

CTED Analytical Brief: A commentary on the codification of the terrorism offence



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Table of Contents

I. Introduction	4
II. Background and methodology	5
III. Elements of the terrorist offence derived from international instruments	6
a. An act of violence	7
b. Outcome	8
c. Intention	8
d. Terrorist purpose	9
e. Bringing it all together: the 1999 Terrorist Financing Convention	9
IV. Elements of the terrorist offence derived from Security Council resolutions	10
a. Resolution 1373 (2001)	11
b. Resolution 1456 (2003)	11
c. Resolution 1566 (2004)	12
d. Resolution 2341 (2017).....	12
V. Domestic codification of the terrorist offence	13
a. Model 1	14
b. Model 2	15
c. Model 3	15
d. New elements.....	16
VI. Common issues identified by the Counter-Terrorism Committee in the domestic codification of terrorist offences	17
a. Poorly structured arrangement of the core elements of the offence.....	17
b. Lack of specificity or overly broad <i>actus reus</i>	18
c. Lack of a requirement for an act of violence in the <i>actus reus</i> , or insufficient gravity required.....	20
d. Addition of a threat to commit a terrorist act as an equivalent to a completed act	22
e. Ambiguity in the outcome element.....	22
f. Addition of vague phrases to the terrorist purpose element.....	23
g. Lack of a terrorist purpose element entirely	24
h. Inconsistency between the main terrorism offence and other terrorism offences	25
i. Incorporating the terrorist purpose element into treaty-based offences	25
VII. Concluding observations: Good practices identified by the Counter-Terrorism Committee	27

I. Introduction

In its resolution 1373 (2001), the Security Council decided that Member States shall 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 requires States to ensure that terrorist acts are established as serious criminal offences in domestic laws and regulations.

Criminalizing acts of terrorism in a clear and precise manner in accordance with relevant Security Council resolutions, human rights, the rule of law, and the provisions of the international counter-terrorism conventions and protocols serves to stop impunity and strengthen international cooperation on bringing terrorists to justice. It also serves to ensure compliance by States with international human rights law, including the principle of legality enshrined in article 15 of the International Covenant on Civil and Political Rights. Overly broad or vague criminalization of terrorist offences creates a risk of human rights violations. It also creates a risk that the resources of law enforcement agencies – especially those dedicated to counter-terrorism – will be stretched thin by being overly tied up with conduct of lesser seriousness than terrorist violence.

Yet, the Counter-Terrorism Committee’s assessments show that Member States continue to develop and implement counter-terrorism legislation using different approaches, including many that are not clear or precise. This may complicate international cooperation, especially formal cooperation such as mutual legal assistance and extradition, which are premised upon the principle of dual criminality.

This Analytical Brief identifies the elements of the terrorist offence that are required by international law. It provides examples of the most common structures that States have employed in criminalizing terrorist acts. The brief then highlights the most frequent recommendations made by the Counter-Terrorism Committee stemming from its country visit assessments and how they aim to improve the clarity and precision of offences.

This brief focuses only on the criminalization of terrorist acts. Other offences, such as the financing of terrorism, incitement to terrorism, and travel for the purposes of terrorism, are not addressed, but the clarity of the terrorist offence itself is important for those other supporting offences.

This brief was prepared by the Counter-Terrorism Committee Executive Directorate in accordance with Security Council resolution 2617 (2021), in which it directs the Executive Directorate to conduct analytical work on emerging issues, trends, and developments and to make its analytical products available throughout the United Nations system.

II. Background and methodology

In 2021, the Counter-Terrorism Committee Executive Directorate concluded a desk review of the implementation of resolution 1373 (2001) by all 193 Member States. Using these data, the Committee published a Global Implementation Survey summarizing key aspects of the resolutions.¹ The Committee found that since the adoption of resolution 1373 (2001), most Member States have taken steps to criminalize terrorist acts within their national legislation in accordance with the international instruments. However, despite this progress, broad, open-ended language is frequently used to define terrorism.² This may lead to its application to acts beyond those envisaged by the relevant international counter-terrorism instruments.

The Global Implementation Survey revealed that approximately 65 per cent of all Member States had a terrorism offence that the Executive Directorate had assessed as being vague or overly broad.³ Among the most frequent recommendations made by the Committee were recommendations advising the State to ensure that its terrorism legislation was defined clearly and precisely in accordance with the principle of legality and that its offences did not apply to acts beyond those envisaged by the international counter-terrorism instruments.

The Global Implementation Survey was a quantitative analysis with the aim of surveying overall levels of implementation – essentially, how many States have enacted the required offences and how many have done so in a manner consistent with the principle of legality. This Analytical Brief, on the other hand, is a qualitative analysis, and its aim is to identify the elements of the offence that the Committee has assessed as problematic, as well as those elements that it has found represent good practice.

This analysis is based on a review of all assessment reports adopted by the Counter-Terrorism Committee since 2017. The examples of domestic offences are anonymized. They are, however, copies of real offences, and the samples of the Committee's recommendations also are derived from actual examples, modified to avoid naming the State concerned.

¹ Global survey of the implementation by Member States of Security Council resolution 1373 (2001) and other relevant resolutions (S/2021/972), para. 626. The Survey notes only one State that does not have an offence in place.

² *Ibid.*, para. 632.

³ This figure is an average of all regions. It was derived by taking the average number of States identified in the “rule of law” section of each subregional section in the Survey as having vague or overly broad terrorism offences. Not all sections identified firm numbers – 5 of the 18 sections used less precise language such as “most States in the region” or “numerous” States. Those subregions were not included in the tally to reach the 65 per cent figure, but the language describing their implementation is consistent with this result.

III. Elements of the terrorist offence derived from international instruments

When the Security Council imposed an obligation on all Member States to establish terrorist acts as serious criminal offences in resolution 1373 (2001), it did not adopt a particular definition of the terrorist offence. But the international community had concluded a series of (at that time) 12 international instruments on counter-terrorism. Those instruments (now numbering 19), collectively establish a broad range of terrorist offences, all of which contain similar elements. The Council, in resolution 1373 (2001), called upon all States to become parties as soon as possible to those instruments.⁴

The Committee's Technical Guide on the implementation of resolution 1373 (2001) includes a question indicating that the elements of the offences in the international instruments are useful guardrails to prevent the offence of committing a terrorist act from becoming too broad. In assessing the implementation of the obligation to codify the terrorist offence, the Guide asks "... is the definition sufficiently clear and precise so as not to apply to acts beyond those envisaged by the international counter-terrorism instruments (i.e., acts said to threaten national security or stability without further elaboration, conventional crimes, or non-violent acts of protest or dissent)?"⁵

This section of the brief sets out the common elements of the treaty-based offences and how they are relevant to the offence of committing terrorist acts required in resolution 1373 (2001).⁶ The next section sets out additional guidance from the Security Council in subsequent resolutions.

⁴ Para. 3(d).

⁵ Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions, (S/2019/998), para. 192.

⁶ The international counter-terrorism instruments generally require an international element to the offence, and many of them exclude acts that occur wholly within one State. This brief does not go into detail on this aspect of the instruments, or issues of jurisdiction, because it is focused on the offence required in resolution 1373 (2001), which does not specify any such territorial exclusion.



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a. An act of violence

In domestic criminal law, most penal codes will specify a mental element (the *mens rea*) as well as a proscribed act (the *actus reus*) as elements of an offence.

The proscribed acts forming the offences in the counter-terrorism instruments adopted from 1963 through the 1990s were all specific acts of violence described quite precisely. Some examples of the offences include the following:⁷

- Using **force or threat** to **hijack** an aircraft⁸
- The **destruction or damage** of an aircraft while in flight⁹
- The **seizure, detention, or threat to kill or injure** another person (hostage-taking)¹⁰

⁷ For a full list of all of the offences contained in the instruments, see Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions, (S/2019/998), para. 193.

⁸ 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), art. 1. The colour emphasis in this quote and throughout this Brief has been added for the purposes of clarity.

⁹ 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 1.

¹⁰ 1979 International Convention against the Taking of Hostages, art. 1.

- The **use or threat of force** to take control of a ship, an **act of violence** against a person on a ship, or **destruction or damage** of a ship¹¹
- The **detonation of an explosive** with intent to cause **death or bodily injury**, or **extensive destruction**.¹²

The commonality across all these offences is that they proscribe violent acts, and none of the treaties criminalize non-violent acts.

b. Outcome

A second point of commonality among the offences created by the international instruments is that they include an outcome element to make it clear that the conduct being criminalized has a threshold of serious violence. This means the *actus reus* essentially forms two parts. For example, the 1980 Convention on the Physical Protection of Nuclear Material requires States parties to criminalize the following:

The intentional commission of an act without lawful authority which constitutes the receipt, procession, use, transfer, alteration, disposal or dispersal of nuclear material and **which causes or is likely to cause death** or **serious injury to any person** or **substantial damage to property**.¹³

c. Intention

The *mens rea* element of criminal offences is the state of mind required to convict a person accused of the crime. With one exception, the international instruments use the *mens rea* of intent consistently throughout.¹⁴ For example:

Any person commits an offence if he unlawfully and **intentionally** performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of the aircraft.¹⁵

The one exception is the 1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention), where some elements of the offence have an additional standard of *mens rea*. Article 2 of the Convention makes it an offence to

¹¹ 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 3(1).

¹² 1997 International Convention for the Suppression of Terrorist Bombings, art. 2.

¹³ 1980 Convention on the Physical Protection of Nuclear Material, art. 7.

¹⁴ Note that while the hijacking offence in the 1970 Hague Convention, (see note 8), initially contained no *mens rea* element, this was rectified by amendments in the 2010 Protocol Supplementary to that Convention. Article 2 of the Protocol added “intentionally” to the offence.

¹⁵ 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 1.

...wilfully collect funds “... with the **intention** that they should be used or in the **knowledge** that they are to be used...”.¹⁶

“Knowledge” is a lower level of *mens rea* and is only used for the terrorist-financing offence. The offence of committing terrorist acts requires a higher level of criminal culpability in order to be consistent with the international instruments.

d. Terrorist purpose

In most criminal offences, the perpetrator’s motive is not an element of the offence. It may be used by a prosecutor as a supporting argument to help to prove the existence of intent, but it is not a requirement and is otherwise not part of the *mens rea*.

What distinguishes terrorism from other violent crimes, however, is precisely that it is violence motivated by some sort of political, ideological or religious purpose. This element is often referred to as “terrorist purpose”.¹⁷

For example, in the 1979 International Convention against the Taking of Hostages the proscribed act is committed by any person “who seizes or detains and threatens to kill, to injure or to continue to detain another person...”, which is the act of violence. The offence goes on to add the terrorist purpose element:

...**in order to compel** a third party, namely a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, **to do or abstain from doing any act** as an explicit or implicit condition for the release of the hostage.¹⁸

The terrorist purpose element was not added consistently in the earlier instruments and otherwise appears mostly with respect to threats to commit the offences. But it was used consistently beginning with the 1999 Terrorist Financing Convention and in every instrument since.

e. Bringing it all together: the 1999 Terrorist Financing Convention

The 1999 Terrorist Financing Convention makes it an offence to finance either of two things. The first is detailed in article 2, paragraph 1(a), which makes it an offence to finance any of the crimes in the existing series of international instruments on counter-terrorism. The second is described in article 2, paragraph 1(b), which makes it an offence to finance

[a]ny other act **intended** to cause **death or serious bodily injury** to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the **purpose** of such

¹⁶ 1999 International Convention for the Suppression of the Financing of Terrorism, art. 2.

¹⁷ See, for example, Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2008).

¹⁸ 1979 International Convention against the Taking of Hostages, art. 1.

act, by its nature or context, is to **intimidate** a population, or to **compel** a government or an international organization to do or to abstain from doing any act.¹⁹

While the act described above is not an offence in its own right – the financing of the act is the offence, not the act itself²⁰ – paragraph 1(b) is nevertheless a description of a terrorist act and has been ratified by 189 States parties. It contains all the elements set out above: **[intent]** + **[violent act]** + **[outcome]** + **[terrorist purpose]**.

IV. Elements of the terrorist offence derived from Security Council resolutions



Reaffirming its unequivocal condemnation of the terrorist acts that took place in New York, Washington, D.C., and Pennsylvania on 11 September 2001, the Security Council unanimously adopted a wide-ranging, comprehensive resolution with steps and strategies to combat international terrorism on 28 September 2001. By unanimous resolution 1373(2001), the Council also established a Committee of the Council to monitor the resolution's implementation. UN Photo / Evan Schneider

¹⁹ 1999 International Convention for the Suppression of the Financing of Terrorism, art. 2, para. 1(b).

²⁰ This position was confirmed by the International Court of Justice in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, 31 January 2024, para. 58.

a. Resolution 1373 (2001)

In resolution 1373 (2001), the Security Council imposed a mandatory obligation on all Member States to criminalize terrorism. In the resolution, the Council:

*Decides ... that all States shall ... ensure that ... 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.*²¹

The Security Council has also required States to create additional terrorist offences, including the financing of terrorism (resolutions 1373 (2001) and 2462 (2019)) and travel for the purposes of terrorism (resolutions 2178 (2014) and 2396 (2017)). It has also called upon States to adopt measures to prohibit incitement to terrorism (resolution 1624 (2005)).²² These offences are not covered in this brief but will be the subject of forthcoming briefs.

While resolution 1373 (2001) did not define the elements of the offence, subsequent resolutions have added additional guidance.

b. Resolution 1456 (2003)

In resolution 1456 (2003), the Security Council adopted a declaration at the ministerial level, in which it stressed that:

*States must ensure that any measure 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.*²³

Similar phrases have been repeated consistently by the Security Council ever since.²⁴ It provides an important clarification that the obligations on States arising from resolution 1373 (2001) should be read consistently with any obligations on States arising from international human rights law.

Specifically, this means that international human rights law obligations relating to the codification of criminal offences should be seen as an inherent part of the obligation to criminalize terrorist acts. This includes the principle of legality, which is a guiding test for

²¹ Para. 2(e).

²² Resolution 1624 (2005) was not adopted under Chapter VII of the Charter of the United Nations.

²³ Para. 6.

²⁴ See, for example, resolution 1624 (2005), para. 4. In the most recent resolution in which the Security Council requires States to create criminal offences (in this case additional requirements for the financing offence), the Council “[d]emands” that all measures comply with their international legal obligations. See resolution 2462 (2019), para. 6.

the Executive Directorate's assessment of the codification of the terrorism offence in States' domestic criminal law.

c. Resolution 1566 (2004)

In resolution 1566 (2004), the Security Council echoed the Terrorist Financing Convention in providing a description of "criminal acts" in the context of condemning terrorism and called upon States to prevent such acts and to ensure they are "punished by penalties consistent with their grave nature." The Council:

Recalls that criminal acts ... committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population or compelling a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable...²⁵

This description essentially mirrors the description of a terrorist act in article 2 of the Terrorist Financing Convention. At a broad level, it is useful that the Security Council has substantially agreed with the General Assembly,²⁶ with both organs providing a description of a terrorist act that follows the same structure and contains the same elements.

d. Resolution 2341 (2017)

In resolution 2341 (2017) the Security Council

...calls upon all Member States to ensure that they have established criminal responsibility for terrorist attacks intended to destroy or disable critical infrastructure, as well as the planning of, training for and financing of and logistical support for such attacks.²⁷

This provision adds in new specificity to the "outcome" element of the international instruments, discussed above in section 3(b). With resolution 2341 (2017), the Security Council has effectively added the disabling or destruction of critical infrastructure to the "death or serious injury" and "significant property damage" clauses in the outcome element. Many Member States have legislated to include this requirement.

Read together, these resolutions set out important clarifications to the obligation to criminalize terrorist acts in resolution 1373 (2001). Firstly, the Security Council has stated, starting with resolution 1456 (2003) and repeated frequently since, that the terrorist offence must comply with States' other obligations under international law, in particular international human rights, refugee and humanitarian law. Secondly, in resolution 1566

²⁵ Para. 3.

²⁶ The Terrorist Financing Convention was adopted by the General Assembly in resolution 54/109.

²⁷ Para. 3.

(2004), the Council indicated broad agreement with the structure and elements of a terrorist act set out in article 2, paragraph 1(b) of the Terrorist Financing Convention. The Council also indicated that States should ensure the offence includes the acts covered by the international counter-terrorism treaties. Thirdly, in resolution 2341 (2017), the Council called upon States to ensure that attacks intended to destroy or disable critical infrastructure are part of the criminal offence.

V. Domestic codification of the terrorist offence

In codifying the terrorist offence, States must be mindful of two elements. First, the Committee has observed that domestic offences should incorporate accurately and fully the obligations States have entered into in becoming parties to the relevant international instruments, as well as the offences required under Security Council resolutions.

Secondly, the Committee consistently reminds States to ensure that their domestic offences are consistent with the Security Council's statement that States must ensure that any measures taken to implement its resolutions comply with all their obligations under international law, in particular international human rights law, refugee law, and humanitarian law. This means that any national definitions of terrorism and related acts must be clear and precise and in conformity with the principle of legality, which is enshrined in article 15 of the International Covenant on Civil and Political Rights. This principle gives rise to a general duty of States to define clearly and precisely all criminal offences in the interest of legal certainty.²⁸ In practice this means that States are obliged to ensure that their definitions of terrorism-related offences are not vague or overly broad.²⁹

While all Member States have their own unique domestic laws, there are some commonalities across States in both the structure and elements of the terrorism offence. These are discussed in this section. An analysis of States' legislation by the Executive Directorate shows that the main terrorism offence in most Member States tends to be consistent with one of three structural models.³⁰

²⁸ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised ed. (N.P. Engel, 2005), p. 360.

²⁹ Office of the United Nations High Commissioner for Human Rights, Fact Sheet 32: Human Rights, Terrorism and Counter Terrorism, July 2008, p. 39.

³⁰ In 2010, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism published a model definition of a terrorist act. It contains all the elements of the crime discussed above, but in a three-part structure. This structure has not been widely taken up by Member States. See Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism - Ten areas of best practices in countering terrorism (A/HRC/16/51), 22 December 2010, para. 28.



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a. Model 1

Model one is a self-contained general offence of terrorism, with the formula of [intent] + [violent act] + [outcome] + [terrorist purpose]. These offences broadly follow the definition of a terrorist act outlined in the Terrorist Financing Convention but often with embellishments. For example:

Terrorism:

- (1) Committing a violent act against a person intending to cause death or bodily injury, or against the environment intending to endanger life or health, the production, distribution or use of a prohibited weapon, or the illegal seizure or destruction of property to a significant extent, if committed with the aim of forcing a State or an international organization to do or not do something, or to seriously disturb the political, constitutional, economic or social organization of the State, or to destroy it, or to seriously disrupt the activities of an international organization, or to destroy it, or seriously intimidate the population,
- (2) shall be punished by 5 to 20 years or life imprisonment.³¹

³¹ The penalties used in this brief are examples only and do not imply any view on the appropriate length of sentences for terrorist offences.

b. Model 2

Model two is a structure where the proscribed act is cross-referenced to other specified violent crimes, with the addition of the terrorist purpose. In this structure there is no new offence per se, but the addition of terrorist purpose to a list of pre-existing crimes creates the terrorist offence. The formula is [intent] + [terrorist purpose] + [violent crimes elaborated elsewhere in the criminal code], and there is no need for an outcome element because that is contained within each of the listed crimes. The list of crimes will sometimes include the treaty-based offences. For example:

Terrorism:

- (1) A person who intentionally commits one of the following offences as specified in:
 - (a) section vv (homicide);
 - (b) section ww (wounding with intent);
 - (c) section xx (hostage-taking);
 - (d) section yy (arson);
 - (e) section zz (hijacking of aircraft)
 - (f) [etc.]
- (2) with the aim of seriously intimidating a population or part of a population, or unduly compelling public authorities or an international organization to perform or abstain from performing any act, in order to further a religious, ideological or political goal.
- (3) commits a terrorist offence and in case of conviction is liable to life imprisonment.

A variation of this structure is also common, where a list of violent acts is set out rather than cross-referenced to other offences:

Terrorism:

- (1) A person who intentionally commits one of the following acts:
 - (a) homicide;
 - (b) wounding with intent;
 - (c) hostage-taking;
 - (d) arson;
 - (e) hijacking of aircraft
 - (f) [etc.]
- (2) with the aim of seriously intimidating a population or part of a population, or unduly compelling public authorities or an international organization, to perform or abstain from performing any act, in order to further a religious, ideological or political goal.
- (3) commits a terrorist offence and in case of conviction is liable to life imprisonment.

c. Model 3

Model three is a simply worded offence of committing a terrorist act, with a more detailed definition of “terrorist act” provided separately. This approach, by splitting the offence and the definition into different sections, allows the definition to be applicable across multiple offences (including the incitement, recruitment, travel and financing offences),

allowing each to be drafted relatively succinctly. It also allows for more precision in defining terrorist acts. For example:

Terrorism:

- (1) A person commits an offence if the person intentionally carries out a terrorist act.
- (2) A person who commits an offence against subsection (1) in case of conviction is liable to life imprisonment.

Definition of terrorist act:

- (1) A terrorist act is an act that is committed:
 - (a) in whole or in part for a political, religious or ideological purpose, objective or cause, and
 - (b) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, or compelling a person, a government or an international organization to do or to refrain from doing any act, and
- (2) that intentionally:
 - (a) causes death or serious bodily harm to a person by the use of violence; or
 - (b) endangers a person's life; or
 - (c) causes a serious risk to the health or safety of the public or any segment of the public; or
 - (d) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (a) to (c); or
 - (e) serious interference with, or serious disruption to, critical infrastructure, if likely to result in the conduct or harm referred to in any of clauses (a) to (c), and
- (3) is not advocacy, protest, dissent or industrial action that is not intended to any of the outcomes in subsection (2).

A variation of this structure replaces subparagraphs (2)(a) to (e) with a list of specific acts, as in the structure in model two above.

d. New elements

Included in the models above are some common elements that do not have their source in any of the international obligations, be they treaty law or Security Council resolutions. States have added these elements on their own initiative, and they occur frequently enough in domestic law to merit their inclusion here as common practice.

The first element is a requirement for an ideological, political, or religious goal. The first iteration of the terrorist purpose element, in the 1979 International Convention against the Taking of Hostages, was a requirement that the act aim to compel a government or international organization to do, or refrain from doing something – which is an inherently political aim. Twenty years later, the 1999 International Convention for the Suppression of Terrorist Bombings added “to intimidate a population” as an alternative. Many States have added a third alternative at their own initiative to give greater precision: an overarching requirement that the act should further a political, ideological, or religious goal. This often appears as a compulsory element required in conjunction with one of the others: with the aim of [compelling a government or international organization etc.] OR [intimidating a population] IN ORDER TO [further a political, religious, or ideological goal].

A second new element is also sometimes included that codifies the Security Council's consistent message that States must ensure that counter-terrorism measures comply with their obligations under international human rights law. An exclusion clause is added to ensure that acts of legitimate protest, labour rights, and free speech rights are not inadvertently caught by the offence. The Counter-Terrorism Committee has welcomed its inclusion as a good practice.

Thirdly, note also that in model three above, subparagraphs 2(d) and (e) of the definition restrict the outcome element of serious property damage and attacks on infrastructure to damage that is likely to cause death, serious injury or serious risk to health. This is an additional safeguard to restrict the offence from being applied in situations where property damage results but does not create a danger to life and limb.

VI. Common issues identified by the Counter-Terrorism Committee in the domestic codification of terrorist offences

The Committee has found common issues in all aspects of the offence. In some States, the attempt to draft a broad and general *actus reus* has resulted in ambiguously described conduct. In others, the outcome or terrorist purpose elements are ambiguous even if the *actus reus* is clear. The issues described below summarize the findings of all the assessment reports adopted by the Committee since 2017.

a. Poorly structured arrangement of the core elements of the offence

A common issue identified by the Committee, and one that particularly affects model one identified above, is that the offence becomes overloaded. This occurs when there are too many additional clauses beyond those elaborated in the description of a terrorist act in the Terrorist Financing Convention. With too many clauses the offence can become difficult and confusing to read. For example:

Terrorism:

A person commits an offence where they intentionally carry out an act where the motive for using force, violence, threat, or causing terror is obstructing application of the provisions of the Constitution, or the act breaches the public order or exposes the public to danger, or damages national unity that results or could have resulted in injuring the public, or terrifying them, exposing their life, liberty or security to danger, harming the environment, public health, the national economy,

public or private utilities, establishments, or properties, or seizure thereof or hindering their functions, or obstructing or hindering the public authorities from exercising their duties.

Many of the problems identified below are featured in this offence, such as ambiguous phrases, an overly broad *actus reus*, and a lack of clarity in the outcome element. But for the purposes of this paragraph the focus is on the structure: the Committee's concern derived from the fact that it is difficult to separate the offence into clear elements. The terrorist purpose element, for example, appears to be split into three, appearing at the beginning, the middle, and again at the end (... where the motive ... is obstructing application ... of the Constitution ... that results in terrifying [the public] ... or obstructing or hindering the public authorities from carrying out their duties.)

The Committee has observed in such circumstance that the offence needs to be clear and precise, and it has issued recommendations that the offence be reviewed for consistency with the principle of legality. In at least one instance the Committee has commended a State following such a revision, where the offence was slimmed down to more closely resemble the definition of a terrorist act in the Terrorist Financing Convention.

b. Lack of specificity or overly broad *actus reus*

Another common issue identified by the Committee is where the attempt to catch all possible terrorist conduct results in an overly broad formulation of the *actus reus*. For example:

- (1) A person who engages in or carries out any act of terrorism as defined in section (2) commits an offence and shall, on conviction, be liable to life imprisonment.
- (2) An act of terrorism is an act committed for purposes of compelling the government or an international organization or intimidating the public or a section of the public and for a political, religious, social or economic aim, indiscriminately without due regard to the safety of others or property, carries out all or any of the following acts:
 - (a) intentional and unlawful manufacture, delivery, placement, discharge or detonation of an explosive or other lethal device, whether attempted or actual, in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily injury, or extensive destruction likely to or actually resulting in major economic loss;
 - (b) direct involvement or complicity in the seizure or detention of, and threat to kill, injure or continue to detain a hostage, whether actual or attempted in order to compel a State, an international intergovernmental organization, a 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;
 - (c) unlawful seizure of an aircraft or public transport or the hijacking of passengers or group of persons for ransom;
 - (d) unlawful possession of explosives, ammunition, bombs or any materials for making of any of the foregoing;
 - (e) any act of violence aimed at causing the death of a civilian not engaged in armed conflict;
 - (f) endangering the life of a person, other than the person committing the act of terrorism;
 - (g) creating a serious risk to the health or safety of the public or a section of the public;
 - (h) causing serious damage to property;
 - (i) any act prejudicial to national security or **public safety**;

- (j) serious acts against **moral integrity**;
- (k) **possessing property** for the commission of acts of terrorism;
- (l) arranging for the **retention or control of property** belonging to a terrorist;
- (m) **knowingly dealing** in property owned or controlled by terrorist organizations;
- (n) **promoting** any offence under this Act;
- (o) unlawful **possession of materials** for promoting terrorism such as audio or video tapes, written literature or electronic literature.

The Committee observed several problems with the *actus reus* of the offence above. The first is the inclusion of terms that are undefined, such as “public safety” and “moral integrity” in subparagraphs (i) and (j). In this offence the outcome element is not consistently included either, appearing in some subparagraphs but not others. It is absent from subparagraphs (i) and (j), and without it, an act “prejudicial to public safety” or “moral integrity” could be anything, especially if there is no requirement for death or serious injury to result, or a risk of that outcome, or serious property damage.

Another ambiguous clause is subparagraph (n). “Promoting” any offence appears to be an incitement offence, but it does not contain any specificity, including a requirement that there be an actual risk that a person would be likely to carry out an offence because of the “promotion”. In addition, “any offence” could include minor and non-violent offences completely unrelated to terrorism.

In resolution 1373 (2001), the Security Council also requires that the punishment duly reflect the seriousness of such terrorist acts, which implies that penalties should be commensurate with the gravity of the conduct. Most States will enact a range of additional lesser offences with less severe penalties to cover ancillary conduct. In the example above, subparagraphs (k), (l) and (m) more properly belong in a financing offence elsewhere in the criminal code. Even more so, subparagraph (o) – the mere possession of terrorist literature – should not be subject to the same penalty as the acts of serious violence captured by subparagraphs (a) to (e).

In such cases, the Committee has noted

...that the definition includes a number of vague terms, ...which could encompass a wide range of activities, thereby raising concerns regarding compliance with the principle of legality which requires that criminal offences be defined with clarity. As such, the definition could also potentially criminalize conduct protected under the right to freedom of expression or association. ***The Committee recommends that [the State] review its definition of “terrorist act” in order to ensure that its scope is consistent with the relevant international counter-terrorism instruments and the principle of legality.***

The Committee has also pointed out to several States that there is a practical risk with an *actus reus* that is overly broad. Law enforcement resources are finite, and the Committee has questioned some States on whether they have under appropriate review where those resources are deployed. If the definition of terrorism is too broad, those resources may be stretched too thin, covering acts that would not commonly be understood to encompass terrorism. The Committee has observed

... it could be counterproductive in directing criminal justice and law enforcement resources away from the serious conduct which should be the focus of counter-terrorism efforts. And it could potentially undermine international cooperation in the fight against terrorism, including with respect to requests for extradition and mutual legal assistance from other Member States.

The Committee has also elaborated further on the risks to international cooperation, noting:

Considering some other Member States require dual criminality in providing international cooperation such as mutual legal assistance in criminal matters and extradition, ... an unclear or excessively broad definition of terrorism, which was inconsistent with the definitions used by other Member States, could undermine international cooperation in the fight against terrorism.

In one case where the Committee has observed that a State had used an overly broad definition of terrorism to prosecute those exercising political speech, it went further to note that severe penalties

... had been applied to acts that had little or nothing to do with terrorism and instead represented the non-violent expression of political views. Those practices had a negative impact on [the State's] ability to engage fully in the international community's efforts to bring terrorists to justice.

In section 5(d) above, this brief notes the addition by some States of an exclusion clause into the offence, where legitimate acts of protest or dissent, or acts not intended to result in the serious outcomes of death, injury, or extensive destruction, are excluded from the offence. If States have this safeguard in place the Committee has noted it as a good practice. In one such case, the Committee noted that such a clause could

... serve to exclude from the definition of a terrorist act certain non-violent conduct and could therefore constitute an important safeguard to ensure that [the State's] counter-terrorism legislation is applied in a manner consistent with international human rights law.

c. Lack of a requirement for an act of violence in the *actus reus*, or insufficient gravity required

Another common problem identified by the Committee is either a lack of a requirement for an act of violence or a description of a criminal act that is insufficiently serious. Without these elements the terrorist offence could be interpreted to include non-violent conduct, such as protests, or free speech, or where minor property damage has occurred, where no serious or violent outcome was intended.

For example:

Terrorism:

- (1) **Any criminal act** committed against a person, or that **causes damage** to property, for the purpose of breaching the security situation or national unity, or to force a State or an international organization to do or not do something, or seriously intimidate the population,

(2) shall be punished by 5 to 20 years or life imprisonment.

Or:

Terrorism:

(1) **Any criminal act subject to the penalty of deprivation of at least five years**, committed against a person, or that **causes damage** to property, for the purpose of breaching the security situation or national unity, or to force a State or an international organization to do or not do something, or seriously intimidate the population,

(2) shall be punished by 5 to 20 years or life imprisonment.

In the first example, the Committee was concerned that “any criminal act” could include non-violent acts or petty crimes. In the second example, while the act is at least limited to serious offences punishable by at least five years imprisonment, it does not specify that violent crimes are required.

In a second problem with the above examples, “damage to property” is lacking any qualifiers such as “serious” or “significant” or “extensive”, or “destruction”. This could then see the offence used, for example, to prosecute those who have spray-painted slogans on buildings during protest actions.

In the Committee’s dialogue with States during assessment visits, officials of some States have noted that a broad definition is useful because it allows the offence to be applied to evolving terrorist methodologies. Although the Committee has noted the need to take into account evolving terrorist methods, it has nonetheless noted that the international instruments specifically envisage the prohibition of acts or threats of violence.

When addressing such an argument the Committee responded as follows:

This definition is not consistent with international best practice, because, although it clearly defines terrorist purpose, it does not clearly proscribe the acts that fall within the definition. While the acts are restricted to serious crimes subject to deprivation of liberty of at least five years, it does not give any other guidance as to what conduct could be covered and is not necessarily limited, for example, to violent acts. The corresponding general definition of a terrorist act provided for in the 1999 International Convention for the Suppression of the Financing of Terrorism refers to acts “intended to cause death or serious bodily injury”. ***The Committee recommends that the State review the wording of the definition of terrorism and revise it to more clearly specify the conduct required to commit a terrorist act.***

In other cases, the Committee has explicitly requested the State to review the terrorist offence and exclude non-violent acts. For example, the Committee recommended that one State

... review its definition of terrorism ... in order to target only the intention to commit violent acts intended to cause death or serious bodily injury.

d. Addition of a threat to commit a terrorist act as an equivalent to a completed act

Some of the international instruments require Member States to criminalize not just the act proscribed by the treaty, but the threat of the act. Some States have extrapolated from this and have also incorporated a threat element into the main terrorism offence or their definition of a terrorist act. For example:

Definition of terrorist act:

- (1) A “terrorist act” means an act **or threat of action** that is committed:
 - (a) in whole or in part for a political, religious or ideological purpose, objective or cause, and
 - (b) [etc.]

Where threats are included in the international instruments, however, they are contained in separate ancillary offences similar to attempts and not in the main offence. The more recent treaty-based offences also require States parties to criminalize threats in a manner that requires a consideration of the credibility of the threat. For example, in the International Convention for the Suppression of Acts of Nuclear Terrorism:

- (2) Any person also commits an offence if that person:
 - (a) Threatens, under circumstances **which indicate the credibility of the threat**, to commit an offence as set forth in paragraph 1 (b) of the present article ...³²

There is no equivalent requirement in the Security Council resolutions to criminalize the threat of terrorist acts. When States extend this ancillary offence from their treaty obligations to the main terrorist offence, the Committee has commented on the need for consistency with the international instruments.

e. Ambiguity in the outcome element

A problem often identified in the Committee’s reports is the inclusion of an outcome element that is ambiguous and could result without a serious act of violence. For example:

Terrorism:

- (1) Any criminal act committed against a person that endangers their lives, or that causes damage to property, **or that causes discord**, for the purpose of breaching the security situation or national unity, or to force a State or an international organization to do or not do something, or seriously intimidate the population,
- (2) shall be punished by 5 to 20 years or life imprisonment.

³² 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, art. 2(2).

In this example, the outcome element of the offence includes a phrase similar to the “intimidate a population” part of the terrorist purpose element, but it is used in the outcome element, which in the international instruments is limited to death, injury or destruction of property or critical infrastructure.

The Committee identified in this case two problems. First, anything could cause “discord” or a “disturbance”, including legitimate political activity or protest. Second, its inclusion in the outcome element is confusing because intimidating the population is already in the terrorist purpose element – and so the criminalized conduct is an act that causes discord for the purposes of intimidation.

In its reports the Committee has cautioned States against using such overly broad terms so that terrorist offences could potentially apply to non-violent actions or threats thereof and has encouraged States to clarify them. It has also recommended that States stick closely to the outcome element used in the international instruments. One such example reads:

The Committee ... recommends that [the State] adopt a clear, precise definition of terrorism that corresponds to the international counter-terrorism instruments to which [the State] is a party and criminalize acts intended to cause death or serious bodily injury ...

f. Addition of vague phrases to the terrorist purpose element

Many States have elaborated the terrorist purpose element beyond what is contained in the international instruments and often in ways that the Committee has observed are vague or overly broad.

One common addition is a purpose of destabilizing, overturning, or undermining constitutional order. Often the Committee observes language such as “undermining constitutional order” or “destabilizing constitutional structures”. The conduct that could constitute “undermining” is not specified. The terms “constitutional order” and “constitutional structures” could also be interpreted quite elastically.

Frequently, this additional element is drafted even more imprecisely, and almost always the Committee recommends that the vague elements be removed. Examples include:

...for the purpose of:

- (a) causing serious fear or intimidation among the population; or
- (b) unlawfully forcing any government or international organization to perform or abstain from any act; or
- (c) destabilizing the social order/seriously disturbing the public peace/sowing discord among the population/harming the interests of the State.

In one case where the offence included “harming the interests of the State” in the terrorist purpose element, the list of proscribed acts in the *actus reus* element concluded with “or other activities”. Read together, that resulted in a possible formulation of the terrorist act

being “activities ... committed for the purpose of ... harming the interests of the State”. This could potentially encompass an enormously wide range of conduct far beyond that envisaged in resolution 1373 (2001), including, for example, advocacy for political change, or journalists embarrassing a government by exposing corruption.

A typical example of the Committee’s response to such phrases reads:

The Committee notes that this phrase is vague and overly broad and does not derive from Security Council resolutions. There is a risk that the term could inadvertently criminalize non-violent acts of protest or dissent. This means that prosecutors potentially have a blank cheque because “harming the interests of the State” could include anything they wanted to define as terrorism. ***The Committee recommends the review of the terrorist offence to clarify the meaning of “harming the interests” of the State in order to ensure that this term does not inadvertently criminalize non-violent acts of protest or dissent.***

An additional problem that has been identified by the Committee, although less frequently, is that the purpose of “unlawfully **forcing** any government or international organization to perform or abstain from any act” is changed to a lower level of compulsion. Verbs that are consistent with the language in the international instruments include “**coercing**” or “**forcing**” or “**intimidating**”, however, some States change this language to “unlawfully **influencing** any government or international organization to perform or abstain from any act”. This broadens the terrorist purpose element significantly from the formulation contained in the international instruments.

g. Lack of a terrorist purpose element entirely

In some States the terrorist purpose element is missing entirely. While the early counter-terrorism instruments also lacked the terrorist purpose element, those offences were for very specific conduct – such as hijacking an aircraft. In general terrorism offences, without a terrorist purpose element, the offence could apply to any act of violence. For example:

Terrorism:

- (1) Any person who intentionally, individually or in an armed association, provokes a state of terror in the population or a sector thereof, by means of acts that endanger the life, physical integrity or freedom of persons, or endangers buildings, means of communication, transport, using means capable of causing havoc,
- (2) shall be punished with deprivation of liberty for a term of 10 to 13 years.

In this example, the elements are [intent] + [violent act] + [to provoke a state of terror]. In the example above, any act of violence by, for example, an organized criminal gang, could be prosecuted as terrorism.

Most States already have other offences in place dealing with violent or organized crime, as well as general public disorder offences such as rioting and looting. Many also have legislation on hate crimes in place, which capture acts of violence motivated by personal

animosity or prejudice but which lack a broader terrorist purpose to coerce a government or international organization.

h. Inconsistency between the main terrorism offence and other terrorism offences

In some States the Committee has identified inconsistencies between terrorism offences in different pieces of domestic legislation. So, for example, terrorism is defined differently in the offence of committing a terrorist act to how it is defined in the offence of financing of terrorism. This can occur when the main terrorism offence is in the criminal code and was enacted first. Subsequently, for example, the State may have become a party to the Terrorist Financing Convention and enacted a terrorism-financing offence that follows the structure and elements of the definition of a terrorist act in that Convention. If the older terrorism offence in the criminal code is not updated, it leaves two different definitions of terrorist acts in place.

In these cases, the Committee has stated that the existence of multiple definitions and the lack of harmonization between relevant provisions could potentially undermine the effectiveness of the prosecutorial system in terrorism cases. The Committee has recommended that the provisions be made consistent.

i. Incorporating the terrorist purpose element into treaty-based offences

As noted above in section 3, the terrorist purpose element was generally not added to the offences in the earlier, sectoral counter-terrorism instruments (with some exceptions, such as the International Convention against the Taking of Hostages). If, when those treaty-based offences are incorporated into domestic law with an added terrorist purpose, it narrows their scope and leaves the State with offences that are not consistent with their treaty obligations. This problem exists in model two detailed in section 5 above.³³

The Committee has noted in its reports to States that have this problem that the terrorist purpose element is required when differentiating the general terrorist offence from other criminal acts, such as murder and serious assault, but it is not always required when an act constitutes an offence under the international instruments. The Committee has noted that adding this element to those treaty offences adds an additional element for the prosecution to prove, raising the threshold of these offences, and that it may lead to difficulties in international cooperation.

³³ This issue also exists in paragraph 3 of resolution 1566 (2004).

The Committee has recommended in such cases that the definition be revised to correct the problem. Examples of how to avoid this problem are below:

Terrorism:

- (1) Any act intended to cause death or serious bodily injury to a person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act; or
- (2) Any act which constitutes an offence under one of the listed international counter-terrorism instruments to which [the State] is a party,

shall be punishable with deprivation of liberty for a term of 10 to 13 years.

Or for States that define terrorist acts in a separate definition section:

Definition of terrorist act:

- (1) A terrorist act is an act that:
 - (a) falls within subsections (2) and (3), but not subsection (4); or
 - (b) is an act against one of the counter-terrorism conventions listed in the Annex to this Act.
- (2) A terrorist act is an act that is committed:
 - (a) in whole or in part for a political, religious or ideological purpose, objective or cause, and
 - (b) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, or compelling a person, a government or an international organization to do or to refrain from doing any act, and intentionally causes:
 - (c) death or serious bodily harm to a person by the use of violence; or
 - (d) endangerment to a person's life; or
 - (e) a serious risk to the health or safety of the public or any segment of the public; or
 - (f) substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (c) to (e); or
 - (g) serious interference with, or serious disruption to, critical infrastructure, if likely to result in the conduct or harm referred to in any of clauses (c) to (e), and
- (3) is not advocacy, protest, dissent or industrial action that is not intended to any of the outcomes in subsection (2)(c) to (g).

VII. Concluding observations: Good practices identified by the Counter-Terrorism Committee

Although the Security Council did not provide a specific formulation of the terrorist offence when it imposed an obligation on all States to criminalize terrorist acts, it provided in subsequent resolutions some guidance that States must follow, as set out in section 4 above. These include that in criminalizing terrorist acts, States must comply with their other obligations under international law.

The recommendations adopted by the Counter-Terrorism Committee provide additional further guidance. Pursuant to the Framework Document on visits to Member States, the recommendations in the visit reports should be focused “on the steps the visited State should take in order to fulfil its obligations under resolutions 1373 (2001) ... and other relevant Council resolutions”.³⁴ Those recommendations, cumulatively, provide considerable additional guidance to States on their obligations to criminalize terrorist acts consistently with their other obligations under international law.

Specifically, the Committee has recommended that:

- The offence should have a clear structure where the individual elements are clearly identifiable.
- Elements of the offence should be consistent with the elements in the 19 international counter-terrorism instruments. Specifically, the offence should specify a *mens rea* of intent, it should require an *actus reus* that is an act of violence, with a clear outcome element that specifies death or serious bodily injury, or significant damage or destruction of property or critical infrastructure. The offence also needs to contain a clear terrorist purpose element to distinguish it from other forms of violence that would not normally be regarded as terrorism, such as organized crime or hate crimes.
- The *actus reus* element should not use ambiguous terms such as acts “against public safety”, which are not consistent with the principle of legality. Similarly, the outcome element also should not contain ambiguous terms, such as “causing discord”. The offence should be limited to those acts that cause death or serious bodily injury, or extensive damage or destruction of property or critical infrastructure.

³⁴ Framework document for Counter-Terrorism Committee visits to Member States aimed at monitoring, promoting and facilitating the implementation of Security Council resolutions 1373 (2001), 1624 (2005), 2178 (2014), 2396 (2017), 2462 (2019) and 2482 (2019) and other relevant Council resolutions (S/2020/731), p. 17.

- Offences require an act of violence that is sufficiently grave if they are to be consistent with the State's obligation to protect human rights, such as freedom of speech and freedom of assembly. The Committee has identified as a good practice a savings clause that specifically excludes non-violent acts not intended to cause grave outcomes such as death or serious bodily injury.
- The terrorist purpose element should be consistent with the formulation used in the international instruments, in particular the Terrorist Financing Convention and resolution 1566 (2004). Where alternative formulations are added, such as "disturbing the peace", "undermining the social order" or "undermining the Constitution", the offence risks criminalizing protest or advocacy and is therefore not consistent with the State's obligations to criminalize terrorist acts consistently with their obligations under international human rights law.
- When States criminalize threats to carry out a terrorist act, this should be consistent with the international instruments, which contain them in a separate offence, together with other ancillary crimes such as attempts.
- The terrorist purpose element should not be extended to all of the offences in the international instruments, unless (like the International Convention against the Taking of Hostages), it exists as part of those offences in the treaty.
- The terrorist purpose element should also specify that the act is meant to "coerce" or "intimidate" or "force" a government or international organization and not downgrade this element to acts designed to "influence" a government or international organization.



United Nations Security Council
Counter-Terrorism Committee
Executive Directorate (CTED)