

TECHNICAL GUIDE

TO THE IMPLEMENTATION
OF SECURITY COUNCIL RESOLUTION 1373 (2001)



2009

Compiled by the Counter-Terrorism Committee Executive Directorate

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INTRODUCTION

In accordance with Security Council resolution 1535 (2004), the Counter-Terrorism Committee Executive Directorate (CTED) is required to assist the Counter-Terrorism Committee in its efforts to monitor the implementation by Member States of Security Council resolution 1373 (2001). In this connection, the Committee requested CTED to prepare the present technical guide to serve as a reference tool and to help ensure consistent analysis of States' implementation efforts. The guide addresses each paragraph of resolution 1373 (2001) in turn, and indicates the relevant section(s) of the preliminary implementation assessment (PIA) matrix approved by the Committee in 2006 to facilitate analysis of Member States' implementation efforts. The guide does not purport to impose any obligations upon States apart from those that already exist by virtue of the relevant Security Council resolutions, international treaties, customary international law, or other obligations voluntarily undertaken by States.

The guide represents the consolidation of elements prepared by the technical groups that were established within CTED under the terms of Security Council resolution 1805 (2008) and the revised CTED organizational plan (S/2008/80). The technical groups are responsible for the following functional areas:

- (1) terrorist financing;
- (2) border security, arms trafficking and law enforcement;
- (3) general legal issues, including legislation, extradition, and mutual legal assistance; and
- (4) human rights aspects of counter-terrorism in the context of resolution 1373 (2001).

The general framework for each of these areas is as follows:

1. TERRORIST FINANCING

Security Council resolution 1373 (2001) requires States to undertake a number of measures for the purpose of preventing and suppressing terrorist financing. Analysis of implementation of these measures should be guided by the provisions of the relevant United Nations conventions, as well as the norms and standards set out in the 40 Recommendations and Nine Special Recommendations of the Financial Action Task Force on Money Laundering (FATF), which has achieved broad recognition as the authoritative international body for the development and adoption of standards relating to money-laundering and terrorist financing. Particular attention should be paid to the norms and standards developed to assist the Member States of FATF and FATF-style regional bodies (FSRBs) in their implementation of the provisions of resolution 1373 (2001). A holistic approach to the analysis of States' counter-financing of terrorism regimes is recommended, based on the methodology used by FATF in its own assessments. (*See: FATF, Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations, 27 February 2004, updated as of February 2009.*) Paragraphs 1(a) and 1(d) of resolution 1373 (2001) should be considered in relation to the other paragraphs of the resolution, in particular paragraphs 1(b) and 1(c). The preventive and prohibitive purpose of paragraphs 1(a) and 1(d) direct the way in which States should implement the other provisions.

2. BORDER SECURITY, ARMS TRAFFICKING AND LAW ENFORCEMENT

The obligations set forth in resolution 1373 (2001) on border security issues require action in a number of areas, including immigration and customs control, as well as aviation, maritime and cargo security. The resolution also calls upon all States to take the necessary steps to prevent the commission of terrorist acts; to intensify and accelerate the exchange of operational information; to cooperate in preventing trafficking in arms, explosives and sensitive materials; and to ensure that asylum and refugee procedures are not abused by persons involved in terrorist acts. The norms, standards and other practices proposed in this guide should be used in the assessment of Member States' implementation efforts.

A. *BORDER SECURITY*

Border security includes controls on the movement of people (immigration) and goods (customs) across borders, as well as prevention of unlawful interference in civil aviation, maritime navigation and international cargo movement. In most of these areas, international norms and standards have been developed by specialized international organizations such as the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO) and the World Customs Organization (WCO).

The principal sources of international norms and standards are as follows:

(i) Customs and cargo security

- * WCO Framework of Standards to Secure and Facilitate Global Trade
- * Recommendation of the Customs Cooperation Council concerning the United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime, 29 June 2002, and explanatory note
- * WCO recommendation on the need to develop and strengthen the role of customs administrations in tackling money-laundering and in recovering the proceeds of crime, 25 June 2005
- * Customs enforcement guidelines on countering money-laundering and terrorist financing
- * Revised Kyoto Convention: General Annex, Chapter 3 on Clearance and other Customs formalities; General Annex, Chapter 6 on Customs control; Specific Annex J, Chapter 1 on Travellers; General Annex Guidelines, Chapter 6 on Guidelines on Customs Control.

(ii) Aviation security

- * ICAO Convention on International Civil Aviation (“Chicago Convention”), 1944
- * Annex 17 to the Chicago Convention
- * Security-related provisions of other annexes to the Chicago Convention
- * Relevant manuals and circulars, including the Oversight Manual, Part C, the “Establishment and Management of a State’s Aviation Security Oversight System” and the Security Manual for Safeguarding Civil Aviation against Acts of Unlawful Interference.

(iii) Maritime security

- * IMO Safety of Life at Sea Convention (SOLAS), 1974, Chapter XI-2 “Special Measures to Enhance Maritime Security”
- * International Ship and Port Facility Security Code (ISPS Code), Parts A and B, administered by IMO
- * Relevant IMO regulations and circulars.

(iv) Immigration

With respect to immigration processing, CTED observed that there were no internationally sanctioned practices that could be recommended to guide the assessment of information provided by Member States. This is because Governments, faced with the challenges arising from massive migratory movements of people, increasing refugee and asylum-seeker claims, and the actions of terrorists attempting to exploit expanded and speedy transportation networks to cross borders, have reacted in their own way, without the benefit of a policy-harmonizing world body or organization. The guide therefore proposes a set of practices to direct the assessment process. The proposed practices are based on observations made and discussions held during the Committee’s comprehensive and focused on-site visits to Member States, as well as on consultations with experts of Member States and the relevant international organizations, such as the International Organization for Migration (IOM).

(v) **Refugee procedures**

The primary references for analysis in this field are the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. In addition, the Office of the United Nations High Commissioner for Refugees (UNHCR) has published numerous guides and handbooks designed to assist in the implementation of international standards. Some elements of international refugee law have attained the status of customary law.

B. ARMS TRAFFICKING

The principal sources of international standards relating to prevention of trafficking in small arms and light weapons (SALW) are: the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime; the United Nations International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons; the United Nations Office on Drugs and Crime (UNODC) legislative guide to the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime; the United Nations Programme of Action (PoA) to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects; and other references developed by the United Nations Development Programme (UNDP), the United Nations Office for Disarmament Affairs (UNODA) and the United Nations Institute for Disarmament Research (UNIDIR).

C. LAW ENFORCEMENT

There are no internationally agreed standards for counter-terrorism in the general field of law enforcement. The information provided in the present guide for agencies with counter-terrorism responsibilities is based on observations made and consultations held during the Committee's comprehensive and focused on-site visits to Member States, on Member States' reports to the Committee on their implementation of resolution 1373 (2001), and on responses to the questionnaire compiled by CTED on strategies, policies and good practices of Member States that could be used by national law enforcement organizations to combat terrorism effectively. The information provided is supplemented by the International Criminal Police Organization (INTERPOL) "Best Practices" in Combating Terrorism and standards concerning the provision of services to the INTERPOL National Central Bureaus (NCBs), as well as by the practices of the European Police working group on terrorism and other regional police associations. It should be noted that there are also standards on best practice in the area of human rights, such as the Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Havana, 1990).

3. GENERAL LEGAL ISSUES, INCLUDING LEGISLATION, EXTRADITION AND MUTUAL LEGAL ASSISTANCE

Security Council resolution 1373 (2001) imposes legal obligations on United Nations Member States in a number of areas, and calls upon them to take additional measures related to their general legal framework, primarily in the area of codification of the international counter-terrorism instruments, safe havens, recruitment, jurisdiction and international legal cooperation. The present guide identifies approaches found in the reports of the Committee on its on-site visits to States, which may be shared as internal practices across internal CTED clusters. It also seeks to identify existing good practices among international, regional and subregional organizations (including practices developed by UNODC in its Model Legislative Provisions against Terrorism and by the Commonwealth). The guide also closely follows the provisions of the international counter-terrorism instruments (which are a critical foundation for several areas of the PIA itself) including, among other things, codification, jurisdiction, international cooperation and safe haven. Ultimately, these measures will, if comprehensively introduced, enhance the effective implementation of resolution 1373 (2001). The guide also addresses practical and institutional issues. Paragraph 2(e), for example, requires that States 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. This lends itself to a review of the extent to which the legislation is being effectively implemented by the Member State. A similar approach is followed with respect to international cooperation.

4. HUMAN RIGHTS ASPECTS OF COUNTER-TERRORISM IN THE CONTEXT OF RESOLUTION 1373 (2001)

The Security Council has stressed that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular, international human rights, refugee and humanitarian law. The Council requires that CTED, in accordance with its mandate, advise the Committee on issues relating to such law in connection with the identification and implementation of effective measures to implement resolution 1373 (2001). In policy guidance on human rights adopted in 2006, the Committee set out its position on human rights, directing CTED to take relevant issues into account, including in analysing States' implementation of the resolution.

The present guide has been prepared in recognition of the fact that human rights obligations undertaken by States around the world differ. Some States are not party to certain of the universal human rights instruments, and many States are party to regional human rights instruments which differ from one another in certain respects. There are also different understandings with respect to the incorporation of international human rights standards into domestic law. Nonetheless, as has been pointed out by the Office of the United Nations High Commissioner for Human Rights (OHCHR), human rights are inherent to all human beings, and are universal, interrelated, interdependent and indivisible. Some human rights enjoy universal protection under customary international law, including, it is generally agreed, the principles set forth in the Universal Declaration of Human Rights. In addition, some principles – such as the absolute prohibition of torture – are considered to have attained the status of *jus cogens*, meaning that they may never be subject to derogation by any State.

Key sources of human rights guidance include the findings of the United Nations special procedure mechanisms and the jurisprudence of United Nations treaty bodies. It is important also to refer to international humanitarian law, including the four Geneva Conventions and, for those States that have ratified them or are bound by provisions having the status of customary law, the two Additional Protocols.



CHAPTER I

SECURITY COUNCIL RESOLUTION 1373 (2001), PARAGRAPH 1

In paragraph 1 of the resolution, the Security Council 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.

1. CRIMINALIZATION OF FINANCING OF TERRORISM AND ASSOCIATED MONEY-LAUNDERING

PIA Section 1.1.1 (L): Anti-money-laundering law in force

PIA Section 1.2.1 (L): Law specifically criminalizing the provision or collection of funds with intention of use for terrorist acts

PIA Section 1.2.2 (L): Law criminalizing the financing of terrorism.

Comment:

- * Terrorist financing should be both a predicate offence to money-laundering, and a stand-alone offence. Offences such as aiding and abetting are not adequate substitutes.
- * The scope of the offence as set forth in article 2 of the International Convention for the Suppression of the Financing of Terrorism is worth noting. It refers to the terrorist acts criminalized under the counter-terrorism conventions and to the generic offence. Intent and purpose are required for the generic acts, but not for the "Convention" acts. Legal frameworks that cover only the self-contained "generic" definition of terrorist acts are unlikely to capture fully the offences set forth in treaties, and analysts should ascertain both whether a State has criminalized the financing of the acts described in the treaties (to the extent that such State is a party to the treaties) and the financing of acts as defined in paragraph 2(c)(ii) of the Interpretative Note.
- * The Interpretative Note attached to FATF Special Recommendation II on article 2 of the Convention and resolution 1373 (2001) calls on States to criminalize the financing of activities of "terrorist organizations" and "individual terrorists". This may be regarded as best practice.

Issues for consideration:

- * Is terrorist financing criminalized as a stand-alone offence?
- * Is every element of the offence covered?

- * Is the collection of funds criminalized independently of provision?
- * Is money-laundering an offence in accordance with the relevant international instruments, and is terrorist financing listed as a predicate offence to the money-laundering offence?

The following FATF Recommendations should be consulted:

- * Scope of the criminal offence of money-laundering (Recommendations 1, 2)
- * Provisional measures and confiscation (Recommendation 3)
- * Criminalizing the financing of terrorism and associated money-laundering (Special Recommendation II).

2. FREEZING TERRORISTS' ASSETS WITHOUT DELAY

PIA Section 1.3.1 (L/P): Provision for the freezing, without delay, of funds and assets of terrorists, whether of licit or illicit origin

PIA Section 1.3.2 (L): Guarantees of due process.

Comment:

- * The obligation to freeze, without delay, funds and assets linked to terrorists is a key element of resolution 1373 (2001). All elements of the provision set forth in paragraph 1(c) should be in place, and the State should be able to freeze funds without delay. Many States report having the necessary mechanisms to determine the persons and entities whose funds and assets should be frozen without delay, as well as the procedures to freeze the funds, but have no record of ever having done so. This can make assessment of effectiveness difficult.
- * States should employ best practice in respect of guarantees of due process. The Security Council has stressed that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular, international human rights, refugee and humanitarian law. Pursuant to article 17 of the International Convention for the Suppression of the Financing of Terrorism, "Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law." Applicable law may include, depending on the State's international obligations, provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as the provisions of the Universal Declaration of Human Rights. Among other considerations, it is necessary to consider whether judicial or other remedies that are effective, independent and impartial are available to persons or entities to challenge decisions to freeze assets.

Issues for consideration:

- * Does the State implement the freezing mechanism under resolution 1373 (2001) using judicial, administrative or executive measures?
- * How does the State identify and designate the names of persons and entities whose funds and assets are to be frozen under resolution 1373 (2001)?
- * Does the State participate in a regional framework for identifying and designating names of persons and entities whose funds and assets are to be frozen under resolution 1373 (2001)?
- * How does the State communicate to the private sector actions taken under the freezing mechanisms?
- * How does the State provide guidance to financial institutions and other persons or entities that may be holding targeted funds or other assets?

- * How does the State monitor compliance with the relevant legislation, rules or regulations, and impose civil, administrative or criminal sanctions for failure to comply?
- * Are requests to unfreeze funds or other assets dealt with in a timely manner?
- * Are funds or other assets of persons or entities inadvertently affected by a freezing mechanism that is unfrozen upon verification that the person or entity is not a designated person?
- * Does the State authorize access to funds or other assets that were frozen pursuant to resolution 1373 (2001) if such access is determined to be necessary for basic expenses, the payment of certain types of fees, expenses and service charges or for extraordinary expenses in accordance with Security Council resolution 1452 (2002)?
- * How does a person or entity whose funds or other assets have been frozen challenge that measure with a view to having it reviewed by a court or other independent administrative body?

The following norms and standards and best practices provide guidance in this area:

- * Security Council resolutions 1373 (2001) and 1267 (1999) and successor resolutions
- * Freezing and confiscating terrorist assets (FATF Special Recommendation III, its Interpretative Note and Best Practices Paper).

3. PREVENTIVE MEASURES TO BE TAKEN BY FINANCIAL INSTITUTIONS AND NON-FINANCIAL BUSINESSES AND PROFESSIONS

PIA Section 1.1.2 (L): Reporting obligation extends to money-laundering and financing of terrorism

PIA Section 1.1.3 (L): Reporting obligation for financial institutions and other intermediaries

PIA Section 1.1.4 (L): Penalties for non-compliance with the reporting obligation

PIA Section 1.1.8 (L): Legislation relating to customer identification and record-keeping.

Comment:

- * The international norms and standards on customer due diligence, the reporting obligations that arise from it, and the penalties attached to non-compliance, are exhaustive and demanding of the private sector. They arise from the need for financial institutions and other businesses and professions to ensure that they can identify their customers and their customers' activities and report any activity – it need not be a completed or even attempted transaction – that gives grounds for suspicion. Compliance with these obligations is generally much stronger in the financial sector than among designated non-financial businesses and professions (DNFBPs) such as lawyers, notaries, other independent legal professionals and accountants, trust and company service providers, dealers in precious metals and stones, casinos and real estate agents. The term designated refers, in this context, to a list of such businesses and professions to be found in FATF norms and standards.

Issues for consideration:

- * Does the State impose a legal obligation on all financial institutions and DNFBPs to identify their customers and keep records?
- * Does the State impose an explicit and direct obligation to report suspicious activity related to terrorist financing and to money-laundering?
- * Does the State impose a reporting obligation on (i) financial institutions and (ii) other intermediaries? (Check each “designated non-financial businesses and profession” listed by FATF.)
- * What sanctions are provided for, and are they effective, proportionate, and dissuasive?

The following norms and standards and best practices provide guidance in this area:

- * Customer due diligence and record-keeping (FATF Recommendations 5-10 and R. 12)
- * Reporting of suspicious transactions and compliance (FATF Recommendations 13-14 and FATF Special Recommendation IV)

- * Internal controls (FATF Recommendation 15)
- * Monitoring transactions (FATF Recommendation 11)
- * Other measures to deter money-laundering and terrorist financing (FATF Recommendations 18-20)
- * Regulation and supervision (FATF Recommendations 17, 23-25 and 29).

4. INSTITUTIONAL AND OTHER MEASURES NECESSARY IN SYSTEMS FOR COMBATING MONEY-LAUNDERING AND TERRORIST FINANCING

PIA Section 1.1.5 (L/I/P): Establishment of a financial intelligence unit (FIU) or equivalent.

Comment:

- * The financial intelligence unit (FIU) is an important element of an anti-money-laundering/counter-financing of terrorism (AML/CFT) regime because it is responsible for receiving, analysing and disseminating reports on suspicious transactions/activity and other relevant information regarding suspected money-laundering and terrorist financing. It is usually (but not always) a key interlocutor between the authorities and the private sector and, as such, often has a role in providing the private sector with guidance, training and feedback. An effective FIU can therefore serve as an important catalyst to the establishment of a dynamic AML/CFT regime. Much depends on the relations that the FIU is able to develop with other authorities and with the private sector. Apart from the need to ensure that it complies with the core functions detailed below, there is no single model for an FIU. Some carry out an investigative or prosecutorial role, while others are purely administrative. Most States have established an FIU, but the range and effectiveness of their activities vary considerably.

Issues for consideration:

- * Does the State have an FIU (or equivalent) established in law?
- * Is the FIU operational?
- * Is it receiving, analysing and disseminating STRs and other relevant information regarding suspected money-laundering or terrorist financing activities, as well as fulfilling the other core functions of an FIU?
- * How many reports have been processed?
- * What is the level of (financial and human) resources dedicated to the FIU?
- * What is the relationship between the FIU and the reporting parties (including provision of guidance regarding the manner of reporting and feedback)?

The following norms and standards and best practices provide guidance in this area:

- * Competent authorities, their powers and resources (FATF Recommendations 26-32)
- * Transparency of legal persons and arrangements (FATF Recommendations 33-34)
- * Implementation of relevant international instruments (FATF Recommendation 35 and FATF Special Recommendation V)
- * Mutual legal assistance and extradition (FATF Recommendations 36-39 and FATF Special Recommendation V)
- * Other forms of international cooperation (FATF Recommendation 40 and FATF Special Recommendation V)
- * Reporting suspicious transactions (FATF Recommendation 13 and FATF Special Recommendation IV)

5. ALTERNATIVE REMITTANCE SYSTEMS/MONEY VALUE TRANSFER SERVICES (E.G. HAWALA)

PIA Section 1.1.7: Regulation of alternative remittance systems.

Comment:

- * There is a wide variety of money/value transfer services available globally (some of which are more informal than others). It is not necessary for States to make such services illegal, but they should have the capacity to monitor and regulate their activities.

Issues for consideration:

- * Does the State regulate money value transfer services?

The following norms and standards and best practices provide guidance in this area:

- * Informal money or value transfer system or networks should be licensed or registered, and be subject to all FATF Recommendations that apply to banks and other non-bank financial institutions. (See, in particular, FATF Special Recommendation VI, its Interpretative Notes and its Best Practices Paper.)

6. WIRE TRANSFERS

PIA Section 1.1.7: Regulation of alternative remittance systems.

Comment:

- * This is an extremely technical issue, and close study of the relevant norms and standards is strongly advised. These norms and standards focus on the type of information that accompanies wire transfers, how that information travels with the transaction, and how States respond to the absence or inadequacy of such information. States' actions in this area should comply with all the other AML/CFT norms and standards, particularly those addressed in section 1.1.8 of the PIA, on customer due diligence and record-keeping.

Issues for consideration:

- * Does the State ensure that accurate and meaningful originator information is attached to wire transfers throughout the payment chain?
- * What measures does the State have in place for enhanced scrutiny of wire transfers without such originator information?

The following norms and standards and best practices provide guidance in this area:

- * Wire transfers (FATF Special Recommendation VII, its Interpretative Note and Best Practice Paper).

7. CASH COURIERS

PIA Section 1.1.7 (L/I/P): Regulation of alternative remittance systems

PIA Section 2.8.1 (L) (I) (P): Effective controls on the cross-border movement of persons and their property.

Comment:

- * States must have in place either a declaration or disclosure system for incoming and outgoing cross-border transportations of currency and bearer negotiable instruments. States can use either a declaration or disclosure system; it is not necessary to have both. Norms and standards in this area focus on the process of information-gathering and sharing. Action in this area should also comply with all other AML/CFT norms and standards. (*See below.*)

- * Analysts working on the PIAs of member States of the European Union should therefore ensure that they have up-to-date information about the norms and standards that apply to this issue in respect of European Union member States, particularly in respect of Commission Directive 2006/70/EC of 1 August 2006 (“European Union Third Anti-Money-laundering Directive”). The FATF norms and standards were revised in February 2009 to reflect this.

Issues for consideration:

- * Does the State have in place either a disclosure or declaration system, or other measures, to detect the physical cross-border transportation of currency and bearer negotiable instruments?
- * Do these measures apply to incoming and outgoing physical cross-border transportations made by a person, through the mail or in containerized cargo?
- * In addition, other AML/CFT measures should apply to the physical cross-border transportation of cash or bearer negotiable instruments:
 - (i) Sanctions should apply to persons who make a false declaration or disclosure;
 - (ii) Sanctions should apply to persons who carry out physical cross-border transportation of cash or bearer negotiable instruments related to terrorist financing or money-laundering;
 - (iv) Provisional and confiscation measures (*see 1.2.2*) should also apply in relation to persons carrying out a physical cross-border transportation of currency or bearer negotiable instruments that are related to terrorist financing or money-laundering;
 - (v) Measures to freeze, without delay, currency or bearer negotiable instruments that are related to terrorist financing should be in place (*see 1.3.1*).

The following norms and standards and best practices provide guidance in this area:

- * Cash couriers (FATF Special Recommendation IX, its Interpretative Note and Best Practices Paper)
- * Sanctions (FATF Recommendation 17)
- * Provision and confiscation measures (FATF Recommendation 3)
- * Measures to freeze, without delay, currency or bearer negotiable instruments (FATF Special Recommendation III).

8. NON-PROFIT ORGANIZATIONS

PIA Section 1.1.6 (L/I/P): Regulation of charitable organizations

Comment:

- * The regulation of charities is among the most important measures to be taken by States to prevent terrorist financing and thus achieve compliance with paragraph 1 of resolution 1373 (2001). Charities or non-profit organizations (NPOs) may be used by terrorists and terrorist organizations to raise and transfer funds, and may also be used to provide direct logistical support to terrorists and to serve as a cover for their operations. However, it is important to recall the positive role that NPOs often play with respect to a State’s development, and to their frequent involvement in essential humanitarian work. Disproportionate regulation would place unacceptable constraints on a sector that is a vital component of many national economies. The challenge is to monitor and regulate - conscientiously and consistently, yet proportionately - in order to respect volunteer dynamism. While good practice requires that NPOs, like any other social actor, be subject to responsible Government oversight, analysts should also bear in mind the obligations of States to ensure that individuals engaged with NPOs are able to hold and act upon their beliefs in conformity with international human rights standards. One area that should be considered is whether procedures exist for the proscription of organizations.

- * Almost all States have laws and a regulatory framework for NPOs. The key for CTED is to decide whether the State has assessed the sector's risk of abuse for terrorist financing, and how the State addresses the sector's vulnerabilities. The analyst must be satisfied that the State has reviewed its NPO sector and its regulatory regime for terrorist-financing risk and has introduced the necessary measures to minimize that risk. The analyst should consider the State's relations and communications with the sector (outreach and oversight); how it gathers information and conducts investigations in respect of the sector; and to what degree it can respond to international requests for information about its NPO sector.

Issues for consideration:

- * Has the State conducted a risk assessment or terrorist-financing review of its NPO sector?

The following norms and standards and best practices provide guidance in this area:

- * Regulation of non-profit organizations (FATF Special Recommendation VIII, its Interpretative Note and Best Practices Paper).

9. CRIMINALIZATION OF ASSISTANCE

PIA Section 1.2.3 (L): Criminalizing of any form of assistance (transport, lodging, etc.)

PIA Section 1.2.4 (L): Assistance criminalized with adequate precision to give fair notice of the conduct prohibited and to avoid misuse to suppress lawful demonstration or dissent.

Comment:

- * States should be encouraged to be as specific as possible when criminalizing various forms of assistance to commit terrorist acts. Although the broad criminalization of "assistance" may provide a legal cover addressing "all" forms of assistance, greater clarity as to "which" forms of assistance are criminalized would assist law enforcement officials, as well as the public, in counter-terrorism efforts and ensure conformity with the principle of legality, requiring precision in the definition of criminal offences. However, any listing of forms of assistance should remain inclusive so as to cover future forms of assistance, as terrorists adapt to newer technologies and methods for committing terrorist acts. Refer also to the provisions of the Commonwealth Model Legislative Provisions (*see 1.2.3.*) as well as to the Council of Europe Convention on Terrorism (*see 1.2.4.*). Article 18 of the UNODC Model Legislative Provisions Against Terrorism provides an example of a generic approach to support.
- * Under the principle of legality, the definition of criminal offence must be sufficiently precise to give fair notice of conduct that is prohibited and guard against potential misuse of criminal laws. This principle is important in connection with the concept of terrorism (which has no universally accepted definition). The State's definition of prohibited "assistance" should be analysed with a view to ensuring that there is no criminal liability for conduct that is protected under human rights law (such as the non-violent expression or manifestation of political opinions or religious or moral beliefs).

Issues for consideration:

- * Is the provision of assistance in the form of lodging criminalized?
- * Is the provision of assistance in the form of transport (vehicle, vessel, or aircraft) criminalized?
- * Is the provision of facilities or equipment for meetings criminalized?
- * Is there sufficient clarity concerning prohibited acts?
- * How might criminal liability be assessed with respect to support provided to charitable organizations?
- * What safeguards are in place to ensure that criminalization of assistance does not lead to infringement of human rights (including the rights to freedom of expression, association and conscience)?
- * Does the applicable legislation include the element of intent, as well as "the aim of furthering the criminal activity or criminal purpose of the group," or "knowledge of the intention of the group to commit an offence"? (See International Convention for the Suppression of the Financing of Terrorism, art. 2(5)(c).)

CHAPTER II

Security Council resolution 1373 (2001), paragraph 2

In paragraph 2 of the resolution, the Security Council 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.

1. SUPPRESSION OF RECRUITMENT

PIA Section 2.1.1 (L): Criminalization of recruitment by terrorist groups

PIA Section 2.1.2 (P): Efforts to suppress recruitment by terrorist groups.

Comment:

- * Criminalization is one effective way to suppress terrorist recruitment. Other counter-recruitment tools include awareness-raising strategies and outreach to different communities. Member States should have a strategy and resources in place to suppress recruitment by terrorist groups. This programme should ideally include at least the four following elements:
- (i) National strategies to suppress recruitment for terrorism which include environmental scans, assessment of potential threats, identification of threats, and sharing of information;
 - (ii) An information and intelligence function that includes collection of information, evaluation and dissemination of intelligence on potential suspects and groups by dedicated services, which is subsequently coordinated with prosecutorial services;
 - (iii) Investigation and assessment methods that are suitable for the types of investigations and which respect the rule of law and conform to human rights standards, including in connection with intelligence activities;
 - (iv) An awareness-raising and outreach programme for community education, policing and creation of self-sustaining community safety and security measures.

- * From a human rights perspective, it is important to verify that a State's drafting and implementation of counter-recruitment provisions are sufficiently precise so as not to impinge on forms of expression that may be controversial, but do not rise to the level of criminal conduct. Right-to-privacy considerations also need to be taken into account.

Issues for consideration:

- * Does the State criminalize recruitment as an autonomous offence?
- * Does the State have a national strategy for suppression of recruitment?
- * Is implementation of the criminalization of recruitment and the national strategy subject to the principle of proportionality, and does it exclude any form of arbitrariness or discrimination?
- * Does implementation of the criminalization of recruitment and the national strategy provide full respect for the rights of individuals, including, in particular, the rights to freedom of association, freedom of expression, freedom of religion, and privacy?
- * Does the strategy address vulnerable communities and places (including cyberspace) where people could be recruited for terrorism, including places of education or religious training and worship, and prisons?
- * Does the strategy include education aimed at countering radicalization and considering conditions conducive to the spread of terrorism?

2. ELIMINATING THE SUPPLY OF WEAPONS TO TERRORISTS

PIA Section 2.2.1 (L): Legislation to control arms and explosives

Comment:

- * Member States should be encouraged to ratify the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime;
- * Member States should have in place a legislative framework to, among other things:
 - (i) With respect to production: define those SALW that are subject to controls; specify the national authorities and mechanisms required for the production, acquisition, ownership and controls; require the marking of SALW; designate licensed manufacturers; establish mechanisms for the verification of marking; and designate the national authorities responsible for verification;
 - (ii) With respect to possession: set rules and regulations governing civilian acquisition, possession, transportation, licensing of dealers, record-keeping, and tracing of the various categories of SALW, and rules requiring the reporting of lost or stolen SALW, and ban all transfers of man-portable air defence systems (MANPADS), their essential components and explosives to non-State end-users;
 - (iii) With respect to brokering: regulate brokers and sellers of SALW and explosives and address the relevant registration and licensing requirements;
 - (iv) With respect to import/export: designate a national body to review requests to export SALW; verify weapons shipped and the relevant documentation; and prohibit the sale and/or transfer of SALW, components, ammunitions and explosives to any non-State actors and implement Security Council arms embargoes and principles.
- * In addition, legislation should criminalize illicit manufacturing of, and trafficking in SALW and explosives; tampering with firearm markings; and moving SALW, explosives and MANPADS across borders illegally.

PIA Section 2.2.1 (P): Operational measures for the control of arms and explosives.

Comment:

- * Member States should be encouraged to become parties to the United Nations International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons;
- * Member States should put in place mechanisms to provide reports in compliance with the United Nations Programme of Action (PoA) to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects;
- * Member States should have in place operational measures that include procedures for:
 - (i) Marking SALW;
 - (ii) Controls of manufacturers and verification of production, storage, security, transfers;
 - (iii) Registration of brokers and established mechanisms to control their activities and detect and arrest those who violate United Nations Security Council arms embargoes;
 - (iv) Management of stockpiles and destruction or disposal of confiscated, seized or collected SALW and MANPADS;
 - (v) Regulation of civilian possession and identification of owner;
 - (vi) Tracing of illicit SALW;
 - (vii) Where applicable, implementation of disarmament, demobilization and reintegration.
- * Member States should also have in place an enforcement programme for the control of arms and explosives on its territory that include:
 - (i) Ongoing assessment of illegal trafficking in the State through law enforcement work (risk, pervasiveness, types of arms, statistics, impact on law and order);
 - (ii) Identification and targeting of the individuals or groups implicated in the illegal traffic;
 - (iii) Detection, collection, seizure and disposal of illegal arms and explosives and prosecution of offenders;
 - (iv) Coordination of efforts at the national, regional and international levels among concerned agencies.

PIA Section 2.2.2 (P): Import/export controls for arms and explosives and an enforcement programme to detect and prevent smuggling of weapons.

Comment:

- * Member States should have in place a customs border-control programme to detect and prevent smuggling of SALW and explosives, including:
 - (i) A border-management programme and procedures for the import, export and transit movement of SALW and explosives administered by customs;
 - (ii) Receipt of advance electronic information from the trade;
 - (iii) Risk-management programme;
 - (iv) Cross-border cooperation between customs administrations;
 - (v) Inspection programme, including verification of markings;
 - (vi) Trade partnership programme;
 - (vii) Employee integrity programme.

3. TAKE THE NECESSARY STEPS TO PREVENT THE COMMISSION OF TERRORIST ACTS AND EARLY WARNING

PIA Section 2.3.1 (I): Counter-terrorism measures managed by appropriate agencies.

Comment:

- * Because of the variety of approaches taken by Governments in their efforts to counter terrorism, some are military, most are civilian, and due to difficulties of combining efforts, means, information and resources, the following is suggested as an appropriate structure.
- * Member States should have a strategy or programme in place to prevent the commission of terrorist acts. This programme should include an institutional structure comprising all agencies with a counter-terrorism mandate and ensuring coordination among them:
 - (i) Central high-level committee or agency for the development and coordination of a national counter-terrorism policy;
 - (ii) Central body for coordination of the operational activities of all law enforcement agencies having a counter-terrorism mandate;
 - (iii) Criminal investigations and forensics function;
 - (iv) Intelligence function, preferably centralized and institutionalized, with international links;
 - (v) Local and regional offices to collect information on the control and security of the territory;
 - (vi) Central counter-terrorism database and a variety of other law enforcement databases with access to all relevant agencies having a counter-terrorism mandate, with oversight mechanisms and appropriate limitations on use of the information, in accordance with human rights principles;
 - (vii) Access to international counter-terrorism databases for all relevant law enforcement and security agencies;
 - (viii) Clear legislative mandates and oversight of the activities of law enforcement and intelligence agencies in order to prevent the misuse of authority or abuse of discretion.

PIA Section 2.3.1 (P): Counter-terrorism measures managed by appropriate agencies.

Comment:

- * Member States should have a Government-wide programme in place to prevent the commission of terrorist acts. This programme should include the following five elements:
 - (i) A national strategy to combat terrorism;
 - (ii) Criminal investigations and forensic capabilities, including special investigation techniques that are dictated by necessity and proportionality and framed by precise legislation that respects the rule of law and adheres to humanitarian and human rights. (The use of such methods should extend to bilateral and multilateral cooperation);
 - (iii) Measures, procedures and tools for international cooperation among all agencies with a counter-terrorism mandate;
 - (iv) Membership in international, regional and subregional law enforcement networks, or associations or police working groups and bilateral arrangements;
 - (v) State protection plans; national security and response plans and counter-terrorism measures.

PIA Section 2.3.2 (P): Early-warning arrangements with other States.

Comment:

- * Early-warning arrangements with other States should include:
 - (i) A designated law enforcement office to serve as the focal point for counter-terrorism;
 - (ii) A national capacity to monitor threats and evaluate information;
 - (iii) Making full use of the INTERPOL secure global police communication system (known as I-24/7), through the INTERPOL NCBs, to receive, share and disseminate information in real time throughout the world;
 - (iv) Extension of I-24/7 beyond the NCB to other law enforcement entities, enabling all relevant authorities to access international databases, including nominal data on criminals, stolen and lost travel documents, fingerprints, DNA and stolen motor vehicles, maintained by INTERPOL;
 - (v) Sharing, through INTERPOL communication tools, of critical crime-related information, including information on wanted individuals, possible threats, dangerous materials and criminals' modus operandi using the organization's system of international colour-coded notices as well as the INTERPOL-United Nations Security Council Special Notice, to alert law enforcement agencies to individuals and entities that are subject to United Nations sanctions because of their affiliation with Al-Qaida or the Taliban;
 - (vi) Sharing, through the Customs Enforcement Network (CEN) secure platform and the Regional Intelligence Liaison Office (RILO) network, of information related to cargo security and other customs matters.

4. DENIAL OF SAFE HAVEN

PIA Section 2.4.1 (L): Legislation criminalizing the provision of safe haven to terrorists and their supporters by individuals or organizations.

Comment:

- * In this regard there are several measures that need to be considered collectively. These include legislative measures on criminalizing provision of safe havens and adequate jurisdiction. Additionally, practical and legal measures on immigration and border control need to be in place.

Issues for consideration:

- * The State should criminalize the harbouring or concealing or hindering or preventing the apprehension of any person in the knowledge that such person has committed or is planning to commit a terrorist act or is a member of a terrorist group;
- * The State should have in place laws that criminalize planning, preparation of activity or acts aimed at the commission of terrorist offences against another State or its citizens or an international organization;
- * The State should have adequate legal measures on jurisdiction in place. (*See sections 2.6.3., 2.6.4. and 2.6.5 of PIA.*);
- * The State should have adequate measures on international legal cooperation obligations. (*See sections 2.7.1., 3.2.1., 3.3.1., 3.6.1., 3.6.2.*);
- * *See 3.5.1., 3.5.2., and 3.5.3 below, on granting of refugee status and asylum. Also refer to immigration laws and border controls. Attention should be paid to the screening procedures to identify terrorists prior to granting any form of residency, and measures to criminalize and reduce illegal immigration.*

PIA Section 2.4.2 (P): Screening procedures to identify terrorists and their supporters prior to granting any form of temporary or permanent residence, including naturalization.

Comment:

* Member States should ensure that:

- (i) The process of issuing identification and travel documents is secure;
- (ii) Identification and travel documents issued by States contain security features, including machine-readable travel documents;
- (iii) Effective screening systems and practices at visa-issuance stage and at entry/exit points are in place;
- (iv) Advance traveller data to assist screening process, including an Advance Passenger Information System (APIS), watch lists, intelligence (national and international) are available;
- (v) Security clearance processes are in place for issuance of work and permanent residence permits and granting of citizenship.

PIA Section 2.4.3 (P): Measures to ensure that populations not under direct State control (e.g. refugee and IDP camps run by UNHCR and NGOs, breakaway provinces, etc.) do not harbour terrorists.

Comment:

* Member States should ensure that large populations and/or territories controlled by non-governmental agents are not used to provide a safe haven for terrorists, by having in place, among other things:

- (i) Robust screening processes;
- (ii) Procedures to identify terrorists and their supporters;
- (iii) Secure camp perimeters.

PIA Section 2.4.4 (L): Provisions to ensure that human traffickers are apprehended and punished.

Comment:

* Member States should criminalize:

- (i) Facilitation of human smuggling and trafficking;
- (ii) Production of fraudulent travel or identity documents;
- (iii) Procuring, providing or possessing such fraudulent documents;
- (iv) Enabling non-nationals to remain illegally in the State.

PIA Section 2.4.5 (L/I): Measures to criminalize and reduce illegal immigration.

Comment:

* Member States should have the appropriate legal underpinning for measures aimed at preventing illegal entry/stay by aliens or non-nationals.

PIA Section 2.4.5 (P): Measures to criminalize and reduce illegal immigration.

Comment:

- * Member States should have in place measures that include:
 - (i) Effective mechanisms for screening those seeking entry into and exit from their territories, in accordance with international human rights standards;
 - (ii) Capacity to trace those who violate the terms of their visas;
 - (iii) Capacity to identify and pursue those who have entered illegally, with due regard to the relevant provisions of international law, including non-refoulement (*see 2.7.2. below*);
 - (iv) Registration of aliens in Government systems.

5. PREVENT USE OF TERRITORY FOR PURPOSE OF TERRORIST ACTS

PIA Section 2.5.1 (L): Prohibition of use of territory to commit or prepare terrorist acts against other States or their citizens.

Comment:

- * The State should have in place laws that criminalize the planning or preparation of activities or acts aimed at the commission of terrorist offences against another State or its citizens or an international organization. The definition of terrorist acts should be State-neutral.

PIA Section 2.5.1 (P): Prohibition of the use of territory to commit or prepare terrorist acts against other States or their citizens.

Comment:

- * Member States should have a law enforcement capacity to detect and prevent the planning or facilitation of activities having as their purpose the commission of terrorist-related offences against another State or its citizens.
- * To prevent use of territory for purpose of terrorist acts, Member States should take into consideration cooperation on border security measures with neighbouring States.

See also 2.3.1, above.

6. CODIFICATION

PIA Section 2.6.1 (L): Codification of terrorist offences, as stipulated in the international counter- terrorism instruments, in domestic criminal law.

Comment:

- * The guidance below closely follows the wording of the international counter-terrorism instruments themselves. Member States may approach codification differently, depending on their respective legal traditions. (For example, they may do so through the use of specific counter-terrorism legislation, amendments to the Penal/Criminal Code, or amendments across different pieces of legislation.) The provisions of the international counter-terrorism instruments are provided in order to ensure that they are reflected in codification. Member States' legislation should also reflect

the attempt to commit the offences, acting as an accomplice, and conspiracy; and impose penalties reflecting the serious nature of the offences. The guide contains additional elements relating to the codification of the offences, which may also be taken into consideration. (For example: the precision with which the terrorist acts are defined, whether these are overly broad or vague, or have the potential for human rights abuse.) Shortcomings in these areas may detract from the actual implementation and/or effectiveness of the overall measures. The guide also provides for practical considerations relating to the prosecution and judiciary that influence the effectiveness of the legislative measures introduced. The Model Legislative Provisions Against Terrorism prepared by UNODC and publications of the Commonwealth Secretariat provide useful guidance in this area.

Issues for consideration:

- * **Convention for the Suppression of Unlawful Seizure of Aircraft, 1970**
- * **Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971**
- * **Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 1988.**

With respect to the above three instruments, the State should criminalize the following:

- (i) The seizing or exercising control of, by force or threat thereof or by any other means of intimidation, by a person on board of an aircraft in flight (1970 Convention);
- (ii) Performing an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft (1971 Convention);
- (iii) Destroying an aircraft in service or causing damage to an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight (1971 Convention); (iv) Placing on an aircraft in service of a device or substance which is likely to destroy that aircraft, or cause damage to it which renders it incapable of flight or to cause damage to it or likely to endanger its safety in flight (1971 Convention);
- (v) Destroying or damaging air navigation facilities or interfering with their operation, if any such act is likely to endanger the safety of aircraft in flight (1971 Convention);
- (vi) Communicating of information which the person knows to be false, thereby endangering the safety of an aircraft in flight (1971 Convention);
- (vii) The unlawful and intentional performing of an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death (1988 Protocol);
- (viii) The unlawful and intentional destroying or seriously damaging the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupting the services of the airport, if such an act endangers or is likely to endanger safety at that airport (1988 Protocol).

- * **Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973.**

The State should criminalize:

- (i) Committing murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
- (ii) Committing a violent attack on the official premises, private accommodation or means of transport of an internationally protected person likely to endanger his person or liberty;
- (iii) The threat to commit such an attack.

- * **International Convention against the Taking of Hostages, 1979.**

The State should criminalize:

The seizing or detaining and threatening to kill, to injure or to continue to detain another person (“the hostage”) in order

to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or group of persons to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.

* **International Convention for the Suppression of Terrorist Bombings, 1997.**

The State should criminalize:

Delivering, placing, discharging or detonating an explosive or other lethal device, in, into or against a place of public use, a State or Government facility, a public transportation system or an infrastructure facility with the intention to:

- (i) Cause death or serious bodily injury;
- (ii) Cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss;
- (iii) Organizing and directing others to commit the offence;
- (iv) Conspiracy to commit the offences referred to in (i) and (ii), above.

* **Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (amended by a 2005 Protocol, once it comes into force).**

The State should criminalize:

- (i) Seizing or exercising control over a ship by force or threat thereof or any other form of intimidation;
- (ii) Performing an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;
- (iii) Destroying a ship or causing damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship;
- (iv) Placing or causing to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or causing damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship;
- (v) Destroying or seriously damaging maritime navigational facilities or seriously interfering with their operation, if any such act is likely to endanger the safe navigation of a ship;
- (vi) Communicating information which he knows to be false, thereby endangering the safe navigation of a ship;
- (vii) Injuring or killing any person, in connection with the commission or the attempted commission of any of the offences set forth above;
- (viii) Threatening aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of these offences:
 - (a) Performing an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;
 - (b) Destroying a ship or causing damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship;
 - (c) Destroying or seriously damaging maritime navigational facilities or seriously interfering with their operation, if any such act is likely to endanger the safe navigation of a ship, if that threat is likely to endanger the safe navigation of the ship in question.

* **Convention on the Physical Protection of Nuclear Material, 1979 (amended by the Amendment to the Convention on the Physical Protection of Nuclear Material, 2005, once it comes into force).**

The State should criminalize:

- (i) Unlawful receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material, without lawful authority which causes or is likely to cause death or serious injury to any person or substantial damage to property;
- (ii) Theft, robbery, embezzlement or fraudulent obtaining of nuclear material;
- (iii) Demand for nuclear material by threat or use of force or by any other form of intimidation;
- (iv) The threat to use nuclear material to cause death or serious injury to any person or substantial property damage;
- (v) The threat to commit the theft or robbery of nuclear material in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act.

*** International Convention for the Suppression of Acts of Nuclear Terrorism, 2005**

The State should criminalize:

- (i) The unlawful possession of radioactive material or making or possessing a device with the intent to cause death or serious bodily injury; or to cause substantial damage to property or to the environment;
- (ii) The use of radioactive material or a device or the use or damaging of a nuclear facility in a manner which releases or risks the release of radioactive material with the intent to cause death or serious bodily injury; or with the intent to cause 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 an act;
- (iii) Any threat, under circumstances which indicate the credibility of the threat, to commit the above mentioned act;
- (iv) The unlawful demand of radio active material or a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force.

*** Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988 (amended by a 2005 Protocol, once it comes into force).**

The State should criminalize:

- (i) Seizing or exercising control over a fixed platform by force or threat thereof or any other form of intimidation;
- (ii) Performing an act of violence against a person on board a fixed platform if that act is likely to endanger its safety;
- (iii) Destroying a fixed platform or causing damage to it which is likely to endanger its safety;
- (iv) Placing or causing to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety
- (v) Injuring or killing any person in connection with the commission or the attempted commission of any of the offences set forth above;
- (vi) Threatening, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of these offences:
 - (1) Performing an act of violence against a person on board a fixed platform if that act is likely to endanger its safety
 - (2) Destroying a fixed platform or causing damage to it which is likely to endanger its safety if that threat is likely to endanger the safety of the fixed platform.

ADDITIONAL ELEMENTS REGARDING THE CRIMINALIZATION OF TERRORIST OFFENCES:

Comment:

- * It should be noted that there is no universally agreed definition of terrorism. Therefore, each State will approach this issue on the basis of its domestic legal framework. However, there are a number of elements to be considered in assessing a State's legislation.

Issues for consideration:

- * Is the definition of terrorism too narrow (by not covering international terrorism or not covering all the acts contained in the universal instruments)?
- * Is the definition of terrorism too broad (by qualifying all kinds of activities directed against national interest as terrorist acts, e.g. military attacks, espionage, etc.)?
- * Is the definition of terrorism too broad (by covering acts which are conventional crimes, e.g., organized crime, any possession of weapons etc.)? Conventional crimes, even if committed by members of terrorist organizations, should not be the subject of counter-terrorism legislation
- * Are there different definitions in a federal system among States, or between States and the federation?
- * Is the definition of terrorism too vague (for example, by using unclear or imprecise terms which may result in a large margin of discretion for the authorities, thus allowing for potential abuse and ineffective allocation of powers within State agencies in charge of counter-terrorism)? Terrorism offences should plainly set out what elements of the crime make it a terrorist crime
- * Does the definition allow for non-violent acts of dissent or protest to be qualified as terrorism?

HUMAN RIGHTS

- * From a human rights perspective, the key question in codification is whether the definition of "terrorist act" is precise or poses a risk of misuse. The principle of legality requires that acts constituting criminal conduct be clearly established in law in order to give notice to potential wrongdoers and ensure that criminal sanctions are not imposed arbitrarily or retroactively. The risk of misuse arises when the definition of "terrorist act" is so broad or vague as to include conduct that is protected under international human rights law, such as the expression of controversial views or non-violent criticism of a Government.
- * One approach to a general definition, recommended by the Special Rapporteur of the United Nations Human Rights Council on human rights and counter-terrorism (see E/CN. 4.2006/98), is the "cumulative approach", using the three elements found in paragraph 3 of Security Council resolution 1566 (2004): (1) acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages; (2) with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a Government or an international organization to do or to abstain from doing any act; and (3) which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.
- * Article 2 of the International Convention for the Suppression of the Financing of Terrorism goes further, criminalizing not only acts which constitute an offence within the scope of the universal counter-terrorism instruments, but also "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". Some definitions would also criminalize acts intended to cause serious property damage, with the required purpose.
- * In order to draw a clear distinction between "terrorist acts" and acts that are permissible under human rights law, some States include an exclusionary provision in the legal definition, such as: "any act which is committed in pursuance of any advocacy, protest, dissent or industrial action and which does not intend the harm contemplated in this law, shall not be regarded as a terrorist activity within the meaning of this definition".

Comment:

- * It is apparent that the prosecution of terrorists has become increasingly complex and highly specialized. Prosecutors need to know typologies of incitement and of recruitment, and they need specialization, understanding of charity laws, finance and even tax laws. This process requires a degree of training, knowledge, skill and sophistication. They need to be able to guide, instruct and supervise the work of the investigatory agencies. The guide incorporates a number of recommendations to assess the practical elements on effective implementation for the prosecution and judiciary.

Issues for consideration:

- * Prosecution

In order to be able to bring terrorists to justice, an effective prosecution system must be able to:

- (i) Handle complex cases (involving conspiracy, charity law, finance, human rights);
- (ii) Cooperate internationally (formally and informally);
- (iii) Execute correctly mutual legal assistance and extradition requests;
- (iv) Supervise the use of special investigative techniques by the investigative agencies;
- (v) Be able to handle intelligence collected by the different investigative agencies and convert it into admissible evidence when appropriate;
- (vi) Handle evidence collected by different States;
- (vii) Access appropriate training;
- (viii) Handle anti-terrorist-financing measures (freezing, confiscation etc.);
- (ix) Fighting against transnational crimes that can support or facilitate terrorist activity.

The prosecution service needs to have the following:

- (i) Central agency;
- (ii) Coordination mechanisms;
- (iii) Human resources and technical resources;
- (iv) Mechanisms for domestic and international exchange of information;
- (v) Counter-terrorism specialization (at least at the national level).

- * Judiciary

In order to be able to bring terrorists to justice, an effective judicial system needs to be capable of:

- (i) Handling complex cases (involving conspiracy, charity law, finance, human rights);
- (ii) Handling forensic, technological and financial aspects of investigation and prosecution;
- (iii) Cooperating internationally (formally and informally);
- (iv) Dealing properly and expeditiously with mutual legal assistance and extradition requests;
- (v) Controlling the use of special investigative techniques by investigative and prosecutorial agencies;
- (vi) Handling evidence collected by different States;
- (vii) Accessing appropriate training;
- (viii) Handling anti-financing measures (freezing, confiscation etc.);
- (ix) Fighting transnational crimes that can support or facilitate terrorist activity.

The judicial system needs to have:

- (i) Human resources;
- (ii) Technical resources;
- (iii) Where appropriate, access to special training or educational programmes for judges and courts concerning counter-terrorism, money-laundering and terrorist-financing offences.

7. EXCEPTIONAL CRIMINAL PROCEDURES AND ACCOMPANYING SAFEGUARDS

PIA Section 2.6.2 (L/P): Existence of exceptional criminal procedures and accompanying safeguards applicable to terrorism-related cases.

Comment:

- * Security Council resolution 1373 (2001) does not require exceptional criminal procedures to investigate or prosecute terrorism-related cases. Some States have chosen to deal with terrorism-related matters through their normal criminal procedures. Other States have established exceptional procedures, on the grounds that terrorism-related cases pose exceptional challenges to law enforcement. Such procedures could include exceptional rules governing detention, evidence and other trial matters, and the establishment of special or military courts. Although such measures may have rational foundations, it is essential to consider whether they comply with the principles of legality, necessity and proportionality, whether they are accompanied by appropriate safeguards, and whether they respect the principle of non-derogable rights. Exceptional criminal procedures should be distinguished from special investigative techniques, which are broadly accepted as a law enforcement tool and are obligatory under a number of international conventions related to serious crimes.

1. SPECIAL INVESTIGATIVE TECHNIQUES

Comment:

- * As noted above, “special investigative techniques” are broadly accepted and should be distinguished from exceptional criminal procedures. Special investigative techniques are techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the subjects of the investigation.
- * The use of special investigative techniques is not required under international standards in all cases. Nonetheless, it has been recognized as a possible component of an effective strategy against serious crimes, including acts of terrorism. The three United Nations Conventions against Transnational Organized Crime, Corruption, and Illicit Traffic in Narcotic Drugs and Psychotropic Substances oblige State parties to take the necessary measures to allow their appropriate use, if permitted by the basic principles of their domestic legal systems (arts. 20, 50 and 11, respectively). States parties are encouraged to conclude bilateral or multilateral agreements or arrangements, as appropriate, for using such special investigative techniques in the context of cooperation at the international level.
- * The use of these techniques could infringe on fundamental rights and freedoms, partly because of their covert nature. For these reasons, States should develop the necessary mechanisms to ensure effective oversight of their use. In all circumstances, recourse to special investigative techniques should be guided by the principles of legality, necessity, proportionality and non-discrimination.

Issues for consideration:

- * Enabling legislation
 - (i) Does the State’s legislation allow the use of special investigative techniques?
 - (ii) Which is the competent authority involved in deciding, supervising or using special investigation techniques?
 - (iii) Is there a time limit on the use of special investigative techniques?
 - (iv) Do the laws and procedures take into account new technologies?
 - (v) Are the circumstances under which special investigative techniques may be used clearly defined in law?
 - (vi) Is there adequate control of their use by judicial authorities or other independent bodies through prior authorization, supervision during the investigation and ex post facto review?

- (vii) Does the law require sufficient reason to believe that a serious crime has been committed or prepared, or is being prepared, by one or more particular persons or an as-yet-unidentified individual or group of individuals?
- (viii) Is there proportionality between the effects of the use of special investigation techniques and the objective that has been identified?
- (ix) Does the law ensure that competent authorities apply less intrusive investigation methods than special investigation techniques, if such methods are adequate for the offence to be detected, prevented or prosecuted?
- (x) Are there procedural rules governing the production and admissibility of such evidence and safeguarding the rights of the accused to a fair trial?

✧ International cooperation in the field of special investigative techniques

- (i) Does the State have in place domestic mechanisms to allow international cooperation in special investigative techniques?
- (ii) Does the State make use to the greatest extent possible of existing international arrangements for judicial or police cooperation in relation to the use of special investigation techniques?
- (iii) Does the State have in place bilateral and multilateral arrangements for international cooperation in special investigative techniques (especially with its neighbouring States)?
- (iv) Does the State have in place arrangements to ensure that information received was not obtained in violation of either the sending or receiving State's human rights obligations?
- (v) *For international cooperation generally, see section 2.7.1. of the guide.*

2. WITNESS PROTECTION

Taking into account that in some areas of criminality, such as terrorism, there is an increasing risk that witnesses will be subjected to intimidation; and in order to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, States need to provide protection to witnesses and collaborators of justice.

Member States should:

- (i) Provide physical and social protection to witnesses and collaborators of justice and people close to them before, during and after the testimony is given;
- (ii) While respecting the rights of the defence, Member States should allow the admissibility of evidence while permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
- (iii) Member States should develop within their means a witness-protection programme which includes an autonomous agency, with sufficient resources, which is able to deal with urgent cases while always guaranteeing the confidentiality of the witness;
- (iv) Member States should develop international cooperation arrangements in order to provide protection to witnesses when appropriate and to enable them to give their testimony;
- (v) Criminal justice personnel should have adequate training and guidelines to deal with cases where witnesses might require protection measures or programmes.

3. INVESTIGATIVE DETENTION

- (i) Some States have instituted exceptional procedures for extended investigative detention in terrorism-related cases. Under international human rights law, pre-trial detention is considered the exception rather than the rule, and must not last for prolonged or indefinite periods. Such detention

raises the issue of respect for the presumption of innocence, which has been qualified as a non-derogable right. Any form of detention must take place in accordance with procedures established in law. Arbitrary detention is impermissible in any circumstances. At a minimum, any form of extended investigative or pre-trial detention should be subject to prompt and periodic review by an independent and impartial tribunal. The right to prepare an effective defence, including meaningful access to counsel, should be assured;

- (ii) In any detention context, States should take steps to safeguard the physical and mental integrity of accused persons. It has been recognized that prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment. The practice of torture or ill-treatment, in addition to being prohibited under international law, could prevent effective implementation of paragraph 2(e) of Security Council resolution 1373 (2001), since it could in some cases frustrate the extradition or prosecution, conviction and punishment of persons involved in terrorist acts;
- (iii) In some States with civil-law systems, it is normal procedure to hold suspects under a form of investigative detention for certain periods (*garde à vue*), but the above caveats should still apply.

4. SPECIAL COURTS AND COURT PROCEDURES

Some States have conferred jurisdiction on special courts to deal with terrorism-related cases. In some cases, these are military courts. Some States have also instituted exceptional provisions relating to court procedures, including with respect to forms of evidence that are admissible. It has been said that the trial of civilians by military courts should be considered highly exceptional. In accordance with article 10 of the Universal Declaration of Human Rights, everyone is entitled “in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. While certain aspects of the right to fair trial may be derogable under emergency situations, subject to strict safeguards, it has been argued that fundamental requirements of fair trial must be respected in all cases. Furthermore, in cases where the death penalty could be imposed, all fair-trial obligations should be respected, due to the non-derogability of the right to life.

8. JURISDICTION

PIA Section 2.6.3 (L): Jurisdiction of courts extends to acts committed outside State’s territory by its nationals (whether or not currently within State territory)

PIA Section 2.6.4 (L): Jurisdiction of courts extends to acts committed outside State’s territory by foreign nationals currently within State

PIA Section 2.6.5 (L): Application of principle of “aut dedere aut judicare” (prosecute or extradite).

Comment:

- * The international counter-terrorism instruments contain mandatory and discretionary aspects related to jurisdiction. The mandatory elements include the requirement for the State to establish territorial jurisdiction if the offence is committed within its territory, if committed by nationals or on board an aircraft or vessel registered with it. Additionally, States must establish jurisdiction over the offence to either prosecute or extradite an alleged offender present in the territory of the State.
- * Outlined in 2.6.3., 2.6.4., and 2.6.5. are the mandatory requirements relating to jurisdiction arising out of the conventions. The UNODC Model Legislative Provisions against Terrorism and Commonwealth publications provide guidance.

Issues for consideration:

- * The State should establish its jurisdiction over the offence in the following cases:
 - (i) When the offence is committed in the territory of that State, including its territorial sea, on board a ship or aircraft registered to the State;

- (ii) When the offence is committed against or on board a ship flying the flag of the State at the time the offence is committed;
- (iii) When the offence is committed against or on board a fixed platform while it is located on the continental shelf of that State;
- (iv) When the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
- (v) When the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence in the State;
- (vi) When the alleged offender is a national of that State;
- (vii) When the crime is committed against an internationally protected person;
- (viii) In order to compel that State to do, or abstain from doing any act (applies only to the "Hostage Convention"; for the other conventions it is optional).

- * The State party to a convention should establish that if an alleged offender is in its territory it shall, if it does not extradite, be obliged without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.
- * Also refer to the relevant sections of this guide on the provision of safe havens and the prohibition on the use of territory to prepare or commit acts against other States.

Discretionary jurisdictional aspects arising out of the conventions:

- * A State Party may also establish its jurisdiction over the offence in the following cases:
 - (i) If the offence was directed towards or resulted in the carrying out of an offence in the territory of or against a national of that State;
 - (ii) If the offence is committed by a stateless person whose habitual residence is in that State;
 - (iii) If, during its commission, a national of that State is seized, threatened, injured or killed;
 - (iv) If the offence was directed towards or resulted in the carrying out of an offence committed against a State or Government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State;
 - (v) If the offence was directed towards or resulted in the carrying out of an offence in an attempt to compel that State to do or abstain from doing any act;
 - (vi) If the offence is committed on board an aircraft which is operated by the Government of that State;
 - (vii) If the offence is committed with respect to a hostage who is a national of that State.

9. INTERNATIONAL LEGAL COOPERATION

PIA Section 2.7.1 (L/P): Domestic provisions for extradition and/or mutual transfer of criminal proceedings.

Comment:

- * A State may rely on a combination of domestic legislation, bilateral agreements, multilateral agreements and regional or subregional agreements. Domestic legislation may also include practices and procedures for the effective implementation of bilateral and multilateral agreements.

(a) Extradition

Issues for consideration:

* Legal

- (i) Does the State have a legal framework covering extradition (Acts of Parliament, bilateral and multilateral treaties, international counter-terrorism instruments, regional and subregional agreements)?
- (ii) Is the legislative framework broad enough to cover the obligations under resolution 1373 (2001)? (In particular refer to codification of offences, jurisdictional elements including the principle of “aut dedere aut judicare”);
- (iii) Are the extraditable offences clearly defined in the legislation?
- (iv) If dual criminality is a requirement for extradition, the State should not impose impediments to extradition where both States have criminalized the underlying conduct;
- (v) Are the offences set forth in the international counter-terrorism instruments deemed to be included as extraditable offences in any extradition treaty existing between the Contracting States?
- (vi) Are the offences falling within the scope of the international counter-terrorism instruments to which the State is a party recognized as extraditable offences in respect of another State which is also a party to the same conventions? (Contracting States that do not make extradition conditional on the existence of a treaty);
- (vii) Legislation should also include grounds of refusal and safeguards:
 - (1) Double jeopardy;
 - (2) Persecution (*see* 3.6.2.);
 - (3) Refoulement (*see* 2.7.2.);
 - (4) Absence of minimum guarantees in criminal proceedings;
 - (5) For States that have abolished the death penalty, absence of adequate guarantees;
 - (6) Appeals/review;
 - (7) Procedures relating to surrender;
 - (8) In the absence of bilateral and multilateral arrangements, provision for ad hoc arrangements with accompanying safeguards.

* Practical application

Multilateral and bilateral treaties provide a basis for extradition, while domestic legislation often sets out the procedural aspects of extradition. Review whether a State has established practices, procedures and criteria relating to extradition:

- (i) Is there an established and designated national central authority for processing extradition requests?
- (ii) Is there a clear procedure upon the acceptance of the request for extradition?
- (iii) Is there available written information of the procedures that can be supplied to requesting States to enable extradition?
- (iv) Are there procedures in place for the arrest of the individual?
- (v) What are the criteria for the granting of bail?
- (vi) Is there due process in the determination of whether the individual is eligible for surrender?
- (vii) Are the procedures in place for appeal/judicial review?
- (viii) Do the legal, practical and procedural measures provide a streamlined process for extradition?
- (ix) Have there have been extraditions for terrorism-related cases or other cases?
- (x) Is the principle, “aut dedere aut judicare” applied? (See Jurisdiction.)
- (xi) What is the capacity of the central authority in terms of expertise, human resources, and financial and technological support?

(b) Mutual legal assistance

Legislation authorizing competent authority to:

- (i) Assist in the availability of detained persons or others to give evidence or assist in investigations;
- (ii) Effect service of judicial documents;
- (iii) Execute searches and seizures;
- (iv) Examine objects and sites;
- (v) Provide information and evidentiary items;
- (vi) Provide originals or certified copies of relevant documents and records, including bank, financial, corporate or business records;
- (vii) Search and seizure of information, documents, or evidence (including financial records) from financial institutions, or other natural or legal persons;
- (viii) Take evidence or statements from persons;
- (ix) Facilitate the voluntary appearance of persons for the purpose of providing information or testimony to the requesting State;
- (x) Identify, freeze, seize, or confiscate assets laundered or intended to be laundered, the proceeds of money-laundering and assets used for, or intended to be used for terrorist financing, as well as the instrumentalities of such offences, and assets of corresponding value.

Legislation allows for:

- (i) Most effective channels of communication to be used, including in particular submission of information through electronic or other means of telecommunication;
- (ii) Evidence to be taken by video conference in the requested party if it is not possible or desirable, for another reason, for the person in question to appear at proceedings in the requested party;
- (iii) Provisions on temporary transfer of detained persons to the requested State for the purpose of investigation;
- (iv) Spontaneous transmission of information;
- (v) Provision of assistance both in the absence of, and pursuant to a treaty arrangement;
- (vi) Giving the central authority the power to enforce conditions and limitations on request;
- (vii) Mutual legal assistance in the context of:
 - (1) Cross-border investigations;
 - (2) Special investigative techniques;
 - (3) Joint investigation teams;
 - (4) Provisions on data-protection in respect of information received through mutual legal assistance;
 - (5) Provisions on admissibility of evidence gathered in other jurisdictions;
 - (6) Provision of legal assistance even in the absence of dual criminality, in particular for less intrusive and non-compulsory measures.

For those forms of mutual legal assistance where dual criminality is required, the State should have no legal or practical impediment to rendering assistance where both States criminalize the conduct underlying the offence. Offences involving the financing of terrorist acts may not be regarded as fiscal offences for the purposes of mutual legal assistance.

PRACTICAL APPLICATION

Establishment of a central authority for receiving requests for mutual legal assistance, which has:

- (i) The capacity to take practical measures with a view to facilitating the rapid execution of a request;

- (ii) The capacity to transmit and execute and to ensure proper and speedy execution of mutual legal assistance requests (clear and efficient processes for the execution of mutual legal assistance requests in a timely way and without undue delays);
- (iii) The ability to train officials, judges and prosecutors in drafting and executing mutual legal assistance requests;
- (iv) The capacity for effective cooperation in cross-border investigations, special investigative techniques and joint investigation teams;
- (v) Arrangements for coordinating seizure and confiscation actions with other States;
- (vi) Mechanisms for cooperation and consultation before refusal of an mutual legal assistance request or before postponing execution of such a request;
- (vii) Effective bilateral or multilateral arrangements and channels to cooperate with other authorities (central, judicial, prosecutorial and law enforcement);
- (viii) Effective bilateral or multilateral arrangements and channels to coordinate cross-border investigations and prosecutions;
- (ix) The relevant equipment (i. e. computers, secure communication channels, video links);
- (x) The capacity to protect data received through mutual legal assistance and to keep the confidentiality of the process;
- (xi) The ability to disseminate guidance on national mutual legal assistance requirements both to domestic practitioners and to foreign authorities;
- (xii) The ability to make use of alternatives to mutual legal assistance (and does in fact do so);
- (xiii) Bilateral or multilateral arrangements on cross-border investigations, controlled delivery, covert investigations and joint investigations teams.

PIA Section 2.7.2 (L/P): Procedures to ensure that refoulement does not take place.

Comment:

- * Non-refoulement obligations arise from both international refugee law and international human rights law and are directly relevant to requests for extradition. Under article 33(1) of the 1951 “Refugee Convention”, no State “shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. However, article 33(2) clarifies that the benefit of the provision “may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”.
- * If there are “serious reasons for considering that” a refugee applicant may have committed or participated in terrorist offences, then that person is excluded from refugee status under article 1 (F) of the 1951 Convention. If a person is excluded from refugee status, then that person does not benefit from protection against refoulement under international refugee law.
- * Nevertheless, extradition may still be precluded on the basis of international human rights law. The human rights-based prohibition of refoulement is based on article 3 of the 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), which prohibits the return of any person – whether or not a refugee, and whether or not a suspected terrorist – “to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The principle of non-refoulement in this context is widely considered to be a principle of customary international law, meaning that it applies whether or not a State is a party to the CAT. In cases where the conditions of article 3 of CAT are met, the host State should exercise jurisdiction and initiate proceedings within its national justice system in keeping with the requirement to extradite or prosecute (“aut dedere, aut judicare”).

Issues for consideration:

- * What procedures and mechanisms are in place to consider extradition requests?
- * What is the level of independence of such mechanisms?
- * Where the subject of an extradition request applies for asylum, is return suspended for the entire duration of asylum proceedings, including the appeal stage?
- * Does the State's legislation recognize that the principle of non-refoulement applies not only to a refugee's State of origin, but also to any other State where that person has reason to fear persecution?
- * Is there a separate inquiry to determine whether there are "substantial grounds for believing" that the subject of an extradition request could be subjected to torture, if returned to his/her State of origin, or any other State?
- * Is return absolutely barred in such cases, as required by article 3 of the CAT?
- * Can extradition and asylum proceedings be conducted in parallel, since the former may result in information having a bearing on eligibility for refugee status?

10. EFFECTIVE BORDER CONTROLS AND RELATED ISSUES

PIA Section 2.8.1 (L): Effective controls on the cross-border movement of persons and their property (including cash and other monetary instruments).

Comment:

- * Legal provisions regarding the movement of people across borders are normally contained in immigration law and should include:
 - (i) Requirements for entering or exiting State (i. e. visas, travel documents, conditions of admissibility/inadmissibility);
 - (ii) Requirement for secure travel documents;
 - (iii) Designation of officers to carry out any aspect of immigration law;
 - (iv) Inspection authority at ports of entry;
 - (v) Enforcement powers, including investigation, arrest, detention and removal.
- * Legal provisions regarding the movement of goods across borders are normally contained in customs law and in other laws that are enforced by customs at the border and should include:
 - (i) Requirements for reporting (of persons and goods, including cash and other monetary instruments) at designated customs offices;
 - (ii) Requirement for information provided to customs to be true, accurate and complete;
 - (iii) Enforcement powers, including search of persons, goods or conveyance, seizure, and arrest for contravention.

PIA Section 2.8.1 (P): Effective controls on the cross-border movement of persons and their property (including cash and other monetary instruments).

Comment:

- * Member States should have controls at authorized entry/exit checkpoints that include:
 - (i) **Screening of people entering/leaving the State, using:**

- (a) Ideally, automated processing systems;
- (b) Watch lists (national and international);
- (c) Inspection/verification techniques to detect forged and stolen and lost travel documents;
- (d) Connection to INTERPOL databases, including the SLTD database;
- (e) Machine-readable travel document (MRTD) capacity;
- (f) Equipment (travel document readers and detection);
- (g) Flight/ship passenger manifests and other information in advance of arrival, or APIS, if possible;
- (h) Risk-assessment units/function;
- (i) Information exchange with other national/international agencies;
- (j) Joint targeting with other concerned agencies at entry/exit checkpoints.

(ii) Cash courier control through:

- (a) Implementation and administration of declaration/disclosure systems;
- (b) Conduct of risk assessment and targeting;
- (c) Inspection;
- (d) Liaison and feedback (FIU, others).

PIA Section 2.8.2 (P): Procedures for identifying illegal immigrants or aliens.

Comment:

* In addition to the measures indicated under 2.4.5, Member States should implement any other monitoring mechanism they deem appropriate:

- (i) Effective mechanisms for screening those seeking entry into and exit from their territories, in accordance with international human rights standards;
- (ii) Capacity to trace those who violate terms of their visas;
- (iii) Capacity to identify and pursue those who have entered illegally;
- (iv) Registration of aliens in Government systems.

PIA Section 2.8.3 (L): Controls on the issuance of identity and travel documents.

Comment:

* Member States should have in place regulations and/or control measures for the issuance of identity and travel documents that include:

- (i) Existence of registry of citizens and non-citizens and exercise of strict controls on their use and security;
- (ii) Security-conscious passport-issuing authority (security staff on hand, vetting employees, etc.);
- (iii) Strict controls on materials, such as blank documents and security laminates, by using numeric and physical controls;
- (iv) Use of anti-fraud staff and techniques during passport application process;
- (v) Verification between passport issuing authority and issuers of supporting documents such as birth and marriage certificates and driving licences;
- (vi) Provision for requiring the reporting of stolen or lost documents for inclusion in international databases, including INTERPOL SLTD database;
- (vii) Replacement of passports reported stolen or lost, only after exhaustive checks;
- (viii) Issuance of machine-readable identity and travel documents.

Comment:

- * Member States should have in place a legal framework and measures to implement an effective aviation security programme that includes:

(i) International conventions

- * Convention on International Civil Aviation (Chicago Convention, Doc 7300);
- * Convention on Offences and Certain Other Acts Committed on Board Aircraft, (Tokyo Convention, Doc 8364);
- * Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague Convention, Doc 8920);
- * Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention, Doc 8966);
- * 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 (Montreal Supplementary Protocol, Doc 9518);
- * Convention on the Marking of Plastic Explosives for the Purpose of Detection (MEX Convention, Doc 9571).

(ii) Annexes to the Convention on International Civil Aviation

- * Security-related provisions of Annex 2 — Rules of the Air (Chapter 3);
- * Security-related provisions of Annex 6 — Operation of Aircraft;
- * Part I — International Commercial Air Transport — Aeroplanes (Chapter 13);
- * Part III — International Operations — Helicopters (Chapter 11);
- * Security-related provisions of Annex 8 — Airworthiness of Aircraft (Chapter 11);
- * Security-related provisions of Annex 9 — Facilitation (Chapters 2, 3, 4, 5 and 8);
- * Security-related provisions of Annex 10 — Aeronautical Telecommunications;
- * Volume IV — Surveillance Radar and Collision Avoidance Systems (Chapter 2);
- * Security-related provisions of Annex 11 — Air Traffic Services (Chapters 2 and 5);
- * Security-related provisions of Annex 13 — Aircraft Accident and Incident Investigation (Chapter 5);
- * Security-related provisions of Annex 14 — Aerodromes;
- * Volume I — Aerodrome Design and Operations (Chapters 3, 5, 8 and 9);
- * Annex 17 — Security — Safeguarding International Civil Aviation Against Acts of Unlawful Interference;
- * Security-related provisions of Annex 18 — The Safe Transport of Dangerous Goods by Air (Chapters 2 and 10).

(iii) Manuals and Circulars

- * The following ICAO documents provide additional guidance material to assist States with the establishment and management of their civil aviation security systems:
 - * Oversight Manual, Part C: The Establishment and Management of a State's Aviation Security Oversight System;
 - * Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference (Doc 8973 — Restricted);

- * Manual on the Implementation of the Security Provisions of Annex 6 (Doc 9811 — Restricted)
- * Aerodrome Design Manual (Doc 9157);
- * Aircraft Operations (Doc 8168);
- * Airport Planning Manual (Doc 9184);
- * Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers (Cir 288);
- * Human Factors in Civil Aviation Security Operations (Doc 9808);
- * Human Factors Training Manual (Doc 9683);
- * ICAO Policies on Charges for Airports and Air Navigation Services (Doc 9082);
- * Machine-Readable Travel Documents (Doc 9303);
- * Training Manual (Doc 7192).

PIA Section 2.8.4 (P): Provisions to ensure maritime security.

Comment:

- * Member States should have in place a legal framework and measures to implement an effective maritime security programme that includes:

(i) *International conventions*

- * International Convention for the Safety of Life at Sea (SOLAS), 1974;
- * Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988;
- * Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988;
- * Once it comes into force, the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
- * Once it comes into force, the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

(ii) *Measures related to maritime security*

SOLAS Chapter XI-2 – Special Measures to Enhance Maritime Security:

- * Regulation XI-2/2 – International Ship and Port Facility Security (ISPS) Code, Part A “Mandatory Requirements”;
- * Regulation XI-2/3 – Security levels;
- * Regulation XI-2/7 – Threats to ships;
- * Regulation XI-2/10 – Port facility security assessments;
- * Regulation XI-2/12 – Equivalent security arrangements;
- * Regulation XI-2/13 – Communication of information.

(iii) *Manuals and Circulars*

The following IMO Regulation, Code of Practice and Maritime Security Circulars provide additional guidance material to assist States with the establishment and management of their maritime security systems:

- * Regulation XI-2/2 – International Ship and Port Facility Security (ISPS) Code, Part B “Guidance regarding Part A”;
- * International Labour Organization (ILO) and IMO Code of Practice on Security in Ports, Recommendations on extending the ISPS Code into the wider port area.

Maritime Security Circulars:

- * MSC/Circ. 1074 – Interim guidelines for the authorization of Recognized Security Organizations (RSOs) acting on behalf of the administration and/or designated authority of a contracting party;
- * MSC/Circ. 1097 – Guidelines for the implementation of SOLAS chapter XI-2 and the ISPS Code;
- * MSC/Circ. 1106 – Implementation of SOLAS chapter XI-2 and the ISPS Code to port facilities;
- * MSC/Circ. 1110 – Matters related to SOLAS regulations XI-2/6 and XI-2/7;
- * MSC/Circ. 1132 – Guidance relating to the implementation of SOLAS chapter XI-2 and the ISPS Code;
- * MSC/Circ. 1155 – Guidelines on training and certification for company security officers;
- * MSC/Circ. 1188 – Guidelines on training and certification for port facility security officers;
- * MSC/Circ. 1192 – Guidelines on voluntary self-assessment by SOLAS contracting Governments and by port facilities;
- * MSC/Circ. 1193 – Guidance on voluntary self-assessment by administrations and for ship security;
- * MSC/Circ. 1194 – Effective implementation of SOLAS chapter XI-2 and the ISPS Code.

PIA Section 2.8.4 (P): Provisions to ensure cargo security

Comment:

- * Member States should have implemented practices and standards that include:
 - (i) Advance electronic transmission of data regarding cargo and container shipments prior to arrival to allow for risk assessment;
 - (ii) Conduct of risk assessment and management of the results to address security threats;
 - (iii) Inspection of cargo originating, exiting, transiting or being transhipped through a State;
 - (iv) Use of technology for risk assessment and for non-intrusive inspection;
 - (v) Customs-to-customs cooperation regarding the conduct of outbound security inspections upon request, and the use of standardized targeting and screening criteria;
 - (vi) Customs-to-business partnerships regarding implementation by business of minimum supply-chain security standards and best practices;
 - (vii) Accreditation of complying businesses as Authorized Economic Operators and facilitating their customs clearances.

CHAPTER III

Security Council resolution 1373 (2001), paragraph 3

In paragraph 3 of the resolution, the Security Council 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.

1. EXCHANGE OF INFORMATION

PIA Section 3.1.1 (L/P): Procedures for exchange of information on the movement of terrorists, forgery and falsification of travel documents, arms trafficking, use of communication technologies and terrorist threats related to weapons of mass destruction (WMDs).

Comment:

- * Member States should have in place procedures and mechanisms that encourage appropriate exchange of information, including:
- (i) A national counter-terrorism strategy that comprises international cooperation, intelligence-sharing and coordination;
 - (ii) Procedures and tools for international police and customs cooperation (databases, secure communication systems), operational “24/7”;
 - (iii) Multilateral and bilateral networks, such as NCBs, RILOs, regional networks, and membership in INTERPOL and regional law enforcement groups or associations;
 - (iv) Safeguards linked to the right to privacy and presumption of innocence.

PIA Section 3.2.1 (P): Procedures for exchange of information and cooperation on administrative and judicial matters.

Comment:

- * Member States should have in place procedures and mechanisms that encourage exchange of information, including:
 - (i) Focal points for the purpose of information exchange and cooperation;
 - (ii) System or process for communication and transmittal of information, operating “24/7”;
 - (iii) Joint Investigation Teams (JIT) between two or more States, as required, on the basis of legal agreements;
 - (iv) Regional arrest warrant to facilitate extradition between States within a region, where applicable.

2. MULTILATERAL AND BILATERAL AGREEMENTS

PIA Section 3.3.1 (L): Multilateral/ bilateral agreements on extradition and/or mutual legal assistance.

Comment:

- * Identify multilateral and bilateral agreements on extradition and mutual legal assistance.

(See also Section 2.7.1.)

3. RATIFICATION OF THE INTERNATIONAL COUNTER-TERRORISM INSTRUMENTS

PIA Section 3.4.1 (L): Status of ratification of/accession to the “13 plus three” international counter-terrorism instruments.

Comment:

- * Identify the international counter-terrorism instruments to which the State is a party.
- * Encourage the State to become a party to the international counter-terrorism instruments to which it is not a party.

PIA Section 3.4.2 (P): Status of implementation of the 13 international instruments.

Comment:

- * With regard to the international counter-terrorism instruments, Security Council resolution 1373 (2001) contains two distinct requirements. Paragraph 2(e) obliges all Member States to ensure that terrorist acts are established as serious criminal offences in domestic laws (this aspect of the resolution is addressed in section 2.6.1). Paragraph 3 of the resolution calls upon Member States to become a party to, and implement the international instruments. As some elements of the instruments are non-criminal in nature, it is not adequate simply to assess criminalization. For example, neither the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963) nor the Convention on the Marking of Plastic Explosives for the Purposes of Detection (Montreal, 1991) creates criminal offences, but their status of implementation by States must be assessed.
- * **Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963)**

Comment:

- * The Convention:
 - (i) Applies to acts affecting in-flight safety;

- (ii) Authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, where necessary to protect the safety of the aircraft;
- (iii) Requires contracting States to take custody of offenders and to return control of the aircraft to the lawful commander.

Issues for consideration:

* Does the State have:

- (i) Legislation in place establishing its jurisdiction over offences committed or acts done on board?
- (ii) Provisions/system in place for restoring control of the aircraft to its lawful commander?
- (iii) Allowance for disembarkation in its territory or taking delivery/custody of the person disembarked by the aircraft commander?
- (iv) A mechanism in place to make an immediate preliminary inquiry regarding a person delivered?
- (v) Safeguards in place to protect the rights of the person in custody?
- (vi) A mechanism in place to ensure that due regard is paid to the safety and other interests of air navigation and to avoid unnecessary delay of the aircraft?

* **Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991).**

Comment:

* The Convention requires each Contracting State to prohibit and prevent the manufacture, use and movement into or out of its territory of unmarked explosives, and also to mark all explosives in its territory, or, failing that, destroy them or render them ineffective. Although the Convention does not create any offences, it is likely that the implementing legislation will need to do so. (*See the Implementation Kits for the International Counter-Terrorism Conventions, Commonwealth, p. 229.*)

* Issues for consideration:

* The State should have measures in place to:

- (i) Prohibit and prevent the manufacture in its territory of unmarked explosives;
- (ii) Prohibit and prevent the movement into or out of its territory of unmarked explosives;
- (iii) Control the possession and transfer of the explosives to prevent them being diverted or used for purposes inconsistent with the objectives of the Convention.

(See also Sections 2.2.1. and 2.2.2 on control of arms and explosives.)

4. MEASURES WITH RESPECT TO REFUGEES AND ASYLUM

PIA Section 3.5.1 (L/P): Procedures for excluding terrorists from obtaining refugee status and expelling terrorists who have obtained refugee status.

Comment:

* Security Council resolution 1373 (2001) does not impose any new constraints or limitations on international refugee law or procedures, and it is important to ensure, as a matter of policy, that its implementation does not have such an effect. For the purposes of the resolution, the issue is whether States are able effectively to implement the provision of international refugee law stating that persons involved in acts of terrorism should be excluded from obtaining or enjoying refugee protection.

- * The key reference in this respect is article 1 (F) of the 1951 Convention Relating to the Status of Refugees, which states that the provisions of the Convention shall not apply “to any person with respect to whom there are serious reasons for considering that:
 - (i) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
 - (ii) He has committed a serious non-political crime outside the State of refuge prior to his admission to that State as a refugee;
 - (iii) He has been guilty of acts contrary to the purposes and principles of the United Nations”.
- * Each of these three categories of offence may apply to terrorist acts.

Issues for consideration:

- * Is the State a party to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol?
- * If so, is asylum legislation in place that incorporates the exclusion and expulsion clauses of the 1951 Convention?
- * If the State is not a party to the 1951 Convention, is legislation in place that achieves the same purpose with respect to exclusion?
- * What specific procedures and mechanisms does the State have in place to facilitate its implementation of this element of the resolution?
- * Are trained personnel and adequate resources available to accomplish this purpose?

PIA Section 3.5.2 (L/P): Exclusion and expulsion procedures in compliance with international human rights standards and appropriate safeguards (e.g. right to respond to evidence or information, right to legal assistance, right to an interpreter, right to appeal and to protection against removal until all legal remedies have been exhausted).

Comment:

- * Member States should ensure in both law and practice that the safeguards mentioned are in place, along with others that are necessary and appropriate in accordance with international human rights standards.

PIA Section 3.5.3 (L/P): Provision for excludable or expellable asylum seekers/refugees who cannot be deported.

Comment:

- * Member States should have in place laws, policies and procedures for excludable or expellable asylum-seekers/refugees who cannot be deported, with the aim of bringing to justice those reasonably suspected of involvement in terrorist acts. At the same time, States must abide by their obligations under international law, including international human rights law, to ensure that individuals who cannot be deported are not subject to arbitrary or indeterminate detention, or torture or ill-treatment.

PIA Section 3.5.4 (L/P): Existence of a parallel asylum, humanitarian or informal protection system and information on how individuals who have planned, facilitated or participated in an act of terrorism are dealt with.

Comment:

- * A number of States, although parties to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, nonetheless maintain parallel asylum systems outside the established refugee processing procedures. In some States,

for example, executive decrees can be issued to confer protected status without any adjudication process. Other States are not parties to the international refugee conventions and have systems for granting protected status that vary from those recommended by UNHCR.

Issues for consideration:

- * Does the State have parallel asylum procedures that do not conform to recognized international standards?
- * In such cases, does legislation exist that ensures that persons involved in terrorist acts cannot obtain protected status?

5. NON-APPLICATION OF POLITICAL OFFENCE DOCTRINE

PIA Section 3.6.1 (L): Requests for extradition or mutual legal assistance based on a terrorist offence cannot be refused on the grounds that the offence is of a political nature.

Comment:

- * Legislation should be in place providing that terrorist offences that qualify as terrorist acts under international legal norms and principles will not be considered excused or exempt from international cooperation on grounds that they are political. This requirement should be distinguished from the parallel obligation (*see 3.6.2, below*) of States to refuse cooperation where it is evident that the transfer of an individual is being requested for the purpose of improper prosecution.

6. DENIAL OF COOPERATION ON GROUNDS OF IMPROPER PROSECUTION

PIA Section 3.6.2 (L): Legislation permits denial of requests for extradition or mutual legal assistance where accusation of terrorism is believed to be made for the purpose of prosecution on account of race, religion, nationality, ethnic origin, political opinion or gender.

Comment:

- * The international counter-terrorism instruments address this requirement. For example, article 15 of the International Convention for the Suppression of the Financing of Terrorism states: “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 [or for mutual legal assistance] 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”. It is possible, in such cases, that the affected person would have a legitimate claim to refugee status.

Issues to consider:

- * Does legislation exist for denial of requests for extradition or mutual legal assistance, where an accusation of terrorism is believed to have been made for the purpose of prosecution or punishment on account of race, religion, nationality, ethnic origin, political opinion or gender?





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