to pick and choose items corresponding to specific needs, without necessarily having to complete all the items under a given module. A typical example is the module dealing with aviation-related and maritime terrorism. Whereas the conceptual links between these two thematic areas explain their inclusion in one single module, it is possible to focus training activities on either the maritime or the aviation-related part.

Target audience

The modules can be adapted to suit the particular needs, expertise and expectations of specific groups. This tailor-made approach will necessarily result in emphasis being placed on certain sections of each module.

The modules draw on the experience of UNODC/TPB in delivering training activities and are based on its mandate. Target audiences typically include criminal justice and law enforcement officials (police, prosecutors and judges), policymakers and Government officials from key departments (in particular ministries of foreign affairs, justice and the interior), who are involved in legislative drafting or mutual legal assistance in criminal matters, or who have responsibilities with regard to the ratification of international treaties.

The provision of technical assistance by UNODC/TPB in recent years has also demonstrated the importance of facilitating the adoption of counter-terrorism legislation by raising awareness among members of relevant parliamentary committees.

In addition, it is foreseen that the target audience for some of the modules will include officials from specialized ministries and government agencies. For example, the module covering maritime terrorism will often include the participation of coastguards and navy officials. Likewise, the module dealing with terrorist financing will often require the involvement of finance ministries, central banks and financial intelligence units.

Module 2

Universal legal framework
against terrorism

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Introduction

Although not a legally defined notion, the expression “universal legal framework against terrorism” is used as a general formula to refer to a set of instruments, adopted at the global level, containing a series of legally binding standards for States to prevent and counter international terrorism. These instruments take the form of treaties and Security Council resolutions and have been developed over several years.

The treaty component of the framework, in particular, is a set of legal norms that have been developed by the international community since 1963. It offers a framework to address terrorism-related offences through a wide array of criminal justice mechanisms. The ultimate aim of the treaties is to ensure that the perpetrators of terrorist crimes, or those who plan and prepare those acts, are either brought to justice by the States in whose territory they are found or extradited to a country willing to prosecute them. The principle *aut dedere aut judicare* (extradite or prosecute) aims to make the world inhospitable for terrorists, and for those who finance and support them, by denying them safe havens. The significance given to the *aut dedere aut judicare* principle can also be read as a reaffirmation that an effective response to terrorism should include a strong criminal justice element.

Module 2 familiarizes practitioners with the requirements of a wide variety of legal instruments. It does so by highlighting the potential of those instruments to assist practitioners in engaging in more effective international judicial cooperation. Although the module emphasizes the legal aspects of the existing framework, some extralegal references are also present. The reason for this approach is that knowledge of the political and historical dynamics that have led the universal legal framework to evolve into its current form leads to a better understanding of the particular legal aspects of the terrorism-related offences that are defined at the international level.

An important section of module 2 is devoted to issues related to implementation. Unless the universal legal framework against terrorism is translated into directly applicable provisions by competent national authorities, the legal mechanisms envisaged will remain theoretical, and judges and prosecutors will not be in a position to use them. Effective implementation, in turn, depends on basic judicial structures and institutions being in place in each implementing country. In this sense, the counter-terrorism legal discourse is linked to broader requirements for a functioning criminal justice system.

In view of its broad range of thematic areas, module 2 can be used as a platform for a general introductory training course. It can also be used in combination with one or more specialized modules, depending on training needs and the resources available. The annex contains answers to case study questions dealt with in module 2.

1. Pillars of the universal legal framework

1.1 Overview

States, assisted by the United Nations, are at the forefront of global counter-terrorism efforts. The role of the United Nations in countering terrorism is extensive and, as a result of its mandates and expertise in various aspects of security, development and international cooperation, the Organization can contribute to almost every aspect of counter-terrorism. As terrorism is a transnational phenomenon, the required global policy response and counter-measures can be pursued most effectively through the United Nations, with its global reach and multi-lateral tools.

At present, there is neither a comprehensive United Nations treaty on terrorism nor an internationally binding definition of the term “terrorism”. However, the States Members of the United Nations are in the process of drafting a comprehensive convention on international terrorism, which will ultimately provide an international generic definition of terrorism.

The expression “universal legal framework/regime against terrorism” is used as a catch-all formula to refer to a set of instruments and resolutions adopted at the global level, outlining a series of legal standards for States to utilize in order to prevent and counter international terrorism. This framework has been developed progressively by the international community over several decades.

For the sake of clarity, the sources of binding requirements and recommendations forming the universal legal framework against terrorism can be divided into three groups:

- General Assembly resolutions

The General Assembly has played an important role in establishing an international legal framework against terrorism and encouraging Governments to work together more closely to address that threat. In that regard, the Assembly has adopted a series of resolutions relating to terrorism. Although not legally binding, these resolutions, together with non-binding Security Council resolutions, constitute authoritative recommendations, and language used therein has often been a source of inspiration for the drafting of subsequent binding instruments.

In September 2006, the Assembly adopted the United Nations Global Counter-Terrorism Strategy, which consists of a resolution and an annexed Plan of Action aimed at enhancing national, regional and international efforts to counter terrorism (see section 1.2 below). The Strategy embodies the first successful attempt by all Member States to agree on a common strategic approach to prevent and suppress terrorism by resolving to take practical steps both individually and collectively. The Strategy encourages the United Nations Office on Drugs and Crime (UNODC) and other international agencies to support its implementation, and calls on Member States to enhance its cooperation with such

international organizations within the framework of their common action against terrorism. Although it does not contain legal obligations per se, the Strategy sets out a number of guidelines for Member States in their counter-terrorism efforts.

- Security Council resolutions

These resolutions address terrorism in its various forms and manifestations. They are often adopted under Chapter VII of the Charter of the United Nations, which deals with the maintenance of international peace and security. They frequently contain binding language addressing all Member States and impose a number of obligations on them.

- Universal counter-terrorism instruments

These are 19 multilateral conventions and protocols related to terrorism requiring States parties to address specific manifestations of terrorism (including through obligations to criminalize certain types of conduct) and serving as bases for international cooperation.

In this context, the term “universal” does not mean that these instruments have been necessarily ratified by every single country in the world, but rather that they are open to all States Members of the United Nations or affiliated specialized agencies, such as the International Civil Aviation Organization (ICAO) and the International Atomic Energy Agency (IAEA), for signature, ratification and/or accession. In practice, however, the majority of such treaties have reached near-universal adherence.

The above-mentioned sources of requirements and recommendations must be kept distinct from one another since they are addressed to different (albeit often overlapping) groups of States. Whereas Security Council resolutions must be observed by all Member States (by virtue of having ratified the Charter of the United Nations), universal instruments bind only those States that have specifically ratified or acceded to them.

1.2. United Nations Global Counter-Terrorism Strategy

The United Nations Global Counter-Terrorism Strategy, adopted by the General Assembly in its resolution 60/288, contains four pillars of action: (a) measures to address the conditions conducive to the spread of terrorism; (b) measures to prevent and combat terrorism; (c) measures to build State capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in that regard; and (d) measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.

While the principal responsibility for implementing the Strategy falls on Member States, some provisions call for United Nations bodies to provide support. The Strategy contains a number of important initiatives, including:

- Improving the coherence and efficiency of counter-terrorism technical assistance delivery so that all States can play their part effectively
- Putting in place systems of assistance to address the needs of victims of terrorism and their families, and promoting international solidarity in support of victims
- Addressing the threat of bioterrorism by establishing a single comprehensive database on biological incidents, focusing on improving State public health systems and

acknowledging the need to bring together major stakeholders to ensure that advances in the field of biotechnology are used not for terrorist or other criminal purposes but for the public good

- Involving civil society, regional and subregional organizations in the fight against terrorism and developing partnerships with the private sector to prevent terrorist attacks on particularly vulnerable targets
- Exploring innovative means to address the growing threat of the terrorist use of the Internet
- Modernizing border and customs control systems and improving the security of travel documents to prevent terrorist travel and the movement of illicit materials
- Enhancing cooperation to combat money-laundering and the financing of terrorism

In addition, the Strategy clearly:

- Affirms that terrorism cannot and should not be associated with any religion, nationality, civilization or ethnic group
- Reaffirms the responsibility of States to deny financial and operational safe havens to terrorists and to prevent terrorists from abusing the system of political asylum, bringing them to justice on the principle of extradite or prosecute
- Calls for Member States to ratify and implement the existing treaties and protocols to create and solidify the legal basis for the international fight against terrorism
- Encourages and enables Member States to take a similarly integrated approach to countering terrorism on the national level and creates a common framework for regional and global coordination of their national efforts
- Creates a common platform for United Nations actions bringing together the efforts of all programmes, offices, departments and agencies, including the counter-terrorism related bodies of the Security Council. It serves as the coordination framework for those entities brought together in the form of the United Nations Counter-Terrorism Implementation Task Force, which was established by the Secretary-General in 2005

It should be noted that the Strategy's fourth pillar is not the only relevant section dealing with human rights and upholding the rule of law. Throughout the document, the Strategy reiterates the need to uphold human rights in conjunction with the efforts to be undertaken under the other pillars. The importance of promoting and protecting human rights while countering terrorism was further underscored in General Assembly resolution 62/272, in which Member States reviewed the implementation of the Strategy.



Reference documents

- [United Nations Global Counter-Terrorism Strategy \(General Assembly resolution 60/288 and annex\)](#)
- [General Assembly resolution 62/272](#)
- [Report of the Secretary-General on the capability of the United Nations system to assist Member States in implementing the United Nations Global Counter-Terrorism Strategy \(A/71/858\)](#)

1.3. Security Council resolutions concerning terrorist acts

Security Council resolutions in the field of terrorism send a strong message to the international community: States are expected to ensure that all necessary mechanisms are in place to facilitate cooperation against terrorist acts. If they do not yet have such mechanisms, they are urged to put these in place without delay. At the same time, the counter-terrorism resolutions do not go into specific detail on procedural issues. As a result, the concrete methods, channels and legal and institutional mechanisms employed to address terrorism are determined by each State.

Under the Charter of the United Nations, the main functions and powers of the Security Council are the maintenance of international peace and security. In that context, the Security Council may enact binding resolutions under Chapter VII of the Charter in the event of a threat to the peace, a breach of the peace or an act of aggression. The adoption of resolutions under Chapter VII enables the Security Council to impose sanctions (under Articles 41 and 42) that may or may not involve the use of armed force against States in the case of violations. The adoption of measures involving the use of force depends on an assessment by the Security Council that other means would prove or have proved inadequate to maintain or restore international peace and security. Key terrorism-related Security Council resolutions that have been adopted so far under Chapter VII (Articles 39-51) of the Charter include 1267 (1999), 1373 (2001), 1540 (2004), 2170 (2014), 2178 (2014), 2199 (2015) and 2253 (2015).

Chapter VII of the Charter of the United Nations: key provisions

Chapter VII

Action with respect to threats to the peace, breaches of the peace, and acts of aggression.

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.



Assessment questions

- Under what conditions can the Security Council authorize the use of force to restore international peace and security?
- Has the Security Council ever adopted decisions in the field of counter-terrorism under Chapter VII of the Charter of the United Nations? If so, what are the legal implications of such an approach?



Further reading

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- Sambei, Arvinder, Anton Du Plessis and Martin Polaine. The United Nations counter-terrorism instruments. In *Counter-Terrorism Law and Practice: An International Handbook*. Oxford: Oxford University Press, 2009, pp. 17-83.
- Simma, Bruno, and others, eds. *The Charter of the United Nations: A Commentary*, 3rd ed., Oxford: Oxford University Press, 2012.



Reference documents

- Chapter VII, Charter of the United Nations
- Security Council resolutions adopted on terrorism-related matters between 2011 and 2015 are available at www.un.org/en/sc/ctc/resources/res-sc.html

1.4. Universal counter-terrorism instruments

There are currently 19 universal instruments (see www.un.org/terrorism/instruments.shtml) directly related to the prevention and suppression of terrorism. These instruments, which have been adopted over a period of more than 50 years (starting in 1963), embody a sectoral approach to terrorism, as each one deals with specific types and manifestations of terrorism. The sectoral approach reflects the need for the international community to address terrorism and terrorist acts in a pragmatic manner in view of the politically sensitive (and still unaccomplished) task of agreeing upon a single, globally binding instrument.

A comprehensive convention on terrorism?

Negotiations have been ongoing for several years—within both Sixth Committee of the General Assembly and the Ad Hoc Committee established by General Assembly resolution 51/210—on the elaboration of a comprehensive convention on countering terrorism.

No sessions of the Ad Hoc Committee were held in 2014, 2015 or 2016, and no session is anticipated in 2017. Work is continuing, however, in the framework of a working group of the Sixth Committee, with a view to finalizing the process and discussing the possibility of convening a high-level conference under the auspices of the United Nations.

Although agreement has been reached on the substantive elements of what constitutes an act of terrorism, consensus has not been reached on the scope of application of the instrument.

Issues still under discussion relate to the complex interplay between the international criminal law instruments and norms applicable during armed conflicts (international humanitarian law), in particular with regard to whether or not the comprehensive convention should explicitly cover acts committed by parties to an armed conflict that are not the “regular” armed forces of a State.

Moreover, some issues relate to the relationship with the existing international legal instruments. If and when adopted, the comprehensive convention would not automatically make existing counter-terrorism treaties irrelevant. On the contrary, those treaties would remain applicable as *lex specialis*.

The web page of the Ad Hoc Committee contains a link to the full text of all its reports and provides in-depth insight into the ongoing negotiation process.

Owing to the difficulty thus far of reaching a universally acceptable notion of terrorism, the international community has taken an incremental approach. Specific instruments were adopted in response to certain serious manifestations of international terrorism. For example, the Achille Lauro incident in 1985 triggered the negotiations for the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.¹ A series of plane hijackings in the 1960s and 1970s prompted the negotiation of several treaties relating to aviation security. In the same way, new mechanisms for cooperation with regard to hostage-taking, offences committed against internationally protected persons, including diplomatic agents, and other topics have been established without the need to define the notion of terrorism as such.

The universal counter-terrorism instruments, which have been developed under the auspices of the United Nations and its specialized agencies, are open to all States. They represent a

¹United Nations, *Treaty Series*, vol. 1678, No. 29004.

major component of the global legal regime against terrorism and an important framework for international cooperation in countering terrorism. In several Security Council resolutions, chief among them resolution 1373 (2001), the Council has called upon Member States to ratify those international instruments and to fully implement them by adopting the domestic measures necessary to fulfil the obligations that they impose.



Activities

- Identify which elements of the *Achille Lauro* case are reflected in the criminalization provisions of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.
- Can you identify, in the legislation of your country, terrorism-related provisions that are a direct consequence of past incidents?
- Consider the offences created by the universal counter-terrorism instruments adopted after the events of 11 September 2001. Do you think they constitute an adequate response to such events?
- What are the advantages of the current sectoral approach followed by the international community on counter-terrorism? What are the disadvantages?



Assessment questions

- Discuss the reasons (legal, political, etc.) why the international community has not yet been able to adopt a comprehensive global convention on counter-terrorism.
- What is meant by an “incremental” or “sectoral” approach in relation to the universal counter-terrorism instruments?
- Why are the 19 counter-terrorism instruments referred to as “universal” instruments?



Further reading

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- Goldie, L.F.E. Legal proceedings arising from the “Achille Lauro” incident in the United States of America. In *Maritime Terrorism and International Law*, Natalino Ronzitti, ed. Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1990, pp. 107-128.
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2. Elements and requirements of the universal legal framework against terrorism

2.1. Relevant Security Council resolutions in detail

2.1.1. Sanctions regimes against the Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and the Taliban: Security Council resolutions 1267 (1999) and subsequent resolutions

The sanctions regimes against the Islamic State in Iraq and the Levant (ISIL) (Da'esh), Al-Qaida and the Taliban were introduced pursuant to Security Council resolution 1267 (1999) and subsequently modified and strengthened by numerous other resolutions, the latest one having been adopted in 2015 (see Security Council resolutions 1333 (2000), 1390 (2002), 1452 (2002), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011), 2170 (2014), 2178 (2014), 2199 (2015) and 2253 (2015)).

The sanctions are established under chapter VII of the Charter of the United Nations and require that States implement three types of measures against designated individuals and entities:

- A freezing of all assets belonging to these individuals and entities, with only certain exceptions (and under certain conditions), introduced by Security Council resolution 1452 (2002), where property is needed to cover basic expenses
- An arms embargo, whereby no arms, weapons or ammunition shall be supplied, sold or transferred to listed persons or entities (this type of sanction includes the prohibition to deliver technical advice, assistance and training related to military activities for the benefit of designated individuals and entities)
- A travel ban, which prevents listed individuals from entering into or transiting through States of which they are not nationals. Exemptions to the travel ban are envisaged, as set out in Security Council resolutions 1988 (2011), 2161 (2014) and 2253 (2015)

The sanctions regime has evolved over the years. It was established in 1999 with the aim of persuading the Taliban, which at that time was in control of Afghanistan, to surrender Osama Bin Laden. Until 2002, the resolutions in question had the features of other “traditional” sanctions regimes aimed at putting pressure on the elites of certain States to change their behaviour or taking specific actions. The scope of application of the sanctions regime was subsequently extended to include individuals and entities linked to Al-Qaida. The sanctions were administered by the Security Council Committee established pursuant to resolution 1267 (1999), a subsidiary body of the Security Council, with the support of the Analytical Support and Sanctions Monitoring Team subsequently established by the Security Council

in its resolution 1526 (2004). In response to a prospect for mediation between the Taliban and the Government of Afghanistan, combined with recognition of the divergent interests of the Taliban and Al-Qaida, the Security Council further modified the unified Taliban/Al-Qaida sanctions regime (composed of a single consolidated list of targeted individuals and entities and a single committee) by dividing it into two distinct regimes. The Committee was split into two: one to deal with sanctions relating to the Taliban and one to deal with sanctions relating to Al-Qaida. Likewise, the consolidated list was split into two separate lists. However, both regimes retained the same types of sanctions (assets freeze, travel ban and arms embargo) as the previous unified regime. More recently, following significant changes in the political landscape in Iraq and the Syrian Arab Republic and the emergence of new terrorist groups, the Security Council formally expanded the sanctions against Al-Qaida to include ISIL and Al-Nusrah Front. The Committee became the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities . Relevant resolutions direct the Analytical Support and Sanctions Monitoring Team to submit reports on the global threat posed by ISIL, Al-Qaida and associated individuals, groups, undertakings and entities (see section 2.1.6. below).

The consolidated lists of targeted individuals and entities (and their regular updates) are circulated through diplomatic channels, and are also publicly available on the Security Council website. It is the responsibility of each State to circulate the consolidated lists to the greatest possible extent within its domestic agencies (banks and financial sectors, border authorities, etc.) for the purpose of implementation.

Crucially, there is no system of judicial review for listed individuals or entities; they must therefore rely on a diplomatic process to have their name removed from the consolidated lists. In response to criticism that the opacity of the system has prevented petitioners from effectively challenging their inclusion on the consolidated lists, the system has evolved over the years: Security Council resolution 1904 (2009) strengthened the delisting process by establishing an Office of the Ombudsperson. As an impartial and independent body, the Ombudsperson receives delisting requests directly from designated persons, and acts as the intermediary between them and the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities. The Ombudsperson has the task of engaging in dialogue with both the applicant and relevant States, gathering additional information on the requests and ensuring that the overall procedure in each individual case is promptly managed.

With regard to the Taliban, petitioners listed on the sanctions list pursuant to Security Council resolution 1988 (2011) may, pursuant to Security Council resolution 1730 (2006), submit delisting requests either through a focal point established by the Secretary-General within the Secretariat or through their State of residence or citizenship.

United Nations and terrorist organizations other than those associated with ISIL (Da'esh), Al-Qaida and the Taliban

Unlike the European Union, the United Nations does not maintain a list (or a corresponding sanctions regime) of individuals and entities other than those associated with ISIL (Da'esh), Al-Qaida

and the Taliban. This is simply because a sufficiently broad consensus has not been reached within the United Nations on other terrorist groups. As a consequence, many States implement a multitude of partially overlapping terrorism-related sanctions regimes in order to effectively address possible terrorist activity within their territories. In addition, several individual Governments maintain their own lists of terrorist groups and/or individuals.

While the United Nations does not have a sanctions regime targeting individuals and entities other than ISIL (Da'esh), Al-Qaida and its affiliates, it provides for a robust criminal justice approach to combating terrorism and terrorist acts, regardless of the group name and affiliation, based on other Security Council resolutions, such as resolution 1373 (2001) and 2178 (2014), and the universal counter-terrorism instruments.

Security Council sanctions are imposed regardless of whether or not targeted individuals or entities are, or have been, the subject of criminal proceedings or investigations. Inclusion on the consolidated lists does not depend on the targeted individual or entity having received a criminal conviction. This often leads States to propose designations based on confidential intelligence information only. To ensure that a strong case exists for each proposed addition to the consolidated lists, States are expected to provide the relevant committee with a detailed statement of case in support of the proposed listing. Furthermore, the Security Council requires that such a statement be releasable, upon request, except for the parts that a Member State identifies as being confidential. Thus, the sanctions regimes attempt to compensate for the absence of a judicial review system by encouraging public scrutiny of the grounds for designations. In the same spirit, the committees are instructed to publish “narrative summaries of reasons for listing” on their websites (see, in particular, Security Council resolutions 1735 (2006) and 1822 (2008)).

ISIL (Da'esh), Al-Qaida and the Taliban: trafficking in human beings

In its resolution 2331 (2016), the Security Council for the first time addressed explicitly the links between terrorism and trafficking in human beings, especially occurring in areas affected by armed conflict and post-conflict situations. In the resolution the Council acknowledges that “acts of sexual and gender-based violence, including when associated to trafficking in persons, are known to be part of the strategic objectives and ideology of certain terrorist groups, used as a tactic of terrorism and an instrument to increase their finances and their power through recruitment and the destruction of communities”.

Of particular note are paragraphs 11 and 14 of the resolution:

11. *Condemns* all acts of trafficking, particularly the sale or trade in persons undertaken by the “Islamic State of Iraq and the Levant” (ISIL, also known as Da'esh), including of Yazidis and other persons belonging to religious and ethnic minorities, and *condemns* also any such trafficking in persons and violations and other abuses committed by Boko Haram, Al-Shabaab, the Lord's Resistance Army, and other terrorist or armed groups for the purpose of sexual slavery, sexual exploitation, and forced labour, *recognizes* the importance of collecting and preserving evidence relating to such acts in order to ensure that those responsible can be held accountable, and *notes* that such acts may also contribute to the funding and sustenance of such groups or to serve other strategic objectives [...];

...

14. *Requests* the Analytical Support and Sanctions Monitoring Team, when consulting with Member States, to include in their discussions the issue of trafficking in persons in the areas of armed conflict and the use of sexual violence in armed conflict as it relates to ISIL (also known as Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities and to report to the Security Council Committee established pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) on these discussions as appropriate;



Case study

1. The Prosperity Foundation, a Bluelandia-based non-governmental organization officially devoted to projects aimed at the alleviation of poverty, is under investigation for having authorized a series of money transfers linked to a deadly terrorist attack. After a careful examination of the evidence at their disposal, the competent authorities of Bluelandia conclude that the Foundation has no connection with terrorist financing.

A few days later, the Ministry of Foreign Affairs of Bluelandia is informed that the Prosperity Foundation has been placed on the Security Council's consolidated list of individuals and entities associated with ISIL (Da'esh) and Al-Qaida. As a result, the funds of the Foundation must immediately be frozen. The lawyers for the Foundation insist that, despite the listing, no freezing action can be ordered, since the competent authorities of Bluelandia have just concluded that the Foundation has no involvement in terrorist activity.

Should the funds of the Foundation be frozen? If so, should the authorities of Bluelandia establish that there are reasonable grounds to believe that the funds of the Foundation are linked to terrorist activities?

2. The Security Council also places Max, a citizen of Bluelandia, on the Consolidated List. Bluelandia immediately freezes all of his funds. Max protests that he has been unfairly deprived of basic living standards. He claims, in particular, that there has been a breach of his fundamental rights since he now lacks the money to pay a lawyer of his choice.

Is there any way of supporting Max in his claims?

3. Max argues that, although his name appears on the Security Council Consolidated List, there has been a mistake in his identity. The sanctions are aimed at another person with the same name as him. He then demands that his funds be immediately unfrozen. The authorities who ordered the freezing of his funds remain unconvinced, arguing that they have no power to supersede decisions taken by the Security Council Committee.

Should Max's argument nevertheless be accepted and his funds unfrozen?

4. A few days after an attack at a kindergarten, Max escapes to Pinklandia. Upon arrival, the airport authorities of Pinklandia realize that his name is on the Security Council's Consolidated List of individuals and entities associated with ISIL (Da'esh) and Al-Qaida.

How should the authorities of Pinklandia deal with Max?

5. Although Max's name appears on the List, the authorities of Pinklandia cannot find any evidence of his involvement in any terrorist offences. Moreover, no request for his extradition has been received. Max claims that he should be allowed to stay in Pinklandia as a free man.

Is Max's position acceptable? What course of action would be open to Max if he wanted to be delisted?



Tools

The Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities, the Security Council Committee established pursuant to resolution 1988 (2011) and the Analytical Support and Sanctions Monitoring Team have produced a number of documents to inform States about the procedure in force for listing individuals and entities, to assist them in the interpretation of the sanctions regimes and to guide them through the delisting process. Those documents include the following:^a

- Guidelines of the committees (including their mandates, meetings and decision-making procedures)
- Consolidated sanctions lists
- Summaries of listing criteria
- Assets freeze: explanation of terms
- Travel ban: explanation of terms
- Arms embargo: explanation of terms

^a More information about the committees, including the resources listed here, are available from www.un.org/sc/suborg/en/sanctions/information.

The International Criminal Police Organization (INTERPOL) assists with the worldwide dissemination of the consolidated lists. The INTERPOL-United Nations Security Council Special Notices (available at www.interpol.int) warn countries as to whether a certain individual or entity is being targeted by the sanctions regimes and informs recipients if the target of those sanctions has also been reached by a Red Notice (an INTERPOL-disseminated request for the arrest or provisional arrest of wanted persons with a view to extradition).

The UNODC model legislative provisions against terrorism (see www.unodc.org/tldb/en/model_laws_treaties.html) contain a section on the Al-Qaida and Taliban sanctions regimes. See, in particular, chapter 4, section 3, on restrictive measures concerning individuals, groups, undertakings and entities placed on the consolidated lists pursuant to Security Council resolution 1267 (1999) and following resolutions.

Whereas other model laws focus exclusively on the obligations with regard to the freezing of funds, the provisions of the model legislative provisions against terrorism suggest drafting language for the whole spectrum of sanctions. Article 49, for example, addresses the complex interaction between the travel ban and the obligation for States to bring alleged terrorists to justice.

Examples of how countries have implemented the sanctions regimes can be found in the UNODC electronic legal resources on international terrorism (see the counter-terrorism legislation database in the terrorism prevention section of the UNODC website).



Activities

- Considering the relevant legislation in your country, discuss how the sanctions regimes are implemented in practice and the challenges faced (use, if necessary, the reports sent by your country to the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities and the Security Council Committee established pursuant to resolution 1988 (2011)).
- Compare the original resolution establishing the sanctions regime, Security Council resolution 1267 (1999), with the most recent one. What has changed in substance? What are the differences?
- Have nationals or entities present in your country been included in the consolidated lists maintained by the Security Council? If so, did your Government accept that a statement of the case be made publicly available? Has the listed individual or entity submitted a request for delisting? What happened?
- Does your country maintain its own list of terrorists and terrorist organizations different from the one set up by the Security Council? If so, what are the similarities and differences in the designating process? If not, is the creation of such a list being discussed or debated at the national level, and what are the results?



Assessment questions

- What are the types of sanctions imposed by the sanctions regimes?
- What are the legal channels available internationally for individuals who consider themselves as being unfairly listed?
- What are the new aspects of the delisting procedure as introduced by the establishment of an ombudsperson?
- Which funds of listed individuals and entities are subject to the freezing obligation, and which funds, if any, are excluded?
- What is the role of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities and the Security Council Committee established pursuant to resolution 1988 (2011) within the sanctions regimes?
- Why does the Security Council maintain a list of individuals and entities associated with ISIL (Da'esh), Al-Qaida and the Taliban, and not of other groups?
- What is the specific role of INTERPOL in assisting States to implement the sanctions regimes?
- Can a Member State autonomously decide to lift the sanctions imposed by the Security Council against a listed individual or entity once that individual or entity has been completely cleared of any pending criminal proceedings? Explain your reasoning.
- How can the duty to bring suspected terrorists to justice under relevant resolutions and treaties be reconciled with the obligation to deny a listed individual from entering a State's territory? Is there a contradiction between the two obligations? Use the text of Security Council resolutions setting up the travel ban for listed individuals as one of the bases for your answer.



Further reading

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Supplementary material

- Security Council resolution 1452 (2002)
- Security Council resolution 1730 (2006)
- Security Council resolution 1904 (2009)
- Security Council resolution 1988 (2011)
- Security Council resolution 1989 (2011)
- Security Council resolution 2253 (2015)

2.1.2. Preventing and suppressing terrorist acts: Security Council resolution 1373 (2001)

Security Council resolution 1373 (2001) was adopted shortly after the events of 11 September 2001 under Chapter VII of the Charter of the United Nations. It establishes a framework for countering terrorism in general and for improved international cooperation against terrorism.

Its three operative paragraphs outline a wide array of measures. Paragraph 1 focuses on the prevention and suppression of the financing of terrorist acts and requires all States to:

- Criminalize the provision or collection of funds in relation to the commission of terrorist acts

- Freeze the funds of persons who commit, or attempt to commit, terrorist acts and those of entities owned or controlled directly or indirectly by such persons
- Prohibit persons and entities from making funds available for the benefit of others involved in the commission of terrorist acts

Paragraph 2 contains requirements aimed at preventing terrorist acts and bringing terrorists to justice, notably:

- Refraining from the provision of any type of support to individuals or entities involved in terrorist acts, including by suppressing the recruitment of members of terrorist groups
- Denying safe haven to all those who plan, support or commit terrorist acts and bringing them to justice
- Establishing terrorist acts as serious criminal offences in domestic laws
- Providing other States with the greatest measure of assistance in connection with terrorism-related criminal investigations
- Applying effective border controls and controls on the issuance of identity papers and travel documents

Paragraph 3 deals extensively with international cooperation measures:

- Intensifying the exchange of operational information
- Cooperating through bilateral and multilateral arrangements and agreements
- Ratifying and fully implementing the universal conventions and protocols related to terrorism
- Taking measures to ensure that asylum-seekers have not planned, facilitated or participated in the commission of terrorist acts
- Ensuring that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts
- Ensuring that claims of political motivation are not recognized as grounds for refusing requests for the extradition of terrorists

Security Council resolution 1373 (2001) is not limited to condemning specific manifestations of terrorism in certain parts of the world, as the Security Council has done in the past, but addresses terrorism as a general phenomenon without geographical limitations.

Unlike the set of resolutions comprising the sanctions regimes against ISIL (Da'esh), Al-Qaida and the Taliban, sanctions are not imposed pursuant to resolution 1373 (2001), nor is a listing mechanism established. Rather, in that resolution, the Security Council requires States to fully employ their criminal justice systems and operational capacities against terrorism and terrorists.

Resolution 1373 (2001) does not define terrorist acts, and thus leaves to individual Member States the task of constructing this notion on the basis of their own criminal policies and domestic legal frameworks. At the same time, as the Security Council calls upon States (para. 3 *(d)*) to “become parties as soon as possible to the relevant international conventions and protocols relating to terrorism”, it can be argued that the types of conduct set forth in such conventions and protocols are considered by the Council to be at least an integral component of what individual countries should regard as “terrorist acts” in their national legislation.

The three operative paragraphs of Security Council resolution 1373 (2001) in full

1. Decides that all States shall:
 - (a) Prevent and suppress the financing of terrorist acts;
 - (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
 - (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
 - (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;
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;
 - (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
 - (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
 - (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
 - (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
 - (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
 - (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. Calls upon all States to:

- (a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;
- (b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;
- (c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;
- (d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;
- (e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);
- (f) Take appropriate measures in conformity with the relevant provisions 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, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

In addition, Security Council resolution 1373 (2001) established the Counter-Terrorism Committee, which is a subsidiary body of the Security Council. Composed of all 15 members of the Council, the Committee monitors the implementation of resolution 1373 (2001) by receiving and analysing reports from Member States and promoting capacity-building efforts to counter terrorism at the national, regional and global levels. The Committee is assisted by the Counter-Terrorism Committee Executive Directorate, which carries out the policy decisions of the Committee, conducts expert assessments of each Member State and assists the Committee in monitoring, promoting and facilitating the implementation of resolution 1373 (2001).

The Counter-Terrorism Committee also facilitates the provision of technical assistance to Member States by various means, including by disseminating best practices and, through the Counter-Terrorism Committee Executive Directorate, serving as an intermediary for contacts between potential donors and recipients. The Executive Directorate, in particular, uses two main tools in its dialogue with States: the detailed implementation assessment and country visits conducted with the approval of the host Government. The assessment helps the Committee and the Executive Directorate to understand and define the counter-terrorism situation in each State. Shared only with the State concerned, the assessment is prepared on the basis of information provided by the State concerned, international organizations and other public sources.

Implementing Security Council resolution 1373 (2001) in domestic legal systems: issues and challenges

Implementing Security Council resolutions presents specific challenges that stem from the fact that these instruments are often drafted in less technical language than conventions. This is certainly true of Security Council resolution 1373 (2001).

For example, the broad obligation set forth in its paragraph 2 (e) is to bring terrorists to justice. This and similar formulas reproduce language used in previous General Assembly resolutions.

The technical challenges of adapting domestic legal systems to the requirements of Security Council resolutions are particularly evident if we consider the issue of freezing funds. Security Council resolution 1373 (2001) raises a number of questions on this issue: for how long are certain funds supposed to remain frozen? Based on which evidentiary standards? Should the freezing of assets lead eventually to their confiscation? Direct answers to these questions are not provided in the text of the resolution. In this and other areas, national implementing agencies have to deal with a set of provisions that are binding upon them and yet leave many elements undefined. Although this means that States have more room for manoeuvre when determining how a certain requirement will take shape and be made operational domestically, the risk is that international requirements will eventually be insufficiently or incorrectly implemented.

The Counter-Terrorism Committee has prepared a number of documents highlighting problems, obstacles and trends related to the implementation of resolution 1373 (2001), such as the Global Surveys of the implementation of Security Council resolution 1373 (2001) by Member States (see, for instance, *S/2016/49*). The Surveys present current general trends in the implementation of the resolution with a view to identifying regional vulnerabilities, or areas where groups of States facing particular implementation difficulties might benefit from a regional or subregional approach to counter-terrorism.



Tools

Tools developed by the Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate include:

- Directory of international good practices, codes and standards to assist Member States in their implementation of Security Council resolution 1373 (2001). The directory compiles, in a single reference document, the best practices, codes and standards of international and regional organizations of relevance to the various provisions of the resolution.
- Technical guide to the implementation of Security Council resolution 1373 (2001), to serve as a reference tool and to help ensure consistent analysis of State implementation efforts (available from www.un.org/en/sc/ctc/docs/technical_guide_2009.pdf).
- Compendium of border control instruments, standards and recommended practices related to counter-terrorism. The Compendium is a comprehensive compilation of international legal instruments, standards, recommended practices and other guidance material, intended to serve as a single point of reference on the various legal and practical matters relating to counter-terrorism aspects of border management.

- Asset-freezing request contact database is intended to facilitate and accelerate the process of making terrorist asset-freezing requests. The database is accessible only by designated national authorities authorized to receive asset-freezing requests from foreign jurisdictions.

Tools developed by UNODC/TPB include:

- UNODC model legislative provisions against terrorism, covering numerous aspects of the implementation of Security Council resolution 1373 (2001). The document also deals with the criminalization of preparatory conduct and support of terrorist acts, such as recruitment and supply of weapons. See, in particular, chapter 2, section 2, on terrorist acts and support offences; chapter 4, section 2-1, on preventive measures under Security Council resolution 1373 (2001); and chapter 4, section 2-3 on common provisions to sections 2-1 and 2-2.
- A technical assistance working paper entitled “Preventing terrorist acts: a criminal justice strategy integrating rule of law standards in implementation of United Nations anti-terrorism instruments”. The paper analyses the relevance of criminal justice preventive measures in anti-terrorism efforts. It reviews the substantive and procedural mechanisms that permit effective intervention.



Activities

- What steps has your country taken to give effect to Security Council resolution 1373 (2001)? What steps is it planning to take in this regard? Consult, if necessary, the reports that your country has sent to the Counter-Terrorism Committee.
- Security Council resolution 1373 (2001) does not explicitly define “terrorist acts”. Why is this the case? Discuss the advantages and disadvantages of this approach.
- Compare the requirement to freeze terrorist funds under Security Council resolution 1373 (2001) with that under the ISIL (Da’esh), Al-Qaida and Taliban sanctions regimes. Identify similarities and differences.
- Highlight the parts of Security Council resolution 1373 (2001) that demonstrate, in your opinion, a preventive approach to addressing terrorism.
- Are the international cooperation areas identified by Security Council resolution 1373 (2001) also reflected in the Global Counter-Terrorism Strategy? Compare the substantive provisions of the two instruments.
- Security Council resolution 1373 (2001) declares that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations. Similarly, General Assembly resolution 96 (I) states that the crime of genocide is contrary to the spirit and aims of the United Nations. Compare the legal consequences of both resolutions.



Assessment questions

- Is the scope of application of Security Council resolution 1373 (2001) limited to countering acts of terrorism committed in specific regions of the world, or specific types or manifestations of terrorism?

- According to the Charter of the United Nations, what are the legal consequences if States violate Security Council resolution 1373 (2001)?
- What is the role of the Counter-Terrorism Committee with regard to Security Council resolution 1373 (2001)?
- Does Security Council resolution 1373 (2001) require States to adopt domestic lists of terrorist organizations for the purposes of applying sanctions? If not, which organizations are to be considered as terrorist organizations?
- How does Security Council resolution 1373 (2001) address the issue of terrorist acts in relation to the political offence exception?
- How is Security Council resolution 1373 (2001) linked to the universal counter-terrorism instruments and to the more recent resolutions dealing with foreign terrorist fighters?



Further reading

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Reference documents

- Security Council resolution 1373 (2001)

2.1.3. Terrorist acts and weapons of mass destruction: Security Council resolutions 1540 (2004) and 2325 (2016)

Adopted under Chapter VII of the Charter of the United Nations, Security Council resolution 1540 (2004) establishes a global framework to prevent non-State actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons, and their means of delivery.

Security Council resolution 1540 (2004) responds to the danger that weapons of mass destruction could not just fall into the hands of non-State actors, but that these actors could also acquire the autonomous capacity to build, use or threaten to use them.

That has already been the subject of numerous non-proliferation instruments, including the Treaty on the Non-Proliferation of Nuclear Weapons,² the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention)³ and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological Weapons Convention).⁴ Security Council resolution 1540 (2004) seeks to fill any gaps in those instruments and to provide a globally binding legal framework which also includes those States that are not parties to the above-mentioned treaties.

What is the definition of a non-State actor?

Under Security Council resolution 1540 (2004), a non-State actor is defined as an “individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution”.

Security Council resolution 1540 (2004) has a hybrid nature: while it contains strong non-proliferation elements, it also addresses the threat of weapons of mass destruction, related materials and means of delivery falling into the hands of non-State actors, including terrorists.

Security Council resolution 1540 (2004) requires that States:

- Refrain from providing any form of support to non-State actors in engaging or planning to engage in the proliferation of weapons of mass destruction
- Adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use weapons of mass destruction and their means of delivery
- Establish domestic controls to prevent the proliferation of weapons of mass destruction and related materials through physical protection and border and export control measures

²United Nations, *Treaty Series*, vol. 729, No. 10485.

³United Nations, *Treaty Series*, vol. 1974, No. 33757.

⁴United Nations, *Treaty Series*, vol. 1015, No. 14860.

Security Council resolution 1540 (2004) and counter-terrorism

Paragraph 2 of Security Council resolution 1540 (2004) reads in part:

“... all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.”

The Security Council Committee established pursuant to resolution 1540 (2004) (see www.un.org/en/sc/1540/) monitors Member States’ compliance with the provisions of Security Council resolution 1540 (2004) and is supported by an expert group. The mandate of the Committee was extended by Security Council resolutions 1673 (2006), 1810 (2008) and 1977 (2011). In 2016, the Committee carried out a comprehensive review of States’ implementation of resolution 1540 (see S/2016/1038).

Also in 2016, the Security Council unanimously adopted resolution 2325 (2016), in which it reaffirmed the requirements of its resolution 1540 (2004) by calling on all States to strengthen national anti-proliferation regimes and to submit timely reports on their efforts. It also called for greater assistance for building State capacity in that regard, including through voluntary contributions, and for improved cooperation among all stakeholders, civil society and academia among them. Crucially, the Security Council noted the need for more attention on enforcement measures; measures relating to biological, chemical and nuclear weapons; proliferation finance measures; accounting for and securing related materials; and national export and transshipment controls.

More in-depth information and analysis concerning weapons of mass destruction and counter-terrorism will be available in module 8.



Tools

UNODC developed a training tool entitled *The International Legal Framework against Chemical, Biological, Radiological and Nuclear Terrorism*, as part of UNODC/TPB’s Counter-Terrorism Legal Training Curriculum. The tool provides a thorough examination of the international legal instruments developed to prevent and suppress acts of chemical, biological, radiological and nuclear (CBRN) terrorism, and utilizes a train-the-trainer approach aimed at transferring the knowledge and expertise needed to strengthen the capacity to implement the international legal framework against terrorism.

The Security Council Committee established pursuant to resolution 1540 (2004) has prepared a request for assistance template (available from www.un.org/en/sc/1540/) for States seeking assistance in implementing their obligations under the resolution. The template provides details on how to request assistance and the categories of assistance available, and asks requesting States to specify their preferred source of funding (for example, the State may wish to use a provider from whom they have already received assistance in other areas).

The website of the Committee offers full access to its legislative database, which contains links to the original texts of laws, ordinances, decrees and decisions related to activities addressed in resolution 1540 (2004).

UNODC electronic legal resources on international terrorism complement the Committee database by including the full text of legislation in the same or connected thematic areas. Within the UNODC electronic legal resources, most legislation relevant to the implementation of resolution 1540 (2004) can be found under the section on substantive criminal law and offences with explosives, firearms, and other dangerous materials in the national legal resources area of the website.

Several international agencies—primarily IAEA, the Organisation for the Prohibition of Chemical Weapons (OPCW) and the Biological Weapons Convention Implementation Support Unit, as well as the International Maritime Organization (IMO), following the adoption of the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation^a—have elaborated guidelines, examples of implementation and model laws, which provide additional help to national implementing bodies in that area.

Although OPCW tools cover more than counter-terrorism, they are a useful platform for legislative drafters and other national authorities interested in addressing counter-terrorism from the perspective of obligations related to weapons of mass destruction, particularly chemical weapons.

While not covering the whole spectrum of the requirements of resolution 1540 (2004), the UNODC/TPB model legislative provisions against terrorism contain model criminal law provisions dealing with offences related to weapons of mass destruction. Topics in section 1 of chapter 2 include offences related to maritime navigation and fixed platforms (subsection 2), terrorist bombings (subsection 4) and radioactive/nuclear material and nuclear facilities (subsection 5).

^aAdopted on 14 October 2005 by the Diplomatic Conference on the Revision of the SUA Treaties (LEG/CONF.15/21).



Activities

- Does your country have legislation dealing with the non-proliferation of weapons of mass destruction? (Consult, if necessary, the reports sent by your country to the Security Council Committee established pursuant to resolution 1540 (2004).)
- What is the added value of Security Council resolution 1540 (2004) in terms of the broader network of international instruments seeking to prevent the proliferation of weapons of mass destruction? Discuss.
- To what extent can the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation assist the implementation of Security Council resolution 1540 (2004)? Compare the two instruments, particularly paragraph 2 of Security Council resolution 1540 (2004) and the criminalization provisions of the Protocol.



Assessment questions

- How does Security Council resolution 1540 (2004) complement existing international instruments dealing with the proliferation of weapons of mass destruction (such as the Treaty on the Non-Proliferation of Nuclear Weapons, the Chemical Weapons Convention and the Biological Weapons Convention changed? Explain.
- What is the role of the Security Council Committee established pursuant to resolution 1540 (2004) in relation to Security Council resolution 1540 (2004)?

- How does Security Council resolution 1540 (2004) relate to counter-terrorism?
- According to the Charter of the United Nations, what could be the legal consequences of non-compliance with Security Council resolution 1540 (2004)?
- How is a “non-State actor” defined under Security Council resolution 1540 (2004)?



Further reading

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- Bosch, Olivia, and Peter van Ham, eds. *Global Non-Proliferation and Counter-Terrorism: The Impact of UNSCR 1540*. Washington, D.C.: Brookings Institution Press, 2007.
- Demeyere, Bruno. The proliferation of international nuclear law's actors: resolution 1540 and the Security Council's fight against weapons of mass destruction falling into terrorists' hands, Working Paper, No. 82. Leuven, Belgium: Catholic University of Leuven, Institute for International Law, August 2005.
- Kraig, Michael Ryan, *United Nations Security Council Resolution 1540 at the Crossroads: The Challenges of Implementation*, Muscatine, Iowa, United States of America: The Stanley Foundation, 2009.



Reference documents

- Security Council resolution 1540 (2004)
- Security Council resolution 2325 (2016)
- 2016 comprehensive review of the status of implementation of Security Council resolution 1540 (2004) (S/2016/1038)
- Request-for-assistance template of the Security Council Committee established pursuant to resolution 1540 (2004)
- Module 6: The International Legal Framework Against Chemical, Biological, Radiological and Nuclear Terrorism

2.1.4. Incitement to terrorism: Security Council resolution 1624 (2005)

Security Council resolution 1624 (2005) complements resolution 1373 (2001) on the issue of incitement of terrorist acts, thus reinforcing and complementing the International Covenant on Civil and Political Rights in its provision that condemns any incitement to violence (see below).

In its resolution 1624 (2005), the Security Council:

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 terrorist act or acts;
- (b) Prevent such conduct;

(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.

The above-mentioned provisions are more specific than the more limited provisions contained in resolution 1373 (2001), in which the Security Council:

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.

The effective implementation of resolution 1624 (2005) was cited by the Security Council as an important aspect of the implementation of resolution 2178 (2014), in which the Council addresses and seeks to eliminate the threat posed by foreign terrorist fighters (see discussion of resolution 2178 below):

The global survey of the implementation of Security Council resolution 1624 (2005) by Member States (S/2016/5) reported that acts of incitement are often a precipitating factor in decisions taken by individuals to travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training.

Incitement in the International Covenant on Civil and Political Rights

Article 20, paragraph 2, of the Covenant 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 No. 11 (1983) of the independent experts composing the Human Rights Committee (see www2.ohchr.org/english/bodies/hrc), which was established by the Covenant to monitor its implementation, emphasizes that, “[f]or article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy.”

In addition to Security Council resolution 1624 (2005), specific universal counter-terrorism instruments prohibit incitement. These include the International Convention against the Taking of Hostages⁵ (article 4), and the International Convention for the Suppression of Acts of Nuclear Terrorism,⁶ whose article 7 requests that States:

“Tak[e] all practicable measures [...] to prevent and counter preparations in their respective territories for the commission within or outside their territories of the offences set forth in article 2, including measures to prohibit in their territories illegal activities of persons, groups and organizations that [...] instigate [...] the perpetration of those offences.”

⁵General Assembly resolution 61/177, annex.

⁶General Assembly resolution 59/290, annex.

Neither the International Convention against the Taking of Hostages nor the International Convention for the Suppression of Acts of Nuclear Terrorism specifies that the prohibition or sanction against instigation of terrorist offences must be criminal in nature. However, it is difficult to imagine non-penal sanctions being effective against clandestine terrorist groups. A number of international instruments recognize that incitement to crime may itself be criminalized (see, for example, article 25, paragraph 3 (e), of the Rome Statute of the International Criminal Court,⁷ as well as article 3, paragraph 1 (c) (iii), of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988).⁸

Regional perspective on the criminalization of incitement: Council of Europe Convention on the Prevention of Terrorism

The Council of Europe Convention on the Prevention of Terrorism^a entered into force in June 2007. Among its preventive measures is the establishment of a new offence of public provocation to commit a terrorist act.

Article 5 of the Convention defines “public provocation to commit a terrorist offence” as 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”.

The Convention is not limited to incitement based upon national, racial or religious hatred. However, since those are the principal grounds used in the recruitment of terrorist groups, the Convention effectively reinforces the requirement under the International Covenant on Civil and Political Rights to prohibit advocacy of hatred that incites violence.

It is worth noticing that States wishing to implement the Convention must also comply with the requirement of article 19 of the Covenant, which states that “[e]veryone shall have the right to hold opinions without interference”, and that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds [...]”.

The Convention’s incitement offence applies only to public provocation to commit criminal offences clearly defined by law and based on the specific criminal intent to incite the commission of an offence. As a result, the Convention does not require that Parties criminalize mere careless conduct.

In view of these safeguards, the provocation offence appears consistent with article 19, paragraph 3, of the Covenant, which states that:

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 of public health or morals.

^aCouncil of Europe, *Treaty Series*, No. 196.

⁷United Nations, *Treaty Series*, vol. 2187, No. 38544.

⁸United Nations, *Treaty Series*, vol. 1582, No. 27627.

Pursuant to a specific mandate set forth in Security Council resolution 1624 (2005), in which the Counter-Terrorism Committee was entrusted with the task of monitoring its implementation, the Committee prepared reports in 2005 (S/2006/737) and 2008 (S/2008/29) on the implementation of that resolution. The reports indicate that most of the reporting States that prohibit incitement do so by expressly criminalizing the making of public statements inciting the commission of a terrorist act. Other States indicated that private communications were included if they amounted to counselling, inducing or soliciting acts of terrorism. In several cases, criminal liability would not depend on whether or not a terrorist act was actually attempted or committed, which would help fill the gap resulting from the predominantly reactive nature of the universal counter-terrorism instruments.

The central role played by Security Council resolution 1624 (2005) in counter-terrorism efforts, together with the way in which it complements the legal framework set forth in Security Council resolution 1373 (2001), prompted the Security Council to request the Counter-Terrorism Committee Executive Directorate to focus increased attention on resolution 1624 (2005) in its dialogue with member States, to develop strategies which include countering incitement of terrorist acts motivated by extremism and intolerance.⁹ In that context, the Security Council directed the Counter-Terrorism Committee Executive Directorate to produce a global survey of the implementation of resolution 1624 (2005) by Member States. The first survey was released in 2012 (S/2012/16, annex), followed by an updated one in 2016 (S/2016/50, annex).

Over recent years, a particularly challenging goal for law enforcement has been finding effective ways to address incitement to terrorism over the Internet.



Tools

In drafting and subsequently applying legislation on offences related to incitement, States should be reminded of the need to fully respect human rights obligations, in particular the rights to freedom of expression, freedom of association and freedom of religion, as set forth in the applicable international instruments.

The complex task of criminalizing incitement to terrorism is dealt with in the UNODC/TPB technical assistance working paper entitled *Preventing terrorist acts: a criminal justice strategy integrating rule of law standards in implementation of United Nations anti-terrorism instruments*. See, in particular, part B.1, section (g).

A model offence on incitement (with attached commentary) is contained in chapter 2, section 2, article 21 of the UNODC model legislative provisions against terrorism as follows:

⁹ See resolution 1963 (2010).

Whoever distributes, or otherwise makes a message available to the public, with the intent to incite the commission of a terrorist act, where such conduct, whether or not directly advocating the commission of a terrorist act, causes a danger that one or more such acts may be committed, shall be punished with [penalties which take into account the grave nature of those offences].

Examples of national legislation criminalizing incitement are also available electronically through the UNODC electronic legal resources on international terrorism.



Activities

- Does your country have legislation criminalizing incitement to terrorism? If not, does it criminalize incitement to criminal acts in general?
- Compile a list of human rights which, in your opinion, are engaged by any domestic legislation criminalizing incitement to terrorism.
- Discuss the role of Security Council resolutions 1373 (2001) and 1624 (2005) in preventing terrorism and incitement to terrorism.
- Analyse the offence of “public provocation” as defined in the Council of Europe Convention on the Prevention of Terrorism. Would you say that the definition covers all the elements needed to effectively criminalize incitement in your domestic legislation? Identify which parts of the definition provide safeguards with respect to human rights.



Assessment questions

- Does Security Council resolution 1624 (2005) define the offence of incitement?
- What is the link between Security Council resolution 1624 (2005) and the International Covenant on Civil and Political Rights?
- How does the International Covenant on Civil and Political Rights, together with the jurisprudence of the Human Rights Committee, address the issue of incitement? Do these instruments provide guidelines drafting legislation on the crime of incitement?



Further reading

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- Council of Europe, Committee of Experts on Terrorism (CODEXTER). Freedom of expression and apologie du terrorisme, 15th meeting. Strasbourg, 24-26 November 2008.
- De Brabandere, Eric. The regulation of incitement to terrorism in international law. In *Balancing Liberty and Security: The Human Rights Pendulum*, Ludovic Hennebel and H el ene Tigroudja, eds. Nijmegen, Netherlands: Wolf Legal Publishers, 2012, pp. 221-240.
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Reference documents

- Security Council resolution 1624 (2005)
- International Covenant on Civil and Political Rights (art. 20)
- General comment No. 11, Human Rights Committee
- Council of Europe Convention on the Prevention of Terrorism
- 2016 global survey of the implementation of Security Council resolution 1624 (2005), prepared by the Counter-Terrorism Committee

2.1.5. Kidnapping by terrorist groups: Security Council resolution 2133 (2014)

Addressing the increasing use of kidnapping for ransom by terrorist groups as a way of financing their activities and/or obtaining political concessions, in its resolution 2133 (2014) the Security Council calls upon Member States to cooperate closely during incidents of kidnapping and hostage-taking committed by terrorist groups. The Council reaffirms that all States should afford one another the greatest measure of assistance in connection with related criminal investigations or proceedings. It calls on Member States to encourage private sector partners to adopt or follow relevant guidelines and good practices for preventing and responding to terrorist kidnappings without paying ransoms.

In its resolution 2133 (2014), the Council reaffirms some key provisions of resolution 1373 (2001), notably the requirements for States to (a) prevent and suppress the financing of terrorist acts, and (b) refrain from providing any form of support to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to them.



Further reading

- Kazmir, Sima. The law, policy, and practice of kidnapping for ransom in a terrorism context. *New York University Journal of International Law and Politics*, vol. 48, No. 1 (2015), pp. 325-361.
- Schindler, Andrew R. Allied pressure: enforcing international obligations forbidding the payment of ransoms for kidnapped western nationals. *University of Miami National Security and Armed Conflict Law Review*, vol. 5 (2015), pp. 206-225.



Tools

- Algiers memorandum on good practices on preventing and denying the benefits of kidnapping for ransom by terrorists (Global Counter-Terrorism Forum)
- Implementing the Algiers memorandum on good practices on preventing and denying the benefits of kidnapping for ransom to terrorists

This manual is intended to serve as an introductory training course on preventing and responding to kidnapping for ransom by terrorists. It broadly covers the following topics: prevention and deterrence, crisis response and denying the benefits of kidnapping for ransom to terrorists.

2.1.6. Foreign terrorist fighters: Security Council resolutions 2178 (2014), 2249 (2015) and 2253 (2015)

In its resolution 2178 (2014), the Security Council defines foreign terrorist fighters as individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict. The phenomenon of individuals involved in that capacity in the activities of terrorist groups has raised major concerns among Member States, in particular in countries of origin, transit and destination.

Although the phenomenon of foreign terrorist fighters is not a new one, over the past few years it has reached a scale hitherto unknown. According to the report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security (S/2016/92), around 30,000 foreign terrorist fighters were estimated to be engaged in the activities of Al-Qaida, ISIL and associated groups. Governments and key representatives of counter-terrorism agencies at the domestic and regional levels have expressed great concern over the possibility of individuals travelling to Iraq, the Syrian Arab Republic or other conflict zones, becoming further radicalized, receiving combat training and possibly returning to their countries of origin as part of a global terrorist movement with the aim of perpetrating or supporting acts of terrorism. One analysis noted that, given the globalization of travel, the chance of a national of any country becoming a victim of an attack relating to foreign terrorist fighters was growing, especially with regard to attacks targeting hotels, public spaces and venues (see S/2015/358). In 2014 in its resolution 68/276, the General Assembly encouraged Member States to address that threat by enhancing their cooperation and developing relevant measures to prevent and tackle the phenomenon, including through information-sharing, border management to detect travel and an appropriate criminal justice response.

The seriousness of the problem of foreign terrorist fighters prompted the Security Council to act. In its resolution 2178 (2014), the Council decided that all Member States shall, in a manner consistent with international law, prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their State of residence or nationality for the purpose of the perpetration, planning of, or participation in terrorist acts.

Expressing concern over the establishment of international terrorist networks, the Security Council underscored the particular and urgent need to prevent the travel of and support for foreign terrorist fighters associated with ISIL (Da'esh), Al-Nusrah Front and other affiliates, splinter groups or derivatives of Al-Qaida. In that context, it decided that all States shall ensure that their legal systems provided for the prosecution, as serious criminal offences, of travel for terrorism or related training, as well as the financing or facilitation of such activities.

The Council also decided that Member States shall prevent the entry into or transit through their territories of any individual who had terrorist-related intentions, as long as the Member State in question had credible information relating to those intentions. Such prevention of entry or transit would be without prejudice to entry or transit necessary for the furtherance

of judicial processes. The Security Council called upon Member States to require airlines to provide advance passenger information for that purpose.

Outlining further measures for international cooperation to counter international terrorism and prevent the growth of violent extremism, the Security Council expressed readiness to designate additional individuals for sanctions listings (see section 2.1.3. above).

The Security Council also directed the United Nations counter-terrorism subsidiary bodies to devote special focus to foreign terrorist fighters, assessing the threat they pose and reporting on principal gaps in the abilities of Member States to suppress their travel. More specifically, Security Council resolution 2178 (2014) requires the Counter-Terrorism Committee Executive Directorate to assess the capacity of Member States to stem the flow of foreign terrorist fighters, identify good practices in that regard and facilitate the delivery of related technical assistance to States in need. Pursuant to its mandate, the Counter-Terrorism Committee issued its first report (S/2015/338), focusing on the implementation efforts of 21 Member States. The second report (S/2015/683) adopted a regional approach and analysed the efforts of 32 States in Central Asia, East Africa and the Horn of Africa, the Maghreb, Oceania and the Americas, and Western Europe.

Pursuant to paragraph 23 of its resolution 2178, the Security Council also requested the Analytical Support and Sanctions Monitoring Team, established pursuant to resolution 1526 (2004), to report on the threat posed by foreign terrorist fighters recruited by or joining ISIL (Da'esh), Al-Nusra Front and all groups, undertakings and entities associated with Al-Qaida. The report by the Analytical Support and Sanctions Monitoring Team (see S/2015/358) found that more than half of the countries in the world generated foreign terrorist fighters. The rate of flow was higher than ever and focused mainly on movement into Iraq and the Syrian Arab Republic, with a growing problem also evident in Libya. The report observed that such individuals and their networks posed an immediate and long-term threat. Those who had returned or would return to their States of origin or to third countries could pose a continuing threat to national and international security. Many individuals might reintegrate and abandon violence. Some had already gone on to organize further terrorist attacks and others might do so in the future.

In addition, elaborating on the obligations set forth in its resolution 2178 (2014), the Security Council issued a presidential statement on 19 November 2014, in which it requested the Counter-Terrorism Committee Executive Directorate, among others, to prepare an analysis of the gaps in the use of advance passenger information by Member States and to make recommendations to expand its use (S/PRST/2014/23). The report of the Counter-Terrorism Committee Executive Directorate, entitled “Gaps in the use of advance passenger information and recommendations for expanding its use to stem the flow of foreign terrorist fighters” (S/2015/377, annex), was issued in 2015.

Following a series of deadly terrorist attacks attributed to or claimed by ISIL (Da'esh) supporters in several places—including Ankara, Beirut, Paris, the Sinai, and Sousse, Tunisia—the Security Council took further measures in dealing with the foreign terrorist fighter phenomenon. In paragraph 5 of its resolution 2249 (2015), the Council called upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the Charter of the United Nations, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL (Da'esh). In that resolution, the Security Council determines that ISIL (Da'esh) constitutes a global and unprecedented threat to international peace and security.

Those developments were also echoed at the regional level. Notably, the Council of Europe adopted the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism to address the phenomenon of foreign terrorist fighters, as well as an Action Plan on the fight against violent extremism and radicalization leading to terrorism. The Protocol, which was opened for signature on 22 October 2015, implements certain requirements of Security Council resolution 2178 (2014), such as the obligation to criminalize travel to third countries for terrorist purposes (e.g., for the purpose of receiving terrorist training), participating in the activities of a terrorist group and receiving training for terrorist purposes. The provisions require all parties to designate permanent contact points facilitating swift information exchange on those suspected of travelling abroad for terrorist purposes.



Reference documents

- Security Council resolutions 2178 (2014), 2249 (2015) and 2253 (2015)
- Analysis and recommendations with regard to the global threat from foreign terrorist fighters, prepared by the Analytical Support and Sanctions Monitoring Team established pursuant to resolution 1526 (2004) (see S/2015/358)
- Report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat (S/2016/501)
- 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism
- Marrakech Memorandum on Good Practices for a More Effective Response to the Foreign Terrorist Fighters Phenomenon, prepared by the Global Counter-Terrorism Forum



Further reading

- Burniske, Jessica, Dustin A. Lewis, and Naz K. Modirzadeh. *Suppressing Foreign Terrorist Fighters and Supporting Principled Humanitarian Action: A Provisional Framework for Analyzing State Practice*. Cambridge, Massachusetts: Harvard Law School Program on International Law and Armed Conflict, 2015.
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- Mehra, Tanya. *Foreign terrorist fighters: trends, dynamics and policy responses*. Hague, Netherlands: International Centre for Counter-Terrorism, 2016.
- Schmid, Alex P. *Foreign (terrorist) fighter estimates: conceptual and data issues*, ICCT Policy Brief. Hague, Netherlands: International Centre for Counter-Terrorism, 2015.

2.1.7. Links between terrorism and organized crime: Security Council resolution 2195 (2014)

In its resolution 2195 (2014), the Security Council addressed the challenge posed by the links between terrorism and transnational organized crime. The Security Council expressed concern that terrorists profited from, among other illicit activities, trafficking in arms, persons, drugs and artefacts; from the illicit trade in natural resources including gold and other precious metals and stones, minerals, wildlife, charcoal and oil; and from kidnapping for ransom and other crimes, including extortion and bank robbery.

In the resolution the Council urged Member States, as a matter of priority, to accede to and implement all international conventions related to terrorism and organized crime, such as the United Nations Convention against Transnational Organized Crime and its Protocols, the United Nations Convention against Corruption, treaties against drug trafficking and the international counter-terrorism conventions and protocols.

In its resolution 2195 (2014), the Security Council called upon Member States to strengthen border management to prevent movement of terrorists, including those benefiting from transnational organized crime. The Council stressed the need to fight against corruption, money-laundering and illicit financial flows, and also stressed the importance of international and regional cooperation.

In addition, in its resolution 2322 (2016), the Security Council, focusing on criminal justice as a tool against terrorism, reiterated the call for Member States to implement the Organized Crime Convention and the Protocols thereto.



Reference material

- Security Council resolution 2195 (2014)
- Security Council resolution 2322 (2016)
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
- United Nations Convention against Transnational Organized Crime
- United Nations Convention against Corruption



Further reading

- Basra, Rajan, Peter R. Neumann, and Claudia Brunner. Criminal pasts, terrorist futures: European jihadists and the new crime-terror nexus. London: International Centre for the Study of Radicalization and Political Violence, 2016.
- Makarenko, Tamara. The crime-terror continuum: tracing the interplay between transnational organised crime and terrorism. *Global Crime*, vol. 6, No. 1 (February 2004), pp. 129-145.
- Shelley, Louise I. *Dirty Entanglements: Corruption, Crime and Terrorism*. New York: Cambridge University Press, 2014.

2.1.8. Terrorism and trafficking in cultural property: Security Council resolutions 2199 (2015) and 2347 (2017)

The international community has witnessed an increasing number of acts aimed at the destruction of the world's cultural heritage and looting and illicit trafficking in cultural property by terrorist groups. Such activities provide financial income to terrorist organizations and strengthen their operational capability to carry out further activities.

The looting of cultural artefacts is not a new phenomenon, especially in countries where State institutions are weak. The breaking down of State authority, which often follows armed conflicts, intensifies the problem. The pattern of deliberately destroying and stealing cultural property, which was initially identified in Afghanistan under the Taliban regime, has more recently been conducted by ISIL (Da'esh) and its supporters in Iraq, Libya and the Syrian Arab Republic, and by other Islamic radical groups in Mali. In the case of ISIL (Da'esh), profits are made from selling artefacts looted from archaeological sites and museums to the black market, as well as from imposing taxes on the movement of such objects through the territories under their control (see S/2014/815).

Complementing Security Council resolution 2195 (2014) on the links between terrorism and transnational organized crime, one section of Security Council resolution 2199 (2015) focuses on cultural heritage. In addition to condemning the destruction of cultural heritage in Iraq and the Syrian Arab Republic, particularly by ISIL (Da'esh) and Al-Nusrah Front, the Security Council recognized the close links between trafficking in cultural property and the financing of terrorist activities of ISIL (Da'esh), Al-Nusrah Front and other individual and entities associated with Al-Qaida. It decided that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance illegally removed from those countries, and called upon the United Nations Educational, Scientific, and Cultural Organization, INTERPOL and other relevant international organizations to assist Member States in that regard.

Also in that resolution, the Security Council requested the Analytical Support and Sanctions Monitoring Team to submit a report on the Organization's efforts to address the threat of terrorists benefiting from transnational organized crime, with recommendations of concrete options for strengthening the capabilities of Member States to counter it. The related report of the Secretary-General (S/2015/366) was issued in May 2015.

In 2017, the provisions of Security Council resolution 2195 (2014) were translated in a fully fledged Security Council instrument devoted entirely to the measures against the exploitation of cultural property by terrorist groups. In its resolution 2347 (2017), the Council calls upon Member States to request and provide cooperation in investigations, prosecutions, seizure and confiscation as well as the return, restitution or repatriation of trafficked, illicitly exported or imported, stolen, looted, illicitly excavated or illicitly traded cultural property, and judicial proceedings. Crucially, the Security Council envisaged a series of concrete measures for Member States to adopt, such as:

- Introducing or improving cultural heritage's and properties' local and national inventory lists, including through digitalized information when possible, and making them easily accessible to relevant authorities and agencies
- Adopting adequate and effective regulations on export and import, including certification of provenance where appropriate, of cultural property, consistent with international standards

- Using and contributing to the INTERPOL Database of Stolen Works of Art, the United Nations Educational, Scientific, and Cultural Organization Database of National Cultural Heritage Laws, and the World Customs Organization electronic information exchange platform (ARCHEO), and relevant current national databases, as well as providing relevant data and information on investigations and prosecutions of relevant crimes and related outcome to the UNODC knowledge management portal known as Sharing Electronic Resources and Laws on Crime (SHERLOC) and on seizures of cultural property to the Analytical Support and Sanctions Monitoring Team

Security Council resolution 2347 (2017) also explicitly envisages the active involvement of the private sector, including museums, business associations and antiquities market as key stakeholders in ensuring the application of due diligence standards and other measures to prevent the trade of stolen or illegally traded cultural property.



Reference documents

- Security Council Resolution 2199 (2015)
- Security Council Resolution 2347 (2017)
- Report of the Secretary-General on the threat of terrorists benefiting from transnational organized crime (S/2015/366)



Further reading

- Bauer, Alexander A. Editorial: the destruction of heritage in Syria and Iraq and its implications. *International Journal of Cultural Property*, vol. 22, No. 1 (2015), pp. 1-6.
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- Campbell, Peter B. The illicit antiquities trade as a transnational criminal network: characterizing and anticipating trafficking of cultural heritage. *International Journal of Cultural Property*, vol. 20, No. 2 (2013), pp. 113-153.
- Frey, Bruno S., and Dominic Rohner. Protecting cultural property against terrorism. *Defence and Peace Economics*, vol. 18, No. 3 (2007), pp. 245-252.
- Giroud, Sandrine and Charles Boudry. Art lawyers’ due diligence obligations: a difficult equilibrium between law and ethics. *International Journal of Cultural Property*, vol. 22, Nos. 2 and 3 (2015), pp. 401-417.
- Lenzerini, Federico. Terrorism, conflicts and the responsibility to protect cultural heritage. *International Spectator: Italian Journal of International Affairs*, vol. 51, No. 2 (2016), pp. 70-85.

2.2. Universal counter-terrorism instruments in detail

2.2.1. Treaties adopted under the auspices of the United Nations, IAEA, ICAO and IMO

One of the pillars of the universal legal framework against terrorism is a set of 19 universal counter-terrorism instruments, adopted by the United Nations and its specialized agencies since 1963.

In this section, the 19 universal instruments are arranged in subgroups on the basis of their thematic focus and depositaries. For each, an overview of the main contents is accompanied by information about the depositary details.

The UNODC website includes the text of all 19 instruments in all the official languages of the United Nations and provides direct access to the official record of depositaries and information on the number of ratifications for each instrument. It also contains national implementing legislation, jurisprudence and model laws.

2.2.1.1. *Instruments related to civil aviation*



Module 5 contains in-depth information, analysis and training materials concerning aviation-related terrorism

The international legal framework dealing with the terrorist threat in relation to civil aviation is currently composed of eight instruments adopted over a timespan of over 50 years, starting in 1963 with the Convention on Offences and Certain Other Acts Committed on Board Aircraft.¹⁰ The treaty establishes procedures for the return of aircraft and for the treatment of passengers and crew after an unlawful diversion. It also requires a contracting State to establish jurisdiction to punish offences committed on board aircraft registered in that State, but does not establish any offences that State parties are required to punish. There is no requirement to define as an offence any particular conduct endangering the safety of an aircraft or of persons on board. Moreover, the requirement to establish jurisdiction only applies to acts committed on board an aircraft while it is in flight, defined as from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

In 2014, a new protocol to amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft expanded the jurisdiction over offences and acts committed on board aircraft from the State of registration of the aircraft to the State of the operator and the State of landing. When one of those States becomes aware that one or more of the other States are conducting an investigation, prosecution or judicial proceeding in respect of the same offence or act, that State will consult the other States with a view to coordinating their actions.

¹⁰United Nations, *Treaty Series*, vol. 704, No. 10106.

ICAO is the depositary of both the Convention on Offences and Certain Other Acts Committed on Board Aircraft and its 2014 amending protocol. However, only the former is in force.

Subsequent aviation-related instruments were incremental reactions to aircraft hijackings at the time. The Convention for the Suppression of Unlawful Seizure of Aircraft¹¹ requires States parties to punish the conduct of persons on board an aircraft in flight who “unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft”. The Convention considers an aircraft to be in flight “at any time from the moment when all of its external doors are closed following embarkation until the moment when any such door is open for disembarkation.”

The Convention for the Suppression of Unlawful Seizure of Aircraft is in force. The depositaries are the Governments of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation¹² was adopted after the destruction of four civilian aircraft on the ground in the Middle East in September 1970. It requires criminalization of attacks on aircraft “in service” (a broader concept than that of aircraft “in flight”), which is defined in article 2 (*b*) as “from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing”. Articles 1 (*a*) and (*d*) also require criminalization of any act of violence against a person on board an aircraft in flight and any damage to or interference with air navigation facilities likely to endanger the safety of an aircraft in flight.

The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation is in force. The depositaries are the Governments of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,¹³ was adopted following attacks on travellers in airports in Vienna, Rome and elsewhere in the 1980s. It requires criminalization of acts of violence likely to cause death or serious injury at airports serving international civil aviation, and of destroying or seriously damaging aircraft or facilities if such acts endanger or are likely to endanger safety at airports. Only States that are parties to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation may sign this Protocol.

¹¹United Nations, *Treaty Series*, vol. 860, No. 12325.

¹²United Nations, *Treaty Series*, vol. 974, No. 14118.

¹³United Nations, *Treaty Series*, vol. 1589, No. 14118.

The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation is in force. The depositaries are the Governments of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

The Convention on the Marking of Plastic Explosives for the Purpose of Detection¹⁴ requires States parties to take measures to control explosives that do not contain volatile chemicals subject to detection by scanning equipment. Those measures need not be penal in nature. It also does not contain any criminal justice cooperation mechanism.

The Convention on the Marking of Plastic Explosives for the Purpose of Detection is in force. The depositary is ICAO.

In 2010, two new legal instruments were adopted with the objective of better taking into account the threats affecting international civil aviation since the events of 11 September 2001.

In particular, the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation modernizes and consolidates the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation. It criminalizes the acts of using civil aircraft for the purpose of causing death, serious bodily injury or serious damage; using civil aircraft to release or discharge any biological, chemical or nuclear weapon or similar substances to cause death, serious bodily injury or serious damage; and using any biological, chemical or nuclear weapon or similar substances on board or against civil aircraft. It further criminalizes the unlawful transport of any biological, chemical or nuclear weapon, or related material or other dangerous material. Cyberattacks on air navigation facilities constitute an offence under this Convention.

The Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft was also adopted in 2010. It expands the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft by covering different forms of aircraft hijackings, including those occurring through modern technological means.

Both the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and its supplementary Protocol specifically provide for the criminal liability of directors and organizers, as well as the liability of those who knowingly assist an offender to evade investigation, prosecution or punishment. Any person making a threat to commit an offence may be held criminally accountable when the circumstances indicate that the threat is credible. Under certain conditions, agreement to contribute or contribution to an offence, whether such an offence is actually committed or not, may be punishable. A legal entity may be held criminally liable if the applicable national law so provides.

¹⁴S/22393, annex I; see *Official Records of the Security Council, Forty-sixth Year, Supplement for January, February and March 1991*.

Neither the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation nor the Protocol are in force. The depositary is ICAO.

Security Council and the terrorist threats to civil aviation

In 2016, the Security Council adopted resolution 2309 (2016), its first resolution entirely devoted to the threat that terrorist groups pose to aviation security globally. In that context, a key role is supposed to be played by both Member States and ICAO to strengthen and promote the effective application of ICAO standards and recommended practices.

Other envisaged measures include:

- Ensuring that effective, risk-based measures are in place at the airports, including through enhancing screening, security checks, and facility security, to detect and deter terrorist attacks against civil aviation
- Ensuring that these measures are effectively implemented on the ground on a continuing and sustainable basis, including through the provision of the required resources, the use of effective quality control and oversight processes, and the promotion of an effective security culture within all organizations involved in civil aviation
- Strengthening security screening procedures and maximizing the promotion, utilization and sharing of new technologies and innovative techniques that maximize the capability to detect explosives and other threats, as well as strengthening cooperation and collaboration and sharing experience in regards to developing security check technologies
- Further engaging in dialogue on aviation security and cooperate by sharing information, to the extent possible, about threats, risks, and vulnerabilities, by collaborating on specific measures to address them and by facilitating, on a bilateral basis, mutual assurance about the security of flights between their territories
- Require that airlines operating in Member States' territories provide advance passenger information to the appropriate national authorities in order to detect the departure from their territories, or attempted entry into or transit through their territories, by means of civil aircraft, of individuals designated by the Committee pursuant to Security Council resolutions 1267 (1999), 1989 (2011) and 2253 (2015)

2.2.1.2. Instruments related to the status of the victim

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents¹⁵ requires States parties to criminalize violent attacks directed at Heads of State and foreign ministers and their family members, as well as diplomatic agents entitled to special protection under international law. The term “diplomatic agents” and the circumstances under which such persons are entitled to special protections can be found in the Vienna Convention on Diplomatic Relations of 1961.¹⁶ While the Convention on the Prevention and Punishment of Crimes against Internationally Protected

¹⁵General Assembly resolution 3166 (XXVIII), annex.

¹⁶United Nations, *Treaty Series*, vol. 500, No. 7310.

Persons, including Diplomatic Agents requires criminalization of attacks on protected persons, it does not address whether the necessary criminal intent must include knowledge of the victim's protected status.

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents is in force. The depositary is the Secretary-General of the United Nations.

The International Convention against the Taking of Hostages requires criminalization of any seizure or detention and threat to kill, injure or continue to detain any person, not limited to diplomatic agents, in order to compel any State, international organization, persons or person to do or abstain from doing any act. This Convention only addresses detentions and related threats, and not any resulting death or injury, and applies only when there is an international dimension to the event. Acts of hostage-taking for which the 1949 Geneva Conventions and their Additional Protocols are applicable are excluded from the scope of application of the International Convention against the Taking of Hostages.

The International Convention against the Taking of Hostages is in force. The depositary is the Secretary-General of the United Nations.

2.2.1.3. *Instruments related to terrorist bombings, financing and nuclear terrorism*

Although its title refers only to bombings, the International Convention for the Suppression of Terrorist Bombings¹⁷ also covers weapons of mass destruction by requiring the creation of an offence of intentionally placing or using an explosive or other lethal device with the intent to cause death, serious injury or major economic loss. "Explosive or other lethal device" is defined as: "[a]n explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or [a] weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material". The activities of armed forces during an armed conflict are not governed by this Convention.

The International Convention for the Suppression of Terrorist Bombings is in force. The depositary is the Secretary-General of the United Nations.

The International Convention for the Suppression of the Financing of Terrorism¹⁸ requires States parties to criminalize conduct by any person who:

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

¹⁷United Nations, *Treaty Series*, vol. 2149, No. 37517.

¹⁸United Nations, *Treaty Series*, vol. 2178, No. 38349.

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

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

The International Convention for the Suppression of the Financing of Terrorism incorporates the offences penalized in nine of the universal terrorism-related instruments that pre-date its adoption as types of conduct for which the provision or collection of funds are forbidden.

Although the International Convention for the Suppression of the Financing of Terrorism has a similar structure and language to the International Convention for the Suppression of Terrorist Bombings, its importance comes from the addressing of the planning and preparation stages that precede terrorist attacks. It accomplishes this in two ways: instead of prohibiting a particular form of violence associated with terrorism, it criminalizes the non-violent logistical preparation and support that make terrorist groups and terrorist operations possible; and it eliminates any ambiguity by expressly providing that the prohibited conduct need not necessarily result in a violent act. Compliance with all of the international standards applicable to the financing of terrorism can only be fully achieved by legislation establishing the Convention offence, and not by reliance upon complicity, conspiracy, money-laundering or other offences not specific to the financing of terrorism.

The International Convention for the Suppression of the Financing of Terrorism is in force. The depositary is the Secretary-General of the United Nations.

The International Convention for the Suppression of Acts of Nuclear Terrorism defines offences such as the possession or use of radioactive material or a nuclear explosive or radiation dispersal device with the intent to cause death or serious bodily injury or substantial damage to property or the environment; and the use of radioactive material or a device, or the use of or damage to a nuclear facility which risks the release of radioactive material with the intent to cause death or serious injury or substantial damage to property or to the environment, or with the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing any act.

These offences focus more explicitly on nuclear devices specifically constructed to do harm than those contained in the Convention on the Physical Protection of Nuclear Material¹⁹ and the Amendment to the Convention on the Physical Protection of Nuclear Material,²⁰ although the Convention and 2005 Amendment also contain prohibitions against harmful use, theft, robbery, embezzlement or other illegal means of obtaining nuclear material and to related threats.

¹⁹United Nations, *Treaty Series*, vol. 1456, No. 24631.

²⁰Adopted on 8 July 2005 by the Conference to Consider and Adopt Proposed Amendments to the Convention on the Physical Protection of Nuclear Material.

Both instruments define the terminology used and those definitions must be reviewed carefully by experts during the legislative drafting process. For example, a “nuclear facility” is protected by both agreements, but the terminology is defined differently in the two instruments. Accordingly, national drafting experts may wish to consult with UNODC and IAEA legal advisers to avoid conflicts and duplication in domestic legislation implementing these two instruments.

The International Convention for the Suppression of Acts of Nuclear Terrorism is in force. The depositary is the Secretary-General of the United Nations.



Module 6 contains in-depth information, analysis and training materials on nuclear terrorism.

2.2.1.4. *Instruments related to maritime navigation and fixed platforms*



Module 5 contains in-depth information, analysis and training materials on maritime terrorism.

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation combines many of the provisions developed in the preceding decades to deal with attacks upon aircraft. It was adopted following the 1985 hijacking of the cruise ship “Achille Lauro” in the Mediterranean Sea and the murder of a passenger. The agreement requires the criminalization of ship seizures; damage to a ship or its cargo that is likely to endanger its safe navigation; introduction of a device or substance likely to endanger the ship; endangering safe navigation by seriously damaging navigation facilities; and injuring or killing any person in connection with the previously listed offences.

The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf expands the types of conduct to be criminalized with regard to fixed platforms.

Both the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf are in force. The depositary is the Secretary-General of IMO.

Two protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf were negotiated in 2005 under the aegis of IMO. These instruments provide that, upon coming into force following the requisite number of adoptions, they shall be combined with the earlier instruments. The new agreements create additional offences, including: using against or discharging from a ship

explosives, radioactive, biological, chemical or nuclear materials or weapons in a manner likely to cause death, serious injury or damage; discharging other hazardous or noxious substances likely to cause death or serious injury or damage; or using a ship in a manner that causes death or serious injury or damage; or threatening to do so.

The Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation provides new perspectives on combating crimes committed at sea. In further expanding the range of conduct to be criminalized, it has added specific counter-terrorism provisions, together with offences related to the proliferation of weapons of mass destruction. Crucially, it has introduced a legal framework to allow States to board foreign ships in the high sea when suspected of having committed any of the newly established offences.

The Protocol of 2005 for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf broadens the range of offences included in the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, concluded in 1988. A person commits an offence if the following conditions are met: (a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act, and (b) if that person unlawfully and intentionally uses against or on a fixed platform or discharges from a fixed platform any explosive, radioactive material or biological, chemical or nuclear weapon in a manner that causes or is likely to cause death or serious injury or damage; or discharges from a fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration, that it causes or is likely to cause death or serious injury or damage; or threatens, with or without a condition, as is provided for under national law, to commit an offence. A new article includes the offences of unlawfully and intentionally injuring or killing any person in connection with the commission of any of the offences; attempting to commit an offence; participating as an accomplice; and organizing or directing others to commit an offence.

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, and their respective Protocols, are in force. The depositary for both is the Secretary-General of the IMO.

2.2.1.5. *Instruments related to the physical protection of nuclear material*



See module 6 for in-depth information, analysis and training materials on the legal framework for the protection of nuclear materials.

The Convention on the Physical Protection of Nuclear Material establishes obligations concerning the protection and transportation of defined materials during international nuclear transport. It also requires States parties to create offences for the unlawful handling of nuclear materials or threat thereof; theft, robbery or other unlawful acquisition of or demand for such material; or a threat of such unlawful acquisition in order to coerce a person, international organization or State. The Convention includes mechanisms for international cooperation along the same lines as the other instruments analysed in this section.

The Convention on the Physical Protection of Nuclear Material is in force. The depositary is the Director General of IAEA.

The Amendment to the Convention on the Physical Protection of Nuclear Material criminalizes acts directed against or interfering with a nuclear facility that are likely to cause serious injury or damage, unauthorized movement of nuclear material into or out of a State without lawful authority; a demand for nuclear material by threat or use of force; a threat to use such material to cause death or serious injury or damage to property or to the environment or to commit an offence in order to coerce a person, international organization or State. Because of the similarities with the International Convention for the Suppression of Acts of Nuclear Terrorism, the two instruments should be considered jointly, both for implementation and training purposes.

The Amendment to the Convention on the Physical Protection of Nuclear Material is in force and the depositary is the Director General of IAEA.

Are certain universal counter-terrorism instruments more relevant for some States than others?

States often ask how certain agreements are relevant to their own circumstances and why they should adopt them. For example, a landlocked country may question how anyone on its territory could possibly violate the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. It is often argued that, if there is no sea coast and no registered ships or offshore platforms, there can be no unlawful seizure of a vessel or platform to punish. The formal response to such questions is that, if a State subscribes to a particular counter-terrorism instrument, then, legally, it cannot ignore the main requirements of that convention, including the obligation to criminalize certain conduct.

More substantial reasons also exist in favour of, for example, the full implementation of maritime-related treaties for a landlocked country: its nationals might commit maritime-related crimes outside the country; its citizens could be among the passengers threatened or killed in such a crime; the unlawful seizure of a vessel and threats to kill passengers or destroy property could be directed at forcing a landlocked country to release a particular prisoner or refrain from taking certain action; or an offender may be found on its territory. Similar arguments can be made in favour of non-nuclear States becoming parties to nuclear-related instruments.



Activities

Looking at the relevant provisions and current ratification status of the universal counter-terrorism instruments, identify the requirements to enable each one to enter into force.



Assessment questions

Explain why landlocked countries might benefit from becoming parties to maritime-related instruments, and why non-nuclear States should become parties to treaties dealing with nuclear materials and nuclear terrorism.



Further reading

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Reference documents

- Full text of the 19 universal counter-terrorism instruments

2.2.2. A common structure reflecting a criminal justice-based approach to counter-terrorism

Most universal instruments embody a marked criminal justice-based approach to counter-terrorism. This means that national criminal court systems and law enforcement institutions are the central engines of the system. Coordination among law enforcement, prosecutorial and judicial authorities are key to this approach.

This section will highlight the following aspects of the universal counter-terrorism instruments:

- Scope of application
- Criminalization requirements
- Jurisdiction and the *aut dedere aut judicare* principle
- Mechanisms for international cooperation (extradition and mutual legal assistance)

2.2.2.1. Scope of application

The universal counter-terrorism instruments were conceived in order to empower States parties to prosecute acts committed by non-State agents. This appears logical, considering that the instruments themselves are founded upon the idea of inter-State cooperation.

However, this approach raises the issue of how to deal with conduct committed by State agents or individuals acting on behalf of a State. Although their acts are not explicitly excluded from the scope of application of the universal counter-terrorism instruments, they are not directly covered by them either.

All of the instruments adopted after the International Convention for the Suppression of Terrorist Bombings recall in their preamble General Assembly resolution 49/60 of 1994 on measures to eliminate international terrorism, in which Member States reaffirmed their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed. This suggests that, at least in principle, the status of the alleged offender is actually irrelevant in the framework of the universal counter-terrorism instruments.

On the other hand, the counter-terrorism instruments establish the principle that nothing will affect other rights, obligations and responsibilities of States and individuals under international law. It is therefore important to determine if other branches of international law contain provisions that exempt from criminal prosecution certain categories of offenders.

In practice, this requires insight into the specific exclusions set forth by the treaties themselves, as well as their interaction with international law on diplomatic and State immunities. The result is a complex legal framework rooted in both international customary and treaty law (see the case study in this section).

In addition, for the universal counter-terrorism instruments to be applicable, the offences established therein must present some transnational elements. Each instrument articulates this requirement in a different manner. Article 13 of the International Convention against the Taking of Hostages, for example, expresses it as follows: “This Convention shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.”

Article 4 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation contains a similar requirement that is relevant to the maritime navigation field: “This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States. In cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender is found in the territory of a State Party other than the State referred to in paragraph 1.”

The requirement that the offence be transnational in nature appears to be a direct consequence of the very objective pursued by the counter-terrorism instruments: facilitating international cooperation for the purpose of ensuring successful prosecutions. Whenever a terrorist act has no international implications, the international cooperation mechanisms envisaged in the counter-terrorism instruments will not be triggered because there would be no need for doing so.

From another perspective, the scope of application of the counter-terrorism instrument is significantly limited when the criminal conduct described therein is committed in the context of armed conflict, whether international or national. Under article 19, paragraph 2, of the International Convention for the Suppression of Terrorist Bombings, for example, “the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention”. In the case of armed conflict, as a matter of principle, the relevant norms of international humanitarian law prevail as *lex specialis*.



Counter-terrorism and the universal counter-terrorism instruments in the context of international humanitarian law will be examined in module 1.

Finally, the immunity enjoyed by the military in general from the jurisdiction of civilian courts explains the following provision contained in the article 19, paragraph 2, of the International Convention for the Suppression of Terrorist Bombings: “the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.”

Following the same logic, the Convention for the Suppression of Unlawful Acts against the Security of Maritime Navigation excludes warships from its scope of application. Similarly, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation excludes aircraft used in military services.



Case study

This case study explores the complex interplay between the scope of application of the universal counter-terrorism instruments and the rules governing diplomatic and State immunities. Assume that Mr. X, a national of State A, discharges an explosive in a place of public use in State B. State B has established jurisdiction to prosecute offences committed in its territory (it is a party to the International Convention for the Suppression of Terrorist Bombings). Let us consider the extent to which the legal position of Mr. X may affect the ability of the courts in State B to exercise jurisdiction.

(a) Assuming Mr. X is not a State agent and has acted in his own capacity:

This is the classic hypothesis for which the International Convention for the Suppression of Terrorist Bombings and other universal counter-terrorism instruments were originally conceived. There is little doubt the courts of State B will be able to exercise their criminal jurisdiction over Mr. X.

(b) Assuming Mr. X is an agent of State A and has acted in his capacity as a State official:

In this scenario, the perpetrator is formally a State official and has acted under the instructions of his Government. In principle, the act is attributable to State A as an entity, with the consequence that “functional immunities” become applicable. The courts of State B would normally be barred from exercising jurisdiction over Mr. X, unless the authorities of State A waive such immunity.

Since the act is attributable to State A, this type of immunity constitutes an exemption from the receiving country’s substantive criminal law and is not simply a temporary bar to prosecution. As a result, the immunity does not end when Mr. X ceases to be a State agent.

The above-mentioned scenario is without prejudice to the fact that State B may take appropriate legal and diplomatic steps to invoke the responsibility of State A at the international level.

(c) Assuming Mr. X is not formally a State agent, but has acted on behalf of State A:

Although Mr. X is not an official of State A, if it is determined that the act he committed is attributable to State A, then he is covered by the same “functional immunities” already mentioned under point (b), above, as the act in question is attributable to the State and performed in his capacity as a State official. This is definitely the case if Mr. X has acted under the explicit instructions of his Government. However, in practice, cases are problematic and present some grey areas. What would happen, for example, if Mr. X had acted under the tacit consent of State A? A series of authoritative judgments given by the International Court of Justice provide guidelines to these grey areas. In the 1979 Tehran case,⁹ for example, it was established that even ex post acceptance of the act in question by the Government would be enough for the acts committed by certain individuals to be attributed to it.

(d) Assuming Mr. X is an agent of State A, but has acted in his own capacity:

In principle, the acts of Mr. X cannot be attributed to State A. No functional immunities come into play in this scenario. As a result, there is no bar to the prosecution of Mr. X based on his formally being a State official.

However, diplomatic agents are also protected by “personal immunities”, which cover acts committed in their private life. The justification for these immunities is found in the need to protect foreign officials from any interference in their private life that might jeopardize the performance of their official functions. It is generally accepted that similar immunities of the kind are extended to Heads of State, Heads of Government and ministers of foreign affairs on official missions abroad.

Although State B might not be able to subject Mr. X to criminal proceedings, it remains possible for it to declare him *persona non grata*, i.e. Mr. X is deemed unacceptable to State B and is thus recalled to State A.

Unlike functional immunities, personal immunities cease to have effect when the person leaves office. In this sense, personal immunities do not exempt the incumbent from criminal liability, but is rather a temporary bar to prosecution. In the present scenario, as soon as Mr. X ceases to be a diplomat and returns to State B, criminal proceedings can be launched.

One final important point: if the offences set forth in the universal counter-terrorism instruments also amount to international crimes (for example, genocide, war crimes, and crimes against humanity), then there is no immunity from criminal jurisdiction.

^aUnited States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3.



Activities

- Do the existing limitations to the scope of application of the counter-terrorism instruments pose a serious constraint to effective prosecution of perpetrators of terrorist acts by States? Discuss.



Assessment questions

- Identify the limitations to the scope of application of the universal counter-terrorism instruments with regard to: different categories of persons (for instance, foreign diplomats); situations of peace and armed conflict; and the nature of the offence (transnational or domestic).



Further reading

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Reference documents

- General Assembly resolution 49/60 on measures to eliminate international terrorism
- Geneva Conventions of 12 August 1949 and the Additional Protocols of 1977 to the Geneva Conventions of 1949 (international humanitarian law)
- Vienna Convention on Diplomatic Relations
- Vienna Convention on Consular Relations
- United Nations Convention on Jurisdictional Immunities of States and Their Property

2.2.2.2. Criminalization requirements

A key component of most of the universal counter-terrorism instruments is the obligation for States parties to introduce certain criminal offences into their national legislation. The offence-creating provisions contain a number of common features, which can be summarized as follows:

- Each criminal conduct is defined according to its objective and material elements (*actus reus*) (e.g. causing destruction, placing explosives, seizing aircraft or ships, etc.). In some cases, a further constituent element of a crime is the creation of a danger, regardless of whether the causation of such danger was intentional. For example, not all acts of violence committed on board an aircraft are covered by the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; it only relates to those which are likely to endanger safety.
- The subjective and intentional element (*mens rea*) included within the offence-creating provisions requires that the offence be committed “wilfully or intentionally”. This “general” intention is often accompanied by a “special” one (for example, an additional intention by the perpetrator to cause death or serious bodily injuries).
- The criminalization requirements extend to attempt and complicity (aiding and abetting).
- The International Convention for the Suppression of Terrorist Bombings and subsequent instruments contain additional criminalization requirements addressing the contribution to the commission of the offences by a group of persons acting with a common purpose.
- No convention determines the nature and quantum of the penalties to be imposed, as they limit themselves to requiring the establishment of appropriate sanctions which take into account the grave nature of the offences in question.

A special “terrorist intention”?

The words “terrorism” and “terrorist” do not appear in any of the offence-creating provisions. Rather, some offences require an additional intention to “intimidate a population” or “compel” a Government or a party “to do or abstain from doing certain acts”. The instruments containing these requirements include: the International Convention against the Taking of Hostages; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; and the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (the latter treaty is not yet in force).

For policymakers and legislative drafters engaged in the implementation of the universal counter-terrorism instruments, there are a number of issues to take into consideration, notably:

- There is no universal instrument that defines “terrorist acts” for criminalization purposes. Even Security Council resolution 1373 (2001) does not contain such a definition. Accordingly, it is up to each State to decide if and how to criminalize terrorist acts, in accordance with other relevant international and regional commitments. This is without prejudice to the obligation for each State to specifically criminalize the types of conduct set forth in the universal counter-terrorism instruments to which it is a party.
- If a State decides to criminalize terrorist acts, particular attention should be given to ensuring that the language used in its legislation is sufficiently precise and unambiguous to suit criminal law drafting requirements, including human rights considerations.
- For States deciding to criminalize terrorist acts, the UNODC model legislative provisions against terrorism provide drafting guidelines and propose various options that reflect descriptions found in different United Nations texts and regional legal instruments.

Additionally, some instruments, such as the International Convention for the Suppression of the Financing of Terrorism and the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (and the most recent aviation-related conventions), require States parties to establish the liability of legal entities located in their territory or organized under their laws when a person responsible for the management or control of one of those entities has, in that capacity, committed an offence as set forth in the two above-mentioned instruments. Such liability is without prejudice to that of the individuals who have committed the offences.

Under the above-mentioned instruments, States can choose whether the responsibility of legal entities should be considered as criminal, civil or administrative. In the absence of national legislation on the responsibility of legal entities, and if a State wishes this responsibility to be criminal, special provision should be made. Moreover, providing for civil or administrative sanctions may require the modification of other laws, in particular company or banking laws.



Case study^a

“A questionable philanthropist”

Preliminary information

Assume that Bluelandia is a State party to all the universal counter-terrorism instruments and that it has duly incorporated its international obligations into domestic criminal laws.

1. A bomb attack occurs in a supermarket in Bluelandia, killing many people. Investigations reveal that the money used to buy the explosives was drawn from a bank account in the name of the Prosperity Foundation, a non-governmental organization officially devoted to poverty-alleviation projects but with a suspicious past. Mr. Filz, a rich philanthropist, had made a wire transfer to that bank account. He admits having authorized the donation to the Prosperity Foundation, but claims he intended the money to reach the poor, in line with the official aims of the Foundation. He claims that, in the absence of any criminal intention, he should be cleared of the charge of terrorist financing.

Is Mr. Filz's argument acceptable? If not, why?

2. The police discover a hut in the countryside of Bluelandia that contains explosives. There is evidence linking these explosives to Mr. Filz and the Prosperity Foundation. The explosives were apparently destined for an attack to be carried out at the same time as the one in the supermarket, but in the end they were not used. The defence lawyer of Mr. Filz argues that, since the explosives were left unused and nobody was injured, his client should not be charged with any offence of terrorist financing.

Is the argument of the lawyer acceptable? If not, why?

*See annex III for the answers to this case.



Tools

In an effort to facilitate the task of national implementing agencies, the UNODC/TPB *Guide for the Legislative Incorporation and Implementation of the Universal Anti-terrorism Instruments* (available from www.unodc.org) deals extensively with the criminalization of treaty-based offences in the area of counter-terrorism. See, in particular, part I, on criminalized acts, and part II, on measures to ensure effective criminalization. UNODC/TPB Counter-Terrorism Legal Training Curriculum—specifically module 4: Human rights and criminal justice responses, and module 5: Transport-related (civil aviation and maritime) terrorism offences—also provide assistance tools for the incorporation and implementation of the universal anti-terrorism instruments. Both modules are also available on the UNODC website.

In order to assist Member States in strengthening the protection of human rights in the context of countering terrorism, in 2010 the Counter-Terrorism Implementation Task Force Working Group on Promoting and Protecting Human Rights and the Rule of Law While Countering Terrorism launched two human rights reference guides on stopping and searching of persons and on protecting security infrastructure. Updated editions were issued in 2014. These guides are aimed at providing assistance on how Member States can adopt human rights-compliant measures in a number of counter-terrorism areas. The guides also identify the critical human rights issues raised in these areas and highlight the relevant human rights principles and standards that must be respected.

Along the same lines, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has prepared a fact sheet on human rights, terrorism and counter-terrorism (available from www.ohchr.org). Although the fact sheet is broadly designed to provide a practical tool for practitioners dealing with counter-terrorism measures in general, it contains guidelines on how to define acts of terrorism in compliance with human rights (see chapter III, section (g), on the principle of legality and the definition of terrorism).

The UNODC/TPB model legislative provisions against terrorism offer suggested drafting language for the criminalization requirements of all the universal counter-terrorism instruments. See, in particular, chapter 2, which discusses offences, and divides the various offences into three sections:

- Offences relating to international treaties
- Terrorist acts and support offences
- Attempt and complicity

Section 4 of chapter 2 provides model language on the liability of legal entities.

The Commonwealth Secretariat *Implementation Kits for the International Counter-Terrorism Conventions* (available from www.thecommonwealth.org) take a different approach. Unlike the UNODC model legislative provisions against terrorism, which group all the offences set forth in the counter-terrorism treaties together in one chapter, the *Implementation Kits* provide model language by grouping requirements together under each treaty. This approach might be better suited to the drafting requirements of countries with a common law system.

Although the tools elaborated by UNODC and the Commonwealth Secretariat cover the whole spectrum of treaty-based offences, specialized international agencies focus on specific criminalization requirements: the model legislation on money laundering and financing of terrorism (available at www.unodc.org/tldb/pdf/Model_law_terr_fin_civil_law.doc), developed jointly by UNODC and the International Monetary Fund in 2005, looks at the requirements of the International Convention for the Suppression of Terrorist Financing from the angle of State obligations in relation to the prevention of money-laundering and terrorist financing.

Similarly, *Suppressing the financing of terrorism: a handbook for legislative drafting*^a contains two model laws in its appendix, one for countries that use civil law and one for countries that use common law.

OPCW has developed model penal code provisions (available from www.opcw.org) which, although not focused on counter-terrorism, suggest language to be used for the criminalization of activities prohibited by the Chemical Weapons Convention. This is a useful document for legislative drafters who wish to address counter-terrorism from the perspective of obligations related to weapons of mass destruction.



More details, training materials and models in relation to chemical terrorism and weapons of mass destructions in general are available in module 6.

Excerpts of national legislation implementing the substantive requirements of the various counter-terrorism treaties can be found in the substantive criminal law section of the national legal resources area of the UNODC electronic legal resources on international terrorism.

The full texts of criminal statutes, also available on the database, allow legislative drafters to see how countries belonging to different legal traditions have chosen to integrate terrorism-related offences into the overall structure of their penal codes.

^aInternational Monetary Fund, *Suppressing the financing of terrorism: a handbook for legislative drafting* (Washington, 2003).



Activities

- Analyse your country's domestic criminal laws and penal code. Mark those provisions which, in your opinion, implement the criminalization requirements set forth in the universal counter-terrorism instruments to which your country is a party. Is your country a party to any convention but has not incorporated the corresponding criminal offences? Has it already established offences contained in any instrument that it has not yet ratified?
- Does your country criminalize acts of terrorism? Compare the structure of the offence of terrorism (its material and intentional elements) with the conduct described in the International Convention for the Suppression of Terrorist Bombings. Which is broader in scope, and why?
- Taking into account your country's legal traditions and the need for clarity in drafting, how and where in your criminal law statutes/codes would you propose criminalizing the offences set forth in the counter-terrorism instruments that your country has ratified but not implemented yet?
- Although the counter-terrorism instruments set out in detail the elements of the various types of conduct to be criminalized, they do not determine the applicable penalties. Why do you think that is the case? What are the advantages and disadvantages of that approach?
- What is the added value, if any, of holding legal entities liable when individuals acting on their behalf can already be held criminally responsible?
- The universal counter-terrorism instruments do not identify the penalties applicable to legal entities. Which types of penalties could be applicable? Refer to your domestic legislation, if appropriate.



Assessment questions

- Do the 19 universal counter-terrorism instruments contain a definition of what a terrorist act is and a requirement that it be criminalized? Discuss.
- How do the universal counter-terrorism instruments deal with the issue of penalties?
- Is the intention on the part of the perpetrator to intimidate a population or compel a Government to do or abstain from doing certain acts an essential element of the types of conduct set forth in the universal counter-terrorism instruments?
- What is the role of motives (ideological, religious, political, etc.) in the structure of the offences set forth by the universal counter-terrorism instruments?
- Are States parties to the universal counter-terrorism instruments required to hold legal persons present in their territory criminally responsible for the commission of the offences set forth within the treaties? Are other forms of liability envisaged?
- How is the offence of financing of terrorism linked to the offences set forth in counter-terrorism instruments?
- Why, from the point of view of international cooperation, is it necessary to faithfully incorporate the offences described in the treaties into domestic criminal laws?

- To what extent is environmental terrorism taken into account within the types of conduct described in the universal instruments?
- Analyse the offence-creating provisions of the treaties and identify the extent to which they require States to criminalize the act of making terrorist threats.
- How do the universal counter-terrorism instruments deal with accomplices, aiders and abettors, as well as attempted offences?



Further reading

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2.2.2.3. Establishment of jurisdictional grounds

It would not be enough for States parties to the universal counter-terrorism instruments to criminalize the conduct set forth therein. Provisions need to be in place to ensure that domestic courts are effectively in a position to adjudicate them. One fundamental objective of the universal counter-terrorism instruments is to avoid a situation where the perpetrators of terrorist acts, or those who plan or support them, escape justice because the countries in which they are physically present decline their jurisdiction.

Three types of jurisdiction that a State can exercise

Jurisdiction is the authority that States have to prescribe and enforce their own domestic laws. This authority is exercised in three forms, corresponding to the three branches of Government:

- Legislative (or prescriptive) jurisdiction refers to the competence to prescribe the scope of domestic law

- Judicial jurisdiction refers to the ability of courts to apply domestic laws
- Enforcement jurisdiction refers to the ability of States to enforce its laws. Unlike the two others, it cannot normally have extraterritorial reach

The universal counter-terrorism instruments refer to judicial jurisdiction.

When an offence covered by the instruments is committed in the territory of a certain State, it is usually clear that that State should prosecute. This type of jurisdiction is based on the territoriality principle: States normally do not tolerate the use of their territory for criminal or terrorist purposes. Thus, when the instruments require that States parties establish their competence over offences committed on their territory, this requirement coincides with what all States already do, in practice.

As an extension of the territoriality principle, it is further expected that States be able to establish their jurisdiction over offences committed on board vessels and aircraft registered by them.

The universal counter-terrorism instruments go further than the territoriality principle by requiring that States be in a position to adjudicate certain offences committed by their own nationals, regardless of the place of commission. This type of jurisdiction is based on the active nationality principle.

Additional extraterritorial grounds for jurisdiction are set forth in specific instruments. For example, the International Convention against the Taking of Hostages mandates that States parties establish jurisdiction over the described types of conduct when these are committed in order to compel their Government to do or abstain from doing any act.

Moreover, the universal instruments set forth a variation of the universality principle, often referred to as quasi universal jurisdiction, embodied by the *aut dedere aut judicare* principle. This means that, whenever the extradition of an individual present in a State's territory is requested, that State must either hand over the person concerned to the requesting State or try the case in its own courts. Because of its very specific nature and implications, the *aut dedere aut judicare* principle will be addressed in more detail in the following section.

Establishing or exercising jurisdiction?

The universal counter-terrorism instruments refer to the obligation for States parties to establish jurisdiction. "Establishment" should be distinguished from the actual "exercise" of jurisdiction. Under instruments, States parties are expected to ensure that their judicial systems are in a position to adjudicate certain offences committed under certain circumstances (based on the place of commission, nationality of the offender, etc.), whether or not this leads to a State actually carrying out a criminal prosecution or trial. A classic situation where jurisdiction often cannot be concretely exercised concerns acts committed by diplomatic or State agents.

Under the universal counter-terrorism instruments, the grounds for jurisdiction set out above (territoriality, active nationality and quasi universal, or *aut dedere aut judicare*) are compulsory. This means that States parties are obliged to incorporate them into their national laws. The instruments also set forth a number of optional grounds, such as the “passive nationality principle”, whereby certain States establish jurisdiction over offences committed abroad against one of its nationals.

While they seek to eliminate safe havens for terrorists by expanding the ability of States parties to exercise jurisdiction based on a number of extraterritorial grounds, the universal counter-terrorism instruments may lead to an overabundance of States parties asserting jurisdiction to prosecute the same facts. This situation may lead to a positive conflict of jurisdiction. While they do not envisage any binding mechanism to address this type of situation, some treaties, such as the International Convention for the Suppression of the Financing of Terrorism, encourage States parties to coordinate action in order to determine which State will exercise jurisdiction in practice. This type of provision aims to offer a general framework for cooperation, leaving States parties with ample room to manoeuvre.

Which domestic court within each State party should be competent to adjudicate terrorist acts?

The universal counter-terrorism instruments do not determine which court or courts within a certain State should be competent to adjudicate terrorist acts. This issue is entirely left for each State to decide. For example, some States may wish to centralize the trial of terrorism-related offences while others may follow the ordinary criteria on the distribution of criminal cases among their courts. Such decisions are based entirely on domestic considerations, criminal policies and procedures.



Tools

The Legislative Guide to the Universal Legal Regime against Terrorism^a devotes a whole chapter to the provisions on jurisdiction to be found in the universal counter-terrorism instruments.

Similarly, the UNODC/TPB *Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments* provides an overview of the various grounds for jurisdiction and accompanies them with concrete illustrations taken from national legislation.

The UNODC model legislative provisions against terrorism offer drafting suggestions by listing all grounds for jurisdiction in chapter 3, article 26.

The UNODC electronic legal resources on international terrorism provide excerpts from the penal codes and other criminal statutes of several countries on the subject of jurisdiction in the national legal resources area of the website.

^aUnited Nations publication, Sales No. E.08.V.9.



Activities

- Write down the provisions on jurisdiction in force in your country in relation to terrorism-related offences. Do they reflect the full spectrum of the grounds set forth in the universal counter-terrorism instruments? Do they go beyond the instruments' requirements?
- Can you think of cases in which the courts of your country have asserted jurisdiction over terrorism-related offences or other grave offences that took place outside your country? On which ground(s) was jurisdiction eventually exercised?
- Identify the possible criteria to resolve a positive conflict of jurisdiction between two or more countries.



Assessment questions

- The universal counter-terrorism instruments require that States parties establish certain jurisdictional grounds. How does this differ from the concept of exercising jurisdiction?
- What is the difference between compulsory and optional grounds for jurisdiction? Provide examples.
- Do the universal counter-terrorism instruments envisage any type of extraterritorial jurisdiction? If so, what does this mean?
- What is a positive conflict of jurisdiction? What guidance does the International Convention for the Suppression of the Financing of Terrorism provide on this issue?
- Do the universal counter-terrorism instruments require specialized domestic courts to be entrusted with the trial of suspected terrorists?
- Is a State party to a counter-terrorism convention allowed to establish jurisdictional grounds that are not envisaged in that convention?
- What do the universal counter-terrorism instruments say about criminal conduct committed on board vessels and aircraft? Can States parties prosecute offences that take place on board vessels flying their flags even when the vessels are in the waters of another State party?



Further reading

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2.2.2.4. *Aut dedere aut judicare* (extradite or prosecute)

A critically important rule of international cooperation, to be found in numerous criminal justice treaties, including the counter-terrorism instruments, is the principle of extradite or prosecute, also known by the Latin term *aut dedere aut judicare*.

As stated in the International Convention for the Suppression of Terrorist Bombings (other instruments use identical or very similar language), a State party that does not extradite a person to a requesting State party shall:

“[B]e 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”.

Aut dedere aut judicare in Security Council resolutions

Security Council resolution 1373 (2001) is usually interpreted as incorporating the *aut dedere aut judicare* principle through the provision in its paragraph 2 (e) requiring States to “[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice”.

The principle is also recognized indirectly by Security Council resolution 1373 (2001) by virtue of paragraph 3 (d), calling upon States to “[b]ecome parties as soon as possible to the relevant international conventions and protocols relating to terrorism”.

Subsequent Security Council resolutions are more explicit. In particular, Security Council resolutions 1456 (2003) and 1566 (2004) specify that the obligation to bring terrorists to justice shall be carried out “on the basis of the principle to extradite or prosecute”. In addition, Security Council resolution 2322 (2016), which focuses on criminal justice relating to terrorism, urges States to follow this principle.

The scope of the *aut dedere aut judicare* concept can be better understood by breaking it down into its constituent parts:

- (a) **A decision not to extradite.** This is the prerequisite triggering the obligation of the State party to submit the case for domestic prosecution;
- (b) **Submission for prosecution.** The obligation to prosecute does not mean that an allegation that is established as unfounded, following a preliminary investigation, has to be brought before a court. The constitutional law and substantive and procedural rules of the country concerned will determine to what extent the prosecution must be carried out;
- (c) **Without exception whatsoever.** This condition can be interpreted in different ways. One interpretation is that the words eliminate the traditional public order exception to international cooperation. Under that exception, a State would not be required to render cooperation in a matter that would undermine its domestic tranquillity by causing public disturbance or upsetting public morale. In the context of terrorism, that might equate to the refusal of cooperation for fear that a terrorist group would retaliate against the requested State’s nationals or national interests if it granted extradition. Similarly, the language used appears to be an implicit rejection of the political offence exception;

(d) Take the decision in the same manner as in the case of any other offence of a grave nature. While allowing States to maintain discretion as to whether or not to prosecute in specific situations, the counter-terrorism instruments make it clear that such discretion has to be exercised in the same manner as with any other offences of a grave nature under the law of the State. In other words, national prosecutors are expected to handle those offences by applying the same criteria that they generally apply to other grave offences. In practice, this reduces the scope for prosecutors to decide not to proceed.

As the application of the *aut dedere aut judicare* principle is closely linked to a decision by State authorities not to extradite an alleged offender, it is also covered in module 3 (international cooperation).

Challenges of implementing the *aut dedere aut judicare* principle

The practical application of the *aut dedere aut judicare* principle presents a number of challenges. In most cases, for example, a State that decides to prosecute instead of extraditing will not have the necessary evidence at its disposal, because the crime has been committed outside of its territory. This is one reason why it might be very difficult for a State to fully reap the benefits of implementing the *aut dedere aut judicare* principle in the absence of fluid channels of mutual legal assistance with the States where most of the evidence is located.

Political difficulties may arise in other circumstances. For example, the State that has seen its request for extradition rejected on the basis of human rights grounds may not be willing to contribute (by transmitting evidence, sending witnesses, etc.) to the prosecution taking place in the State that has rejected its request.

Despite these and other obstacles, the *aut dedere aut judicare* principle, one of the fundamental tenets of the universal counter-terrorism instruments, is potentially one of the most meaningful judicial mechanisms for international cooperation.



Case study

Consider the following scenario on the basis of the International Convention for the Suppression of Terrorist Bombings. (All States involved are parties to the Convention.)

Mr. X discharges an explosive device in a public place in State A. He and the victims are nationals of State B. After the bombing, Mr. X escapes to State C.

In this scenario, it may be argued that State C has no apparent interest in prosecuting Mr. X, as neither he nor the victims are nationals of it. Mr. X is simply present in its territory, perhaps without any intention to remain there.

Eventually, Mr. X may find refuge in State C, simply because State C has no specific incentive to prosecute him. States normally do not have the capacity to prosecute for crimes that have occurred outside their territory unless the crime directly affects their own interests. Although States A and B may have jurisdiction, based on the territoriality and the active nationality principles (and the

passive nationality principle if used by the country), they cannot retrieve Mr. X in order to prosecute him.

It is exactly in such scenarios that the universal counter-terrorism instruments aim at filling gaps in existing domestic laws through the application of the *aut dedere aut judicare* principle. Assuming State A has requested the extradition of Mr. X, State C will be under an obligation to either extradite him or submit the case to its own authorities for the purpose of prosecution.



Tools

Both the *Legislative Guide to the Universal Legal Regime against Terrorism*^a and the UNODC/TPB *Guide for the Legislative Incorporation and Implementation of the Universal anti-terrorism Instruments* (available from www.unodc.org) provide an overview of the *aut dedere aut judicare* principle.

The *Digest of Terrorist Cases* explores the implications of the *aut dedere aut judicare* principle in the context of the Mohammed Hamadei and Lockerbie cases.

The same obligation is analysed within the broader framework of criminal justice systems and the role of prosecutors in the UNODC/TPB *Handbook on Criminal Justice Responses to Terrorism*.^b

The UNODC/TPB model legislative provisions against terrorism offer relevant drafting suggestions (with commentary) under article 55, on the obligation to submit for prosecution or extradite.

^aUnited Nations publication, Sales No. E.08.V.9.

^bUnited Nations publication, Sales No. E.09.IV.2.



Activities

- Is the *aut dedere aut judicare* principle reflected in your country's criminal legislation? On which terms? To which offences does it apply?
- In your opinion, what are the basic prerequisites and conditions that need to be in place to ensure that the *aut dedere aut judicare* principle is used effectively?
- The *aut dedere aut judicare* principle is contained in various international instruments other than the universal counter-terrorism instruments. Can you identify some of these instruments and compare the language and terminology adopted?



Assessment questions

- What is the overall criminal justice objective that the *aut dedere aut judicare* principle, as set forth in the universal counter-terrorism instruments, seeks to achieve?
- Describe the steps to be taken by a State party to the International Convention for the Suppression of Terrorist Bombings if it refuses to extradite an alleged perpetrator of an offence set forth in that Convention to another State party.
- Is the *aut dedere aut judicare* principle compatible with the principle of discretionary prosecution that is in force in many countries? Explain.

- Highlight the similarities and differences between the *aut dedere aut judicare* principle and the principle of universal jurisdiction.
- Compare the *aut dedere aut judicare* principle as set forth in the universal counter-terrorism instruments and article 16 of the United Nations Convention against Transnational Organized Crime.^a What are the differences, if any?

^aUnited Nations, *Treaty Series*, vol. 2225, No. 39574.



Further reading

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Reference documents

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- Security Council resolution 1566 (2004)
- Security Council resolution 2322 (2016)

2.2.2.5. International cooperation mechanisms

To a significant extent, the transnational dimension of terrorism is a by-product of the increasingly interconnected nature of State economies. Additionally, over the past two decades global terrorist networks have exploited new information and communication technologies to dramatically expand their geographical field of operations and to radicalize and make new recruits in every corner of the world. In that context, inter-State cooperation to prevent and suppress acts of terrorism is of paramount importance. The ability of States to provide one another with swift and effective assistance is no longer simply a recommended option, but a condition *sine qua non* to address terrorist threats.

Security Council and international judicial cooperation

The Security Council has on several occasions highlighted how important it is for Member States to strengthen their judicial cooperation mechanisms against terrorism, starting with resolution 1373 (2001). However, it was only in 2016 that the Council decided to devote almost an entire instrument to this matter. In addition to reiterating the call for Member States to enhance traditional cooperation channels and afford one another the greatest measure of assistance, Security Council resolution 2322 (2016) envisages a series of measures that previous resolutions had not explicitly mentioned, including, among others:

- Consider the possibility of allowing, through appropriate laws and mechanisms, the transfer of criminal proceedings, as appropriate, in terrorist-related cases
- Enhance cooperation to prevent terrorists from benefiting from transnational organized crime to investigate and to build the capacity to prosecute such terrorists and transnational organized criminals working with them
- Designate mutual legal assistance and extradition Central Authorities or other relevant criminal justice authorities and ensure that such authorities have adequate resources, training and legal authority, in particular for terrorism-related offences
- Consider reviewing national mutual legal assistance laws and mechanisms related to terrorism and updating them as necessary in order to strengthen their effectiveness, especially in the light of the substantial increase in the volume of requests for digital data
- Take measures, where appropriate, to update current practices on mutual legal assistance regarding acts of terrorism, including considering, where appropriate, the use of electronic transfer of requests to expedite the proceedings between the central authorities or, as appropriate, other relevant criminal justice authorities with full respect to existing treaty obligations

The universal counter-terrorism instruments provide essential judicial tools and mechanisms for national authorities to effectively conduct cross-border investigations and to ensure there are no safe havens for alleged terrorists. Given the global dimension of the terrorist threat, it is no longer sufficient to confront it exclusively through bilateral and/or regional cooperation agreements. The universal instruments provide States parties with a series of legal bases for cooperation that are not limited by geographical boundaries.

It is worth noting that the instruments focus on international cooperation from the criminal justice point of view, that is, they aim to facilitate the conduct of criminal proceedings in cases containing transnational elements. This does not include other forms of cooperation related to counter-terrorism, such as the exchange of information for protecting national security and identifying criminal routes and patterns, and the extension and nature of criminal and terrorist organizations.

Of the various forms of international cooperation in criminal matters, the universal counter-terrorism instruments focus on extradition and mutual legal assistance.



The complexities of extradition and mutual legal assistance mechanisms, together with their legal and practical implications, are examined in module 3. This module also contains in-depth analysis of the subject and additional training material.

Setting up a national legal framework on extradition and mutual legal assistance

In the field of extradition and mutual legal assistance, the universal counter-terrorism instruments contain both broad requirements and detailed obligations. Among the requirements is the duty of States parties to afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings (article 12, International Convention for the Suppression of the Financing of Terrorism). More detailed obligations exclude the possibility for States to invoke the political nature of the offence to reject an extradition request and compel them to execute foreign requests for the transmission of bank details, irrespective of bank secrecy laws in place in the requested country.

Although, in theory, some States can directly apply the text of ratified instruments without enacting specific legislation, in practice it would be difficult for many to comply with the treaty requirements if a general legal framework for granting and obtaining international cooperation was not in place at the domestic level. Such a framework should empower national authorities to engage in international cooperation for criminal offences in general, not only terrorism-related crimes.

There is no definitive list of legislative prerequisites that a State must have in place in order to use available extradition and mutual legal assistance mechanisms. However, some examples of the choices and issues that national authorities may wish to consider when adopting basic norms in the areas of extradition and mutual legal assistance are as follows:

- In terms of the scope of application of a national legal framework dealing with international cooperation, is it more appropriate to adopt a generally applicable law or one that focuses on terrorism-related offences?
- Which authority will be responsible for receiving and executing a request for extradition or mutual legal assistance?
- What are the rights and guarantees of the persons reached by an extradition request? For example, can the sought person appeal against the decision to surrender him or her? In which form and within which time frame? Key guidelines are provided by international human rights instruments and related jurisprudence, such as the International Covenant on Civil and Political Rights.
- In collecting evidence on behalf of a foreign State, to what extent can the procedural laws of the foreign State be observed? This is important, considering that certain pieces of evidence may not be admissible in the criminal proceedings of the requesting State unless that evidence has been collected following certain procedures.

The universal counter-terrorism instruments contain key provisions related to extradition, notably:

- The offences set forth in the universal counter-terrorism instruments are deemed to be included as extraditable offences in any existing extradition treaty between States parties.
- States parties undertake to include the offences described therein as extraditable offences in any future extradition treaty.
- States parties are required to consider the offences set forth in the universal counter-terrorism instruments as extraditable.
- States parties that normally require a treaty as a condition for extraditing may, at their discretion, use the universal instrument as a legal basis.

- All extradition treaties and arrangements between States parties to the same universal instrument are “deemed to be modified” if they are incompatible with that universal instrument. This provision is contained in the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism and the International Convention for the Suppression of Acts of Nuclear Terrorism.
- States parties are prohibited from rejecting another State party’s extradition request (concerning any convention-based offence) on the grounds that it concerns a political offence, an offence connected with a political offence or an offence with political motives.

With regard to mutual legal assistance:

- The universal counter-terrorism instruments should be considered as a valid legal basis for affording the greatest measure of legal assistance in relation to investigations and criminal or extradition proceedings, including assistance in obtaining the necessary evidence for such proceedings.
- States parties are prohibited from rejecting another State party’s request for legal assistance on the grounds that it concerns a political offence, an offence connected with a political offence or an offence with political motives.

Non-discrimination clause

Under the universal counter-terrorism instruments, if a person is being prosecuted or punished because of his or her political opinion, or if his or her position would be prejudiced for that reason, the non-discrimination articles allow the refusal of an extradition or mutual legal assistance request. This leaves the State receiving the request free to deal with the person as determined by its own national laws and available evidence.

The treaties establish the non-discrimination principle as follows:

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



Case study

“Invincible Warriors”

Preliminary information

- Unless otherwise indicated, it is assumed that Bluelandia and Pinklandia are States parties to the universal counter-terrorism instruments.
- For the purpose of this case study, it is assumed Bluelandia and Pinklandia have duly incorporated the provisions of the universal counter-terrorism instruments into their domestic legal systems.

- This case study has been developed for the purpose of stimulating expert legal discussion on scenarios that may occur in the practice of international cooperation. The answers provided (see annex) are not the only possible solutions, but they highlight the practical mechanisms and tools available in light of the universal counter-terrorism instruments.

Background

Tom is the leader of an international terrorist group known as Invincible Warriors, which aims to destabilize the political institutions of various countries. He carries out a bomb attack in a kindergarten in Bluelandia, killing 30 children, including the children of various diplomats.

Following the attack, Tom manages to escape Bluelandia and finds refuge in Pinklandia, a neighbouring State.

Extradition: legal basis

Bluelandia swiftly sends a request to Pinklandia for the arrest and extradition of Tom based on the International Convention for the Suppression of Terrorist Bombings.

1. Bluelandia and Pinklandia are not bound by any extradition treaty. Moreover, the laws of Pinklandia prevent a person from being extradited in the absence of a specific extradition treaty.

Should Pinklandia refuse to extradite Tom to Bluelandia?

2. An old bilateral extradition treaty binds Bluelandia and Pinklandia. However, in an exchange of diplomatic notes, Pinklandia anticipates that Tom will not be extradited because the offence is not specified in the list of the extraditable offences annexed to the extradition treaty in question.

Is the old extradition treaty definitely unusable?

3. Pinklandia is not a State party to any multilateral convention in criminal matters, nor is it bound by any extradition treaty with Bluelandia. In addition, it has no law in place regulating the conditions and procedure for extraditing alleged offenders to third countries.

Should Bluelandia give up on its hopes to obtain the surrender of Tom?

Extradition: political offence

4. Bluelandia demands the extradition of Tom from Pinklandia on the basis of the International Convention for the Suppression of Terrorist Bombings. During the extradition hearing, Tom's defence lawyer argues that the Invincible Warriors act for the noble purpose of freeing Bluelandia from a repressive and bloody dictatorship. The offence for which Tom is requested is therefore a political one, having been committed for the purpose of forcing the oligarchs of Bluelandia to open the way to democratic and fair elections.

How should the authorities of Pinklandia balance the need to extradite Tom with consideration for his "noble" purpose?

5. Since some of the victims of the attack at the kindergarten are children of diplomatically protected persons, the request of extradition from Bluelandia to Pinklandia is based on the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (ratified by both States). However, the Convention does not include the issue of the "political offence".

Should the authorities of Pinklandia refuse to extradite Tom?

Mutual legal assistance: dual criminality and admissibility of evidence

6. In the absence of an extradition request from Bluelandia, the authorities of Pinklandia decide to investigate the case themselves. The prosecutors realize that technical advice is needed from an expert on explosives living in Jollylandia, and make a request to Jollylandia in order for an expert on explosives to be heard.

The authorities of Jollylandia refuse to accommodate such a request, arguing that it is based on an offence that the Penal Code of Pinklandia calls “terrorist bombing”, which does not exist in the legislation of Jollylandia.

If you were the prosecutor from Pinklandia, how could you persuade the authorities of Jollylandia to execute the request?

7. Finally, prosecutors in Pinklandia gather enough evidence to successfully convict Tom.

However, the trial takes an unexpected turn when the court decides that evidence provided by Jollylandia is not admissible, since it was not made under oath. According to the laws of Pinklandia, evidence given by witnesses under oath is a compulsory requirement, whereas the laws of Jollylandia do not contain such a requirement.

As the prosecutor, what could you have done to ensure that the evidence provided by Jollylandia could be used in court?

Mutual legal assistance: banking secrecy and spontaneous transmission of information

8. Pinklandia seeks to obtain details of a bank account held in Jollylandia under Tom’s name, which may provide evidence of his terrorist financing activity. However, Jollylandia informs the authorities of Pinklandia that the request cannot be executed because of a strict domestic law protecting the confidentiality of banking information.

Is the refusal to cooperate by the authorities of Jollylandia acceptable?

9. During the execution of the request, the authorities of Jollylandia realize that different bank accounts held at the same bank have all been used in the same criminal operation. However, the request from Pinklandia only relates to one of those bank accounts and not the others.

Should the authorities of Jollylandia disclose information relating to all the suspect bank accounts, despite the absence of a specific request from Pinklandia?

Mutual legal assistance: informal channels and alternative means for executing requests

10. In order to convict Tom, Pinklandia needs the testimony of Palo, formerly Tom’s enemy who belongs to a rival criminal gang. Palo lives in Jollylandia. Despite the fact that his testimony has to be collected as a matter of urgency, the authorities of Pinklandia are told that they have to submit their request through the diplomatic channel, known to be a lengthy process.

Should Pinklandia proceed through the diplomatic channel, as requested?

11. Eventually, Pinklandia decides to transmit an official request for legal assistance to Jollylandia. The request specifies that it is essential that the questioning be carried out directly by judicial authorities of Pinklandia. The response from Jollylandia is that no foreign authorities are to be allowed to exercise official functions on its soil. Moreover, Palo has just been convicted and sentenced to life imprisonment in Jollylandia.

Discuss possible ways to meet both States’ concerns.



Case study

The Buongustaio case

Extradition request drafting exercise

Note for the trainer:

The text in this exercise is a fictitious request for extradition in a terrorist-related case. The request (with its accompanying note verbale) has been drafted by a government official with little experience in extradition matters. As a result, it contains several flaws. Ask your audience to advise the official in reformulating it to increase the chances of prompt and effective execution by the requested State. Encourage your audience to read the background information carefully and to think creatively with the help of the material provided.

To facilitate the analysis of specific legal issues, the extradition request has been divided into sections, each of which poses a specific substantive legal problem. Each section is followed by commentaries, which you should not make available while your audience is discussing them.

This exercise has been prepared on the basis of the 2004 *Report of the Informal Expert Working Group on Effective Extradition Casework Practice* (available at www.unodc.org).

Texts to distribute to participants for this exercise:

- International Convention for the Suppression of Terrorist Bombings
- International Convention for the Suppression of the Financing of Terrorism
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents
- Convention on the Physical Protection of Nuclear Material
- United Nations Convention against Transnational Organized Crime (Organized Crime Convention)

Background information

At 5.30 p.m. on 24 January 2007, two armed individuals break into a supermarket just beside the city's diplomatic compound in State X and open fire, killing several people. Afterwards, they use a spray to write "BBB" on the walls of the supermarket. BBB is a well-known organization fighting to promote political change in State X.

The police arrive at the crime scene too late to arrest the two men, who manage to escape quickly in a car.

Over the next few days, the main hospitals in the capital report the deaths of 12 patients, caused by a severe form of a rare respiratory disease. The authorities of State X establish that 90 per cent of the people reporting acute respiratory problems had visited the supermarket on the day of the shooting. In addition, forensic evidence shows traces of a dangerous poison found on the shelves and floors of the supermarket.

Evidence allows the investigators to identify Mr. A and Mr. B as the individuals who carried out the attack. They both have previously escaped from prisons in State X.

The authorities of State X ask INTERPOL to issue a Red Notice. A few days later, State Y communicates that one of the two individuals has been located in its territory. State X prepares and issues a request for his provisional arrest.

Mr. A is arrested by State Y on 31 January 2007. State X forwards an extradition request to State Y through the diplomatic channel.

At the same time, the authorities of State X are unofficially informed that a request for the extradition of Mr. A is also being prepared by State Z. Some of the victims of the attack at the supermarket were nationals of State Z.

Note verbale

1. The Embassy of State X presents its compliments to the Ministry of Foreign Affairs of State Y, and has the honour to refer to the [regional convention on extradition], which both States X and Y have signed,

Commentary

What matters is that both States are parties to the extradition convention (either through ratification or accession). The requesting State should use precise legal terminology to limit the risk of delays and misinterpretations.

2. and hereby requests, on behalf of State X, the extradition of Mr. A, a citizen of State X. Such request follows communication from your Government that Mr. A was arrested on 4 February 2007 upon the request of the competent authorities of State X.

Commentary

State X has submitted a specific request for provisional arrest, but has it enquired as to whether State Y might have already recognized the INTERPOL Red Notice as a valid request for this purpose?

3. The above-mentioned individual is wanted by State X in order to be brought to trial before its courts for the offence of attempting to destroy the Constitutional order of the State, in relation to the tragic events of 24 January 2007, which occurred in a public place in the capital city of State X.

In the absence of any detailed provision in the [regional convention on extradition] concerning the submission of documents, and in order to expeditiously process the present request, the prosecutorial authorities of State X have chosen to enclose the following documents under the seal of the State:

- Authenticated copy of the arrest warrant
- Description of the events giving rise to the charges against Mr. A, the offences for which extradition is requested and the applicable legal provisions

Commentary

The requesting State appears not to have considered the requirements of State Y relating to the submission of documents, which are necessary even in the absence of specific provisions contained in applicable treaties.

4. The Embassy of State X avails itself of this opportunity to express to the Ministry of Foreign Affairs of State Y the renewed assurances of its highest consideration.

Commentary

The request for extradition is submitted more than one month after the arrest by State Y. Under many treaties and national laws, this period would be far too long for the requested State to

continue to enforce the arrest warrant. For example, under the European Convention on Extradition,⁹ a provisional arrest may be terminated after 18 days from the date of arrest if the requested party has not received the request for extradition and the relevant documents, and shall not in any event continue for longer than 40 days.

Material to be included with the extradition request:

- Authenticated copy of the arrest warrant
- Descriptions of the events giving rise to the charges against Mr. A, the offences for which extradition is requested and the applicable legal provisions.

1. At 4.25 p.m. on 24 January 2007, two men entered the back door of the Buongustaio supermarket, located in [street name] in the capital city of State X. They were carrying two big bags and were masked. Standing in one of the most crowded aisles, they took two semi-automatic guns out of their bags and began to shoot people at random. The shooting lasted almost a minute, after which one of the two men put his gun back into his bag and took out a spray bottle. He sprayed for a few seconds in the air, and then wrote “BBB” on the walls of the supermarket. The two men eventually left the supermarket through the main door. A few minutes afterwards, the two men were seen in a sports car driving away at great speed. The above version of the facts has been reported in a consistent and detailed way by a number of witnesses who were present at the scene.

The police and ambulance arrived a few minutes later to find 10 people dead. Thirty-four other people were taken to hospital in a critical condition, six of whom died on the way and two in the next few days as a direct result of their gunshot injuries. It has been established that two of the victims were nationals of State Z.

A video camera belonging to the Embassy of State W, located directly opposite the back door of the supermarket, made it possible to identify the two attackers, Mr. A and Mr. B. It is likely that Mr. A and Mr. B believed there would be no video cameras at the back entrance, as they only wore their masks after entering the supermarket. The video images of the two men before they put on their masks have been disseminated widely throughout the country.

Commentary

The evidence provided by the requesting State consists of a statement that the facts reported in the request were confirmed by a number of witnesses. This may be sufficient under specific treaties that simplify evidentiary requirements, but many States would expect witness statements and other supporting material to be authenticated (the form of authentication should be established on the basis of the requirements of the requested State). Some countries even require probable cause to be established.

2. Mr. A and Mr. B did not remove any valuable objects from the supermarket, which provided the investigative authorities with an early indication that their purpose was not robbery.

Commentary

The requesting State (State X) uses various arguments to convince the requested State (State Y) about the nature of the terrorist acts perpetrated by Mr. A. In doing so, a number of weak extralegal arguments are put forward, including that the purpose of the perpetrators was not robbery.

3. Mr. A is one of the founding members of BBB, which has long been engaged in attempting to subvert the stability and democratic credentials of State X. The attack at the Buongustaio on 24 January 2007 reflects the violent tactics used by BBB to create fear and cause the death of innocent civilians in the capital city of the State.

Commentary

Mr. A is identified as a terrorist, but there is no mention of the fact that he also has a history of escaping from prisons in State X. This information may be more important for the requested State than knowing that he is a terrorist: State X should have made it clear that there is a risk he may flee, to limit the possibility of a decision being reached to release him on bail during the extradition proceedings in the requested State.

4. In addition to this, it cannot be ignored that BBB appears in the list of terrorist groups compiled by a [regional organization] to which the Government of State Y belongs, and which State X intends to join soon. The list is accompanied by the requirement that member States must afford each other the widest possible measure of assistance in the fight against terrorist acts, and must, with respect to inquiries and proceedings conducted by their authorities in respect of listed persons, fully take advantage, upon request, of their existing powers in accordance with all relevant international agreements.

Commentary

The argument that Mr. A should be extradited because BBB is listed as a terrorist group by a regional organization (to which State X is not yet a party, despite its intention to join) is a weak one. State X cannot invoke the regulations of that organization. A duty of legal assistance exists for member States of that organization only, and it is a general duty. The direct legal consequence of “listing” is the application of a sanctions regime (such as asset freezing), not an obligation to apply criminal sanctions or to extradite.

It might have been preferable to focus on the conduct committed and find a solid legal basis to obtain cooperation, regardless of whether the acts in question could be characterized as terrorism.

Assuming that no extradition treaty was in force between the two States, one possibility would be to use the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents as a basis. Given that the attack was carried out in the proximity of an embassy, there is at least a possibility that diplomatically protected persons were among the victims.

5. The conduct on which this extradition request is based is in violation of the right to life, which is universally recognized by human rights treaties as the very essence of all other rights and liberties. As such, it does not qualify as a political offence.

Commentary

It is questionable whether the violation of a right, however fundamental, could be considered a non-political act by the requested State. In assessing the political nature of this conduct, the jurisprudence of States typically evaluates a number of additional factors, including the proportionality of the ends to the means employed. In the absence of more persuasive arguments, the requesting State uses an argument here that carries a moral rather than a legal value. In addition, the argument that, under international treaty law in general, individuals can be held directly responsible for violating human rights, might not be acceptable to other States.

6. Additionally, in its resolution 1373 (2001), the Security Council called upon all States to ensure, in conformity with international law that claims of political motivation were not recognized as grounds for refusing requests for the extradition of alleged terrorists.

Commentary

Reference to Security Council resolution 1373 (2001) can be useful as a support for another legal basis. The paragraph mentioned is an authoritative one, but is not legally binding.

7. We submit that it is in the interest of all countries to disrupt the activities of BBB, as this organization is well known for its international retaliations. For example, in the weeks leading up to the Buongustaio attack, Mr. A had extensive contact with Mr. C, an independent consultant known for his international connections who sold radioactive material to a number of foreign criminal groups. After retaining a percentage of the profit made, part of the money could have been used to support the terrorist activities of BBB and, more specifically in this case, to buy the sports car that Mr. A and Mr. B escaped in. There are indications that Mr. C is currently hiding in State D, which is in the last stages of the ratification process for the regional convention on extradition. Its authorities have indicated that a valid extradition request could be submitted only after the extradition treaty becomes applicable in State D, which should happen within a few weeks.

Commentary

If the regional convention on extradition cannot currently be used as a legal basis to obtain the surrender of Mr. C, the requesting State should explore the possibility of relying on other legal grounds.

All universal counter-terrorism instruments can offer such a basis, therefore potentially providing the requesting State with a number of options. In particular, for States that do not need a specific extradition treaty to grant extradition, accepting the counter-terrorism treaties as a basis for doing so is a treaty obligation (for States that subordinate extradition to the existence of an extradition treaty, accepting the counter-terrorism treaties as a basis is optional). In this specific scenario, the following could be considered:

- The Convention on the Physical Protection of Nuclear Material (Mr. C has been trafficking and smuggling radioactive material internationally)
- The International Convention for the Suppression of the Financing of Terrorism (Mr. C provided funds for the attack perpetrated by Mr. A and Mr. B)
- The Organized Crime Convention (was Mr. C committing a serious crime involving a transnational organized group?)

In deciding which basis to use, the requesting State should look, among others, at whether the offences set forth in the chosen treaty existed in the law of the requested State at the time the offence was committed. For instance, the offence of radioactive smuggling might not or might have just been implemented into the domestic law of the requested State, but the offence of terrorist financing might have already been in place at the time the offence was committed.

8. In view of the above and in accordance with the penal code of State X, the acts committed by Mr. A and Mr. B at the Buongustaio supermarket fall within the scope of article [...], "Attempt- ing to destroy the constitutional order of the State".

Commentary

The requested State is not given sufficient material to fully assess the presence of the dual criminality requirement: the text of article [...] is not reproduced, and there is no explanation of its contents, nor any indication of the applicable penalties.

In any case, it is not certain that the requested State could find in its criminal laws an offence equivalent to the one contained in article [...]. This article only criminalizes damage to the interests

of State X. The requested State could easily reject the request arguing that it cannot punish a conduct specifically affecting the interests of State X.

9. In addition to causing the death of several people, the gunshots fired at the supermarket damaged the building in various ways. There has therefore been severe disruption to a public place, an action which falls within the scope of the penal code of State X, under an offence of disrupting business activity or damaging commercial premises. However, the few investigative resources available to the police services, and the urgency to submit the present request, has meant the authorities could only focus on the most serious crimes committed. Pending the time needed to identify exactly the charges to be brought against Mr. A for these collateral offences, permission is sought in advance to prosecute him for causing such damage (if he is surrendered in relation to the offences that are the object of the present request).

Commentary

The requesting State is asking to waive the speciality rule. However:

- The request to waive the speciality rule is submitted too early, before the requested State has even made a decision on the extradition request itself.
- Even if the request to waive the speciality principle had been received after the surrender of Mr. A, the exact charges have not been identified. The requested State cannot assess the presence of the dual criminality requirement, or whether the minor offences mentioned are extraditable (it is likely that the offences for damage would be punishable with a light sentence that would be less than the minimum one-year sentence required by most extradition treaties).

The requested State risks not being able to prosecute Mr. A on these additional charges. A better course of action would have been for the requesting State to clearly identify, in the extradition request, all the offences for which State X intends to prosecute Mr. A. Even if some of these offences are not serious enough to be extraditable, many States would allow extradition in conjunction with extraditable offences.

10. Finally, we kindly ask your authorities to consider the present request as a matter of priority, due to the current situation where you might receive extradition requests from other States involving the same person.

Commentary

The requesting State is stressing the need for the request to be given priority, but is not making a substantive case of priority. Why is it important that Mr. A be extradited to State X and not to other States, which might also have valid reasons to prosecute him? The requesting State appears to assume that its request will be evaluated on a first come, first served basis. It could have been useful to informally contact the other States that have an interest in prosecuting the same person in order to coordinate action collectively.

11. We stand at your disposal to transmit any additional information or document which you might need to execute the present request.

Commentary

To limit the risk of the request not being executed (or being executed too late) due to the lack of supporting information or documents, the requesting State could have taken a more active approach and liaised informally with its foreign counterparts before submitting the official request.

^aUnited Nations, *Treaty Series*, vol. 359, No. 5146.



Tools

UNODC/TPB has prepared a *Manual on International Cooperation in Criminal Matters related to Terrorism* (available from www.unodc.org). It provides practitioners specialized in the fight against terrorism with immediate answers concerning the tools that can be used under the treaties, and gives practical advice to overcome the most frequent difficulties and obstacles encountered.

The Manual is divided into four modules. The first one presents the basic principles of international cooperation against terrorism. These are the rules that apply to all forms of cooperation for terrorism prevention and criminal prosecution. The second is devoted to mutual legal assistance, while the third covers extradition. The fourth module focuses on other types of cooperation.

The *Digest of Terrorist Cases* analyses various aspects of international criminal justice cooperation through real cases focusing on, among others, the political offence exception, expulsions and diplomatic assurances.



Models

Chapter 5 of the UNODC Model legislative provisions against terrorism covers international cooperation. It should be stressed, however, that the purpose of this chapter is not to lay out a comprehensive legal framework governing extradition and mutual legal assistance, but rather to complement basic provisions that should already exist at the national level. States that have not yet implemented adequate provisions covering basic conditions and procedures in the area of extradition and mutual legal assistance should be advised to do so.

The UNODC Model Law on Extradition and the UNODC Model Law on Mutual Assistance in Criminal Matters provide useful frameworks in this regard.

The Model Treaty on Extradition (General Assembly resolution 45/116) and the Model Treaty on Mutual Assistance in Criminal Matters (Assembly resolution 45/117), together with their detailed explanatory manuals, represent useful tools for States that need to adopt basic procedures and identify the authorities in charge of receiving and executing foreign requests.



Other resources

UNODC electronic legal resources on international terrorism include the full text of national laws dealing with international cooperation, as well as the texts of bilateral and regional extradition and mutual legal assistance treaties.

The Mutual Legal Assistance Request Writer Tool (available from www.unodc.org), created by UNODC, is designed to assist practitioners in drafting a request for mutual legal assistance. It guides them through all the necessary steps in order to facilitate affirmative decision and execution of the request and avoid legal difficulties and obstacles in both the requesting and receiving States.

Through a programme of expert working groups, UNODC has gathered best practices in the field of extradition and mutual legal assistance, including what works and what does not, lessons learned, practical guides and tips, with a view to identifying best international practice and making it available to practitioners. The expert meetings have resulted in the following two reports:

- The 2001 *Report of the UNDCP Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice*

- The 2004 *Report of the Informal Expert Working Group on Effective Extradition Case-work Practice*



Additional tools and resources on mutual legal assistance and extradition in terrorist cases are available in module 3.



Activities

- Can your country extradite suspects to a country with which no extradition treaty is in place? If so, on which legal basis? Discuss.
- Identify treaties (bilateral and regional) based on which your country is obligated to assist others in extradition and mutual legal assistance matters. To what extent do such treaties cover the offences set forth in the universal counter-terrorism instruments? If multiple treaties are simultaneously available (e.g. both a bilateral and a regional one), is one of them more convenient than the other in procedural terms and conditions? Are there some extradition treaties that are more protective than others in terms of the rights of the person being sought?



Assessment questions

- What is the added value of the universal counter-terrorism instruments in a context where an extensive network of regional and bilateral cooperation treaties already exists?
- What are the main cooperation mechanisms envisaged in the universal counter-terrorism instruments?
- What added value can the universal counter-terrorism instruments bring to the cooperation between two States that are not linked by any extradition or mutual legal assistance treaty?
- What do the universal counter-terrorism instruments say about future extradition treaties that might be concluded between two States parties?
- Explain which role the universal counter-terrorism instruments can play for those States whose domestic legislation requires an extradition treaty as a condition to surrender alleged offenders.
- What does it mean that the universal counter-terrorism instruments constitute a legal basis for extradition and mutual legal assistance? Does it imply an obligation to extradite suspects and provide requested evidence without any exception? Explain.



Further reading

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Reference documents

- Security Council resolution 2322 (2016)

2.2.2.6. Other common elements and requirements

Since the universal counter-terrorism instruments must be implemented by countries belonging to very different legal traditions, they do not contain the same level of procedural detail found in bilateral treaties, such as the number of days allowed for certain actions or the precise form or channel of communications to be used.

However, the instruments do contain some provisions concerning the need for procedures governing the custody and extradition or prosecution of a suspect. When a requested State is satisfied that grounds exist to take an alleged offender into custody, that State should ensure the person's presence for the purposes of prosecution or extradition. A preliminary inquiry into the facts must be made. All of these procedural steps are to be governed by national law. The State of nationality and other interested States must be notified immediately of the custody and informed promptly of the results of the inquiry, and whether the custodial State intends to exercise jurisdiction.

Procedural steps under the universal counter-terrorism instruments (excerpts)

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence as set forth in article 2 may be present in its *territory*, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so *warrant*, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

[...]

6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 6, paragraphs 1 and 2, and, if it considers it advisable, any other interested States Parties, of the fact that that person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 of the present article shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Source: Article 7, International Convention for the Suppression of Terrorist Bombings.

On a general level, the universal counter-terrorism instruments require that any person in custody, or any person against whom any proceedings are carried out under the treaties, is granted fair treatment. This includes enjoyment of rights and guarantees under national law and applicable provisions of international law, including international human rights law. The fair treatment provision has been included as a standard one in all the instruments adopted since 1998, starting with the International Convention for the Suppression of Terrorist Bombings.

Moreover, all of the universal counter-terrorism instruments obligate States parties to allow persons in custody to communicate with and be visited by a representative of their State of nationality. There is also a requirement that the detainee be informed of this right. Most counter-terrorism instruments require that domestic implementing measures “enable full effect to be given to the purposes for which the rights accorded are intended.” Other States parties claiming jurisdiction have the right to invite the International Committee of the Red Cross (www.icrc.org) to communicate with and visit the person in custody. (For more information, see article 5 of the International Convention for the Suppression of Terrorist Bombings, article 6 (5) of the International Convention against the Taking of Hostages and article 9 (5) of the International Convention for the Suppression of the Financing of Terrorism.)



More analysis and training materials on the interplay between counter-terrorism and human rights can be found in module 4.

Human rights under the universal counter-terrorism instruments (excerpts)

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

Source: Article 14, International Convention for the Suppression of Terrorist Bombings.

* * *

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

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

(b) Be visited by a representative of that State;

(c) Be informed of that person's rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 6, subparagraph 1 (c) or 2 (c), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

Source: Article 7, International Convention for the Suppression of Terrorist Bombings.

Another common feature of the universal counter-terrorism instruments is the inclusion of a specific dispute settlement procedure. When a dispute arises between States parties concerning the interpretation or application of a convention, a three-step approach is envisaged. First, the States in question are expected to settle their controversy through negotiation. If, within a reasonable time, no agreement can be reached, at the request of one of them the case is to be submitted to arbitration. If this mechanism also proves unsuccessful, the universal counter-terrorism instruments provide that the dispute may be referred to the International Court of Justice (ICJ). These envisaged mechanisms are all consensual in nature. Even resorting to the ICJ is only possible if both parties have accepted its jurisdiction. In the event that no solution can be agreed upon, the ordinary norms of treaty and customary international law on State responsibility remain applicable.



Case study

Tom is the leader of an international terrorist group known as “Invincible Warriors”, which aims at destabilizing the political institutions of various countries. He carries out a bomb attack on a kindergarten in Blueandia, killing 30 children, including the children of various diplomats. Following the attack, Tom manages to escape Blueandia and finds refuge in Pinklandia, a neighbouring State.

Intelligence reports suggest that Mr. Wheat, an accomplice of Tom, was involved in the logistical preparation for the bomb attack in the kindergarten. He is a national of neither Blueandia nor Pinklandia, but happens to be in Pinklandia. Moreover, the police have no reason to suspect that he has committed any illegal act during his stay in Pinklandia, but they arrest him for his involvement in the attack. His lawyer argues that he should be released immediately because his conduct has not affected the interests of Pinklandia or its citizens in any way.

Should Mr. Wheat be unconditionally released? Identify the procedural steps, if any, that Pinklandia is expected to take under the universal counter-terrorism instruments.



Activities

- Reliance on domestic criminal procedures is necessary in order to bring suspected terrorists to justice. Does the domestic procedure in force in your country reflect the procedural steps envisaged in the universal counter-terrorism instruments?
- Are people under pretrial detention for terrorism-related offences granted the same rights to be informed as set forth in the universal counter-terrorism instruments?
- How are the fair trial provisions of the International Covenant on Civil and Political Rights implemented in your domestic legislation? Do different standards apply when it comes to terrorism-related offences?
- Discuss the concept of fair treatment, as it appears in the universal counter-terrorism instruments. To what extent does it overlap with the concept of a fair trial, as enshrined in article 9 of the International Covenant on Civil and Political Rights?
- The method envisaged by the universal counter-terrorism instruments for the settlement of disputes among States parties is consensual in nature. What can be done, instead, if one State claims that another has not complied with its obligations under Security Council resolution 1373 (2001)?



Assessment questions

- Which specific rights should States parties to the universal counter-terrorism instruments grant individuals who are in their custody?
- What is the link between the universal counter-terrorism instruments and international human rights law?
- To what extent are rules of customary international human rights law (as opposed to human rights treaties) reflected in the fair treatment provision of the universal counter-terrorism instruments?
- The universal counter-terrorism instruments require States parties to inform other States about a number of facts. Can you list which States should be informed about which facts? Identify the rationale behind the various duties to keep other States informed.

- Identify the procedural steps that States parties to the universal counter-terrorism instruments are required to take in relation to an alleged offender present in their territory.
- What is the role of the International Committee of the Red Cross in the context of the universal counter-terrorism instruments?
- Describe the procedure envisaged by the universal counter-terrorism instruments for the settlement of disputes arising between two or more State parties.



Further reading

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3. Implementing the universal legal framework against terrorism

3.1. Actions required for implementing the universal legal framework against terrorism into national laws

3.1.1. Prerequisites and basic action

In order to implement the universal counter-terrorism instruments, a functioning criminal justice system must be in place in each State party. A certain degree of stability and effectiveness in the functioning of the domestic institutions in charge of setting criminal policies and administering justice is a key component to ensuring that States can adequately respond to terrorist threats.

In other words, the universal counter-terrorism instruments are not “ready to use” simply by virtue of States becoming parties to them. In fact, in order for criminal justice officers to be able to apply the provisions of the universal instruments in national courts, each State must perform a set of actions.

The nature and extent of the actions necessary to comply with the requirements of the universal legal regime against terrorism depends on two key factors:

- The method used by each State for incorporating international law into its domestic legal system.
- The status of the legislation in each State in relation to the requirements established in a certain convention or Security Council resolution. In some cases, appropriate legislation will already be in place and only a few adjustments will be needed, while in other cases, new laws will have to be drafted to comply with international requirements.

Some States follow the so-called “dualist” approach, which means that international law and domestic law are considered as two separate legal systems and legislation is always required in order to introduce each international obligation into the domestic legal order. Conversely, in countries following the so-called “monist” approach, the ratification of a treaty followed by its publication ensures that its provisions are automatically incorporated into the country’s domestic legal system.

Monist States and national constitutions

Article 55 of the Constitution of France (see www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly), a monist State, reads:

Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.

Similar provisions are found in the constitutions of many other countries, particularly those following a civil law tradition.

Unlike dualist States, monist States can, in theory, apply the norms of treaty origin without further executive or legislative action other than the practical step of publishing the treaty in the official gazette, or otherwise giving notice to the public. For example, convention articles relating to mutual legal assistance and other procedural matters might already contain all the necessary details that national authorities need to apply such articles directly. Such provisions are considered to be “self-executing”. In practice, however, even monist States often require legislation in order to apply the requirements of international treaties that are not self-executing. This is the case, for example, with criminalization requirements.

When planning to implement the universal legal regime against terrorism, States need to understand what changes they have to introduce into their own legal systems. Ideally, the gap analysis process should involve all the different governmental agencies whose competencies and prerogatives would be [affected by the implementation of a certain instrument.

In each State, different legislative procedures are in place and, depending on the subject matter, different governmental agencies are responsible for drafting legal acts. The areas impacted by the universal legal regime against terrorism are particularly broad and relate to the competencies of several ministries and State agencies. For example, the criminal law aspects of the aviation-related instruments often fall within the realm of justice ministries, whereas the regulatory elements concerning the powers and duties of aircraft commanders fall within the competence of the aviation regulators. For nuclear-related instruments, an important component falls within the ambit of domestic nuclear regulatory agencies. The multidisciplinary character of the universal legal regime against terrorism can sometimes make it difficult for States to determine which entity should take the coordinating role in the assessment and subsequent implementation phase.



Tools

The *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (available from www.unodc.org/unodc) is a leading tool for States planning to set up a basic criminal justice system prior to implementing the universal legal regime against terrorism. The Compendium offers a comprehensive overview of the issues at stake and contains internationally recognized normative principles and standards in crime prevention and criminal justice that have been developed by the international community over the last 50 years.

UNODC has developed a Criminal Justice Assessment Toolkit (available from www.unodc.org) to enable international and government officials engaged in criminal justice reform to conduct comprehensive assessments of criminal justice systems.

The UNODC *Handbook on Criminal Justice Responses to Terrorism*^a aims to provide law enforcement and criminal justice officials with an accessible guide to dealing with some of the key issues that they face when responding to terrorism and related crimes. It reviews the many challenges encountered by the various components of the criminal justice system in the prevention, investigation, prosecution and detention of alleged or convicted perpetrators of terrorism. It offers guidance based on international standards and generally accepted good practice. As a practical tool, the Handbook can be used to facilitate the implementation of the universal legal instruments against terrorism within the context of accepted criminal justice and rule-of-law principles and practice, particularly as these apply in the fight against terrorism. It can be used to support a review of the capacity of a criminal justice system in a particular country, guide policy development or support training initiatives.

^aUnited Nations publication, Sales No. E.09.IV.2.



Activities

- Does your country follow a monist or dualist approach when it comes to complying with international treaties? What does the Constitution of your country provide in this respect?
- Consider the provisions on criminalization, jurisdiction and international cooperation in any of the universal counter-terrorism instruments. Are they self-executing? Do they require implementing legislation in order to be enforced in your country? What type of implementing legislation would be needed?



Assessment questions

- What is a “self-executing” provision?
- What are the main differences between monist and dualist States? Which of the two has, in principle, less need to adopt implementing legislation?
- Following the ratification of a universal counter-terrorism instrument, what steps need to be taken by State authorities to ensure that its provisions are duly enforced?



Further reading

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3.1.2. Drafting criminal legislation on counter-terrorism

Whether monist or dualist, all States parties to the counter-terrorism instruments need to adopt implementing legislation to criminalize certain offences (unless those offences have already been established prior to ratification or accession) and impose the related penalties. In particular, none of the terrorism-related instruments specify a penalty or even a range of penalties for the offences defined. For example, article 4 of the International Convention for the Suppression of the Financing of Terrorism states that:

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

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

Even if a country's legal tradition allows for a criminal charge for committing an offence defined only in an international treaty to which it is a party and not in domestic legislation, that offence remains a crime without punishment until domestic legislation defines the penalty. A fundamental principle of the rule of law is that there can be no punishment without law. Few people would argue in favour of allowing punishment to be imposed by analogy to another offence. Consequently, even countries which automatically incorporate offences into their domestic laws upon adoption of a treaty must take legislative action to provide penalties for those offences and to implement any other provisions that are not self-executing.

As long as all the elements of the various offences set forth in the treaties are introduced into the criminal legislation of States parties, there is no single correct approach to complying with the criminalization aspects of the universal counter-terrorism instruments. Each State's criminal policies and legal traditions will dictate how and where to make the necessary changes. Similarly, the drafting style can vary depending on the choice of each implementing State. A classic divide is the one between civil law and common law countries.

The following is a non-exhaustive list of issues in the criminal justice field. Although individual countries may address such issues in different ways, following different approaches and drafting styles, they all serve to ensure eventual compliance with the requirements of the counter-terrorism instruments:

- Special laws vs. penal code amendments. Some countries prefer to enact autonomous counter-terrorism laws, while others choose to amend existing statutes, for example, by updating their penal code to amend existing offence-creating provisions or introduce new ones.
- The place of definitions. Some countries explicitly incorporate into their domestic laws all the definitions contained in ratified treaties. Other countries have a less rigid approach and, once the required offences are incorporated, criminal justice officers can go back to the text of the convention when doubt arises as to the meaning of a certain term.
- "Thematic" headings. Each universal convention or protocol covers a set of criminal conduct types that do not automatically or easily fit under one single chapter or section of a State's penal code. This is the case, for example, with the offences set forth in the International Convention for the Suppression of Acts of Nuclear Terrorism; owing to the cross-cutting nature of the topics covered, one State may find it

convenient to incorporate them under a section dealing in general with weapons of mass destruction, whereas another State may decide that some of the types of conduct described in the Convention belong to a section dealing with environmental crimes.

Whatever the drafting style followed and the position of the various offences, it remains crucial for each State to link those offences with the other treaty-based requirements, such as the jurisdictional provisions including, notably, the *aut dedere aut judicare* principle.

3.1.3. United Nations institutional framework for implementation

In addition to the General Assembly and its subsidiary organs,²¹ a number of other United Nations bodies are directly involved in the implementation of counter-terrorism activities and/or mandates. These are:

3.1.3.1. Security Council

Under the Charter of the United Nations, the main functions and powers of the Security Council centre on the maintenance of international peace and security. In this context, the Council may enact resolutions under Chapter VII of the Charter in the event of a threat to the peace, a breach of the peace or an act of aggression. The adoption of resolutions under Chapter VII enables the Council to impose sanctions (under Articles 41 and 42) that may or may not involve the use of armed force against States in cases of violation. With the adoption of its resolution 1373 (2001), the Council drew terrorist acts into the realm of threats against peace and security.

With the implementation of resolutions relating to terrorism in mind, the Security Council has established several committees, each of them consisting of its 15 members. States are expected to submit reports to the committees in which they describe the measures taken to implement the relevant resolutions:

Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities

The Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities oversees the implementation of sanctions (freezing of assets, travel bans and arms embargoes) imposed on designated individuals and entities associated with Islamic State in Iraq and the Levant (Da'esh) and Al-Qaida, whose names are on a consolidated list updated by the Committee.

Security Council Committee established pursuant to resolution 1988 (2011)

The Security Council Committee established pursuant to resolution 1988 (2011) oversees the implementation of sanctions (freezing of assets, travel bans and arms embargoes) imposed on designated individuals and entities associated with the Taliban, whose names are on a consolidated list updated by the Committee.

²¹These are committees either represented by all Member States or by a group of Member States elected to serve on them. Those involved in the development of counter-terrorism policies are the Third Committee, which deals with social and humanitarian affairs and human rights issues, and the Sixth Committee, which deals with international legal matters.

Counter-Terrorism Committee

Established pursuant to resolution 1373 (2001), which requires States to take a number of measures to prevent terrorist activities and criminalize various forms of terrorist acts, the Counter-Terrorism Committee monitors the implementation of resolution 1373 (2001) and other subsequent, related resolutions, and facilitates assistance to States in order to build capacity to counter terrorism at the national, regional and global levels. The Committee is assisted by the Counter-Terrorism Committee Executive Directorate, established pursuant to Security Council resolution 1535 (2004).

Security Council Committee established pursuant to resolution 1540 (2004)

The Security Council Committee established pursuant to resolution 1540 (2004) monitors Member States' compliance with Security Council resolution 1540 (2004), which is aimed at preventing weapons of mass destruction from getting into the hands of non-State actors such as terrorist groups. The Committee is assisted by an expert group.

3.1.3.2. Secretariat

The Secretariat is the body that executes the decisions rendered by the General Assembly and the Security Council. It also fulfils duties entrusted to it by the Economic and Social Council. The Secretary-General, who heads the Secretariat, has the power to “bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security” (Charter of the United Nations, Articles 97 and 99).

Office of Legal Affairs

Through its Office of Legal Affairs, the Secretariat has provided appropriate services for the drafting and adoption of various counter-terrorism instruments and has participated in negotiations for a comprehensive convention on international terrorism.

Terrorism Prevention Branch of the United Nations Office on Drugs and Crime

A key assistance provider within the Secretariat is the Vienna-based Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC/TPB). As mandated by the General Assembly, UNODC/TPB assists Member States, upon request, with the ratification, legislative incorporation and implementation of the universal legal framework against terrorism. The United Nations Global Counter-Terrorism Strategy acknowledges the role of UNODC/TPB by encouraging “the United Nations Office on Drugs and Crime, including its Terrorism Prevention Branch, to enhance, in close consultation with the United Nations Counter-Terrorism Committee and its Executive Directorate, its provision of technical assistance to States, upon request, to facilitate the implementation of the international conventions and protocols related to the prevention and suppression of terrorism and relevant United Nations resolutions” (General Assembly resolution 60/288, annex, part III, para. 7).

UNODC/TPB possesses significant comparative advantages for offering a comprehensive response to terrorism. In particular, it combines a range of expertise in the related areas of crime prevention and criminal justice, rule of law, drug control, transnational organized crime, money-laundering, corruption and related international cooperation in criminal matters with operational field-level capacity.

Counter-Terrorism Implementation Task Force

The Counter-Terrorism Implementation Task Force was established within the Secretariat. It is a coordinating and information-sharing body that brings together 38 international entities and organizations dealing with counter-terrorism (e.g., UNODC, Office of Legal Affairs and INTERPOL). It serves as a forum for discussion of strategic issues and ensures coherent action across the United Nations system. In 2011, the United Nations Counter-Terrorism Centre was established within the Task Force to promote international counter-terrorism cooperation and support Member States in the implementation of the Global Counter-Terrorism Strategy.

3.1.3.3 *International Court of Justice*

The International Court of Justice is the principal judicial organ of the United Nations, established pursuant to Article 92 of the Charter. The Statute of the International Court of Justice is annexed to the Charter of the United Nations and forms an integral part of it. Even though all States Members of the United Nations are parties to the Statute, consenting to the jurisdiction of the International Court of Justice is a necessary prerequisite for submitting disputes to it. The International Court of Justice has issued a number of decisions with direct bearing on the development and interpretation of the international legal framework against terrorism.²²



Tools

- The UNODC Electronic legal resources on international terrorism include a searchable online database containing the full text of national laws from over 120 countries that enables users to compare different drafting styles, techniques and solutions.
- The Council of Europe has drawn up country profiles on counter-terrorist capacity (available from the rule-of-law section of www.coe.int) that address issues related to the counter-terrorism standards of the Council of Europe's member States and observers and their capacity to counter terrorist acts.



Activities

- In your opinion, what are the advantages and disadvantages of enacting a special law covering terrorism-related offences as opposed to introducing those offences into the penal code?
- Take one of the universal counter-terrorism instruments that your country has ratified and implemented, and see how convention-based offences have been incorporated into domestic criminal legislation. If you are looking at a penal code, analyse the relationship between the general and the special part. For example, where have the provisions on jurisdiction been introduced? How have the definitions been handled?

²²See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*; and *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (available from www.icj-cij.org).

- Repeat the exercise above by taking another universal treaty and the legislation of a different State. (Use, if necessary, the UNODC/TPB Electronic legal resources on international terrorism to access criminal laws from States other than yours.)



Assessment questions

- Why is it necessary to introduce the offences set forth in the universal counter-terrorism instruments into domestic laws? Would a direct application of the instruments not suffice?
- Do the universal counter-terrorism instruments contain rules or guidelines as to how and where the criminal conducts set forth therein should be incorporated into domestic criminal laws?



Further reading

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4. Universal legal framework against terrorism and related legal frameworks

4.1. Addressing terrorist acts through the United Nations Convention against Transnational Organized Crime

Because terrorists employ, to a considerable extent, the same methods as “traditional” organized criminal groups, it is possible to make effective use of the legislative tools for combating organized crime in order to counter terrorism.

In its resolution 1373 (2001), the Security Council noted with concern the close connection between international terrorism and transnational organized crime. Subsequently, the Council recognized the links between terrorism and transnational organized crime (see resolution 2195 (2014)) and addressed trade with ISIL, Al-Nusrah Front and other entities associated with Al-Qaida (see resolution 2199 (2015)). The report of the Secretary-General (S/2015/366) issued pursuant to resolution 2195 (2014) developed recommendations to address the threat of terrorists benefiting from transnational organized crime. The chief global legal tool in this area is the United Nations Convention against Transnational Organized Crime (Organized Crime Convention)^{23,21} and its three protocols (the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;^{24,22} the Protocol against the Smuggling of Migrants by Land, Sea and Air;^{25,23} and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition).^{26,24} More recently, in its resolution 2322 (2016), focusing on criminal justice as a tool against terrorism, the Security Council reiterated the call for Member States to implement the Organized Crime Convention and its Protocols.

While the Organized Crime Convention does not explicitly mention “terrorist acts”, their inclusion among the types of conduct subject to the Convention’s cooperation mechanisms was discussed at length during the negotiation phase. Moreover, the existence of links between terrorist groups and organized criminal groups has long been acknowledged and researched by scholars around the world. Acts defined as “serious offences” under the Organized Crime Convention—i.e., conduct constituting an offence under domestic law punishable by a maximum deprivation of liberty of at least four years or a more serious penalty—may in effect be committed by a terrorist group operating on a transnational scale.

²³United Nations, *Treaty Series*, vol. 2225, No. 39574.

²⁴United Nations, *Treaty Series*, vol. 2237, No. 39574.

²⁵United Nations, *Treaty Series*, vol. 2241, No. 39574.

²⁶United Nations, *Treaty Series*, vol. 2326, No. 39574.

Even though the Organized Crime Convention was not specifically designed to counter the terrorist threat, its full range of legal mechanisms can nevertheless be employed against terrorism whenever the two basic conditions triggering its application are fulfilled: (a) the transnational nature of the offence; and (b) the involvement of an organized criminal group as defined in the Convention.

When can an offence be regarded as a “transnational” one?

Under the Organized Crime Convention, an offence is transnational in nature if it is committed in more than one State; if it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; if it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or if it is committed in one State but has substantial effects in another State (article 3, paragraph 2).

In addition to detailed provisions covering extradition and mutual legal assistance, the Organized Crime Convention sets forth a legal framework for parties to establish witness protection schemes, joint investigation teams, special investigative techniques, et cetera. Of particular interest is article 18, because of its detailed regulation of conditions and procedures covering mutual legal assistance.

What are the characteristics of an “organized criminal group”?

An “organized criminal group” is defined as a “structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention in order to obtain, directly or indirectly, a financial or other material benefit” (Organized Crime Convention, article 2 (a)).

In turn, a “structured group” is one that is “not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure” (Organized Crime Convention, article 2 (c)).



Tools

To assist in the implementation phase, UNODC has developed the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*.⁹

Through the analysis of national legislation and real scenarios, the UNODC *Digest of Terrorist Cases* devotes one of its sections to terrorism and organized crime.

UNODC has also developed a *Digest of Organized Crime Cases*, which is a compilation of illustrative cases and related good practices in criminalization, investigation, prosecution and legal experiences in dealing with organized crime and its various forms and manifestations. The *Digest* aims at providing policymakers, criminal justice officials and investigative police with practical perspectives and insights based on expert practitioners’ experience and associated good practices.

⁹United Nations publication, Sales No. E.05.V.2.



Activities

- Look at the definition of “organized criminal group” contained in the Organized Crime Convention. In your opinion, does this definition encapsulate the main features of current terrorist groups?
- Consider the four groups of offences that the Organized Crime Convention explicitly defines (participation in an organized criminal group, corruption, laundering of proceeds of crime and obstruction of justice). Are these also offences that terrorist groups and networks commit? Discuss.
- Compare the provisions on extradition and mutual legal assistance contained in the universal counter-terrorism instruments and in the Organized Crime Convention. In which areas is the Organized Crime Convention more detailed?
- Identify provisions of the Organized Crime Convention, other than article 16 (extradition) and 18 (mutual legal assistance), that relate to cooperation mechanisms which are absent from the universal counter-terrorism instruments. In your opinion, could such mechanisms be usefully transferred to the area of counter-terrorism?
- Analyse the cases in which the Organized Crime Convention considers an offence to be transnational in nature. Would you argue that the term is sufficiently broad to include the modus operandi of current terrorist organizations?
- Compare the requirement of Security Council resolution 1373 (2001), on preventing the supply of weapons to terrorists, with the scope of the Firearms Protocol to the Organized Crime Convention. Are the two instruments mutually supportive in this regard?



Assessment questions

- Explain how the Organized Crime Convention can support and facilitate international cooperation concerning terrorism-related offences (in particular, the offences set forth in the universal counter-terrorism instruments).
- Which are the four groups of offences that the Organized Crime Convention explicitly defines?
- Consider the offences set forth in the universal counter-terrorism instruments. Are they “serious offences”, for the purposes of the Organized Crime Convention?



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4.2. Interplay between universal and regional legal instruments

The universal counter-terrorism instruments are part of a complex network of instruments concluded by States at the regional level.

There are a large number of regional and subregional organizations whose mandate includes terrorism-related work. The mandate and law-making powers of these organizations vary considerably: some have extensive legislative and supranational authority (notably the European Union), while others have only the power to adopt non-binding recommendations.

When binding instruments are adopted, they rely on domestic criminal laws and procedures to ensure their concrete application. It is often challenging for national authorities to set up an integrated implementation plan which takes into account this articulated and often overlapping legal structure. The task is also demanding for criminal justice officials, who often have to choose from among a number of legal bases for requesting assistance from foreign authorities. It is essential for them to familiarize themselves with the complex interplay between the various layers in order to increase the chances of obtaining the desired level of cooperation from other States.

Regional treaties on counter-terrorism

The following regional and subregional instruments relate to terrorism and are binding for their States parties. The full texts of the instruments are available at www.unodc.org/tldb/en/regional_instruments.html.

- Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance
- Inter-American Convention against Terrorism
- European Convention on the Suppression of Terrorism
- South Asian Association for Regional Cooperation Regional Convention on Suppression of Terrorism
- Arab Convention for the Suppression of Terrorism
- Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism
- Convention of the Organization of the Islamic Conference on Combating International Terrorism
- Organization of African Unity Convention on the Prevention and Combating of Terrorism
- Association of Southeast Asian Nations Convention on Counter Terrorism
- Council of Europe Convention on the Prevention of Terrorism and Additional Protocol to the Convention

It is not possible to make a general comment as to whether regional agreements or the universal instruments offer a better legal option for practitioners engaged in international cooperation. Several regional instruments provide useful frameworks for cooperation, often including detailed and precise procedural steps to achieve the objectives set forth therein. At the same time, any regional instrument is by definition limited in its geographical scope, which makes the universal counter-terrorism instruments a more interesting option as a truly global cooperation network whenever States parties seek to provide or receive assistance from countries outside their region.

In some cases, one framework might appear more suitable than another. This will depend on the circumstances of the case, the quality and quantity of the legal bases available, and the opportunities offered to obtain the desired outcome.

In this sense, the regional counter-terrorism instruments do not aim at replacing the universal instruments, but rather at offering criminal justice officers worldwide a number of complementary legal tools. In many instances, the regional agreements list the offences set forth in the universal instruments as a way of defining their own scope of application.

Occasionally, the provisions contained in one instrument may appear to be in conflict with those contained in another. In such cases, the problem will have to be addressed through the application of existing international norms. The 1969 Vienna Convention on the Law of Treaties²⁷ is a fundamental instrument, as it provides rules (many of a customary nature) on the interpretation and application of international treaties. Article 30 is particularly relevant, as it covers the application of successive treaties relating to the same subject matter. With regard to the relationship between obligations stemming from the Charter of the United Nations and other international instruments, article 103 of the Charter of the United Nations establishes that obligations under the Charter will prevail.

²⁷United Nations, *Treaty Series*, vol. 1155, No. 18232.

Resolving conflicts between international norms: basic rules

Article 103, Charter of the United Nations

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 30, Vienna Convention on the Law of the Treaties

Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
 - (b) as between a State party to both treaties and a State party to only **one** of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. [...]

An example of the potential conflict between the universal and regional treaties on counter terrorism can be seen in the fact that some regional counter-terrorism instruments exclude national liberation movements from their scope of application. This creates a possible contradiction with the universal instruments, which do not provide for such an exemption.



Tools

International Instruments related to the Prevention and Suppression of International Terrorism,^a published by the United Nations Secretariat, is a compilation of regional and subregional instruments against terrorism.

(Inter-) Regional Action against Terrorism (available from www.unodc.org) is an interactive world map providing access to the full text of regional instruments and websites of their respective organizations. The various treaties are grouped by continent and, where possible, are available in different United Nations languages.

^a United Nations publication, Sales No. E.08.V.2.



Activities

- Is your country a party to one or more regional agreements on counter-terrorism? Which one(s)? How do these regional agreements relate to the universal legal framework against terrorism?
- Consider a regional agreement on counter-terrorism of your choice and analyse its provisions on extradition and mutual legal assistance. Compare them critically with the equivalent provisions contained in the universal counter-terrorism instruments.



Assessment questions

- Why should States cooperate through the universal counter-terrorism instruments when many regional counter-terrorism agreements are already available?
- How can the Vienna Convention on the Law of Treaties assist in cases of perceived inconsistencies between treaties dealing with the same subject matter?



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Annex

Case studies—answers

Module 2

Section 2.1.1. Sanctions regimes against ISIL (Da’esh), Al-Qaida and the Taliban

1. Should the funds of the Foundation be frozen? If so, should the authorities of Bluelandia establish that there are reasonable grounds to believe that the funds of the Foundation are linked to terrorist activities?

According to the United Nations sanctions regimes against ISIL (Da’esh), Al-Qaida and the Taliban, Member States are under an obligation to freeze the funds of individuals and entities appearing in the Security Council consolidated lists. Since the freezing of funds is an automatic consequence for an individual or entity which appears on the Lists, national authorities are not required to establish evidence of any connection between the funds and terrorist activity. As a result, the freezing of funds shall be executed without delay after receiving information on the designated accounts.

2. Is there any way of supporting Max in his claims?

Security Council resolution 1452 (2002) mitigates the sanctions regimes by laying down the conditions and procedures that States have to follow to ensure that listed individuals and entities can still access enough funds to cover basic expenses. In practice, the authorities of Bluelandia should take the following steps:

- Determine what funds are necessary to cover basic expenses
- Notify the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da’esh), Al-Qaida and associated individuals, groups, undertakings and entities of its intention to authorize access to such funds
- Authorize access to the funds, in the absence of a negative decision by the Committee, within 48 hours

3. Should Max’s argument nevertheless be accepted and his funds unfrozen?

If there has been a mistake as to Max’s identity which has resulted in the freezing of his funds, the national authorities would have the power to unfreeze these funds, on the grounds that it was never the intention of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da’esh), Al-Qaida and associated individuals, groups, undertakings and entities to sanction him. However, national authorities could not unfreeze his funds based on his allegations that the Committee did not possess sufficient evidence or that he has been listed unfairly.

4. How should the authorities of Pinklandia deal with Max?

The sanctions regime requires that listed individuals are prevented entry or transit into the territories of Member States. In principle, therefore, Max should not be allowed to enter Pinklandia. The granting of entry would only be possible when necessary for the fulfilment of a judicial process.

In practice, if the authorities of Pinklandia have information that Max may have committed any of the offences set forth in the universal counter-terrorism instruments (to which Pinklandia is a party), they should investigate the facts and ensure that Max appears before its competent judicial authorities for the purpose of prosecution or extradition. Max's inclusion in the Security Council consolidated lists may also be prima facie evidence of the commission of such offences.

5. Is Max's position acceptable? What course of action would be open to Max if he wanted to be delisted?

Max's name still appears on the Security Council consolidated lists. The authorities of Pinklandia may decide not to prosecute him because of a lack of evidence, but they still have to enforce the travel ban against him. In principle, therefore, they cannot grant him the right to reside.

If he seeks to be delisted, Max would have to trigger the delisting procedure, as outlined in the Guidelines of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities. Under the procedure outlined in resolution 1904 (2009), Max would have to submit his petition to the Office of the Ombudsperson.

Section 2.2.2.2. Criminalization requirements

1. Is Mr. Filz's argument acceptable? If not, why?

According to the International Convention for the Suppression of the Financing of Terrorism, the offence of financing of terrorism is committed by any person who not only has the intention to carry out a terrorist act, but also possesses knowledge that the funds are to be used for such purpose (article 2, para. 1). Before clearing Mr. Filz of any charge related to the financing of terrorism, and provided that the offence under the Convention has been duly incorporated into its domestic laws, the authorities of Pinklandia should inquire whether Mr. Filz knew that the Prosperity Foundation was also used as a channel for terrorist activities.

2. Is the argument of the lawyer acceptable? If not, why?

For an act to constitute an offence under the International Convention for the Suppression of the Financing of Terrorism, it is not necessary that the funds were actually used (article 2, para. 3). As a result, the lawyer's argument is not a conclusive one with regard to the innocence of Mr. Filz.

Section 2.2.2.5. International cooperation mechanisms

Extradition: legal basis

1. Should Pinklandia refuse to extradite Tom to Bluelandia?

Article 9, paragraph 2, of the International Convention for the Suppression of Terrorist Bombings states that States parties may take the Convention as the legal basis for extradition, if they make extradition conditional on the existence of a treaty. The same provision is found in all other universal counter-terrorism instruments. There is, therefore, a legal basis available for Pinklandia for the extradition of Tom, provided that Pinklandia makes a declaration to this effect.

2. Is the old extradition treaty definitely unusable?

According to article 9, paragraph 1, of the International Convention for the Suppression of Terrorist Bombings, any existing extradition treaties between States parties are regarded as being automatically modified to the effect that they include, inter alia, the offences set forth in the Convention. The annex to the old extradition treaty between Pinklandia and Bluelandia is therefore automatically updated and can be used as a basis for extradition.

3. Should Bluelandia give up on its hopes to obtain the surrender of Tom?

Despite the lack of a conventional legal basis for extradition with Pinklandia, Bluelandia may still have laws in place allowing it to submit an extradition request to the authorities of other States. In the present scenario, the authorities of Pinklandia may decide to assist their counterparts, possibly by making extradition conditional on the acceptance of a reciprocity clause.

Extradition: political offence

4. How should the authorities of Pinklandia balance the need to extradite Tom with consideration for his “noble” purpose?

As the International Convention for the Suppression of Terrorist Bombings is binding on both Pinklandia and Bluelandia, Pinklandia cannot invoke the political nature of the offence as a ground to reject the extradition request (article 11). Unless other grounds for refusal are applicable, Tom has to be extradited, regardless of the nature of the offence he has committed.

5. Should the authorities of Pinklandia refuse to extradite Tom?

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents does not mention the political nature of the offence. As a result, and in order to avoid the risk of its request being rejected, Bluelandia would be advised to base its request, if possible, on the International Convention for the Suppression of Terrorist Bombings.

In any case, it is recommended that States abolish the “political offence” exception in relation to terrorist acts, following Security Council resolution 1373 (2001), in which the Council calls upon States to ensure that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists (para. 3 (g)).

Mutual legal assistance: dual criminality and admissibility of evidence

6. If you were the prosecutor from Pinklandia, how could you persuade the authorities of Jollylandia to execute the request?

You may want to encourage the authorities of Jollylandia to adopt a flexible interpretation of the “double criminality” requirement. The authorities of Jollylandia may realize that the elements of the same offence are present in their own criminal legislation, although the offence may not be classified in the same way as in Pinklandia. This way, Jollylandia should be in a position to collect and transmit the testimony required by Pinklandia.

The United Nations Convention against Corruption supports this approach by stating that, “[i]n 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” (article 43, para. 2).

7. As the prosecutor, what could you have done to ensure that the evidence provided by Jollylandia could be used in court?

To be able to use the evidence in court, the prosecutors of Pinklandia should have asked their counterparts in Jollylandia to follow the procedures in force in Pinklandia, i.e., the expert advice should have been given under oath. Although this procedure is not used in Bluelandia, the State should proceed as requested unless the collection of testimonies under oath is contrary to its laws and basic principles.

Mutual legal assistance: banking secrecy and spontaneous transmission of information

8. Is the refusal to cooperate by the authorities of Jollylandia acceptable?

As long as both Pinklandia and Jollylandia are parties to the International Convention for the Suppression of the Financing of Terrorism, they should be in a position to properly apply article 12, paragraph 2 of this Convention, which stipulates that “States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy.” Article 18, paragraph 8, of the United Nations Convention against Transnational Organized Crime stipulates the same.

9. Should the authorities of Jollylandia disclose information relating to all the suspected bank accounts, despite the absence of a specific request from Pinklandia?

The duty of States parties to the International Convention for the Suppression of the Financing of Terrorism (as well as the other universal counter-terrorism instruments and Security Council resolution 1373 (2001)) to cooperate to the greatest extent possible means that it is important for Jollylandia to transmit information on such bank accounts to Pinklandia even without a specific request for such information.

Mutual legal assistance: informal channels and alternative means for executing requests

10. Should Pinklandia proceed through the diplomatic channel, as requested?

If Pinklandia proceeds through the diplomatic channel, it runs the risk of receiving the evidence too late for Tom to be successfully convicted.

Alternatively, Pinklandia might explore the possibility of using informal channels, such as having Palo (the witness) travel voluntarily to Pinklandia to testify. In this way, there would be no formal involvement of the authorities of Jollylandia.

Another possibility would be to ask Palo to go to the Pinklandia consular offices in Jollylandia. This possibility is explicitly envisaged in the Vienna Convention on Consular Relations, according to which, “consular functions consist in [...] transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State [...]” (article 5, para. j).

This solution has the advantage of avoiding the costs and other possible bureaucratic and material obstacles involved in Palo travelling to Pinklandia.

11. Discuss possible ways to meet both States’ concerns.

If the authorities of Pinklandia are not allowed to obtain Palo’s testimony by going to Jollylandia themselves, the two States may consider obtaining such testimony through video conference. Article 18, paragraph 18, of the United Nations Convention against Transnational Organized Crime explicitly encourages States to use such a channel.

If this is not possible (for instance, because of concerns relating to the right of defence), another possible solution is the “transfer of detained persons”, notably the provisional surrender of Tom to Pinklandia with an obligation to return him once his testimony has been obtained. This mechanism is foreseen by various counter-terrorism treaties, for example, article 16 of the International Convention for the Suppression of the Financing of Terrorism, which sets out the basic legal obligations of both States in this situation.





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United Nations Office on Drugs and Crime

Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria
Tel.: (+43-1) 26060-0, Fax: (+43-1) 26060-3389, www.unodc.org